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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

RICHARD BOEKEN,
Plaintiff,
vs.
PHILIP MORRIS INCORPORATED, a
corporation, et al.,
Defendants.

CASE NO. BC 226593
**PLAINTIFF'S OPPOSITION TO
MOTION FOR NEW TRIAL (CORRECTED)**
DATE: August 6, 2001
TIME: 9:30 a.m.
DEPT: 308
JUDGE: Honorable
Charles W. McCoy, Jr.
Complaint Filed: March 16, 2000
Judgment Entered: June 11, 2001

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1 **INTRODUCTION**

2 For the past half century, Philip Morris and its coconspirators have pursued the most
3 lucrative and destructive corporate fraud scheme in history. From evidence obtained from
4 Philip Morris’s own files and employees, the jury saw the results of its admittedly “all-
5 consuming ambition . . . to create wealth.” Reporter’s Transcript (“RT”) 3684-85 (Bible).
6 Philip Morris’s decades-long scheme to deceive consumers about the hazards of its
7 tobacco products did create wealth for its owners. But it consumed the lives of millions of
8 Americans, including Richard Boeken.

9 For decades, Philip Morris used deceit to lure children and young adults into using
10 products that it knew to be both highly addictive and deadly. For decades, it falsely
11 represented that no danger was proven, it falsely promised to protect the health of
12 consumers through scientific research, and it concealed its own knowledge of the extreme
13 dangers posed by its products. Philip Morris’s fraudulent scheme to preserve its tobacco
14 franchise caused extreme suffering and premature death for millions of Americans, who on
15 average were cheated out of seven years of life.

16 Philip Morris knew it had a legal duty to respect the autonomy of consumers by
17 refraining from such deceit, whatever the cost to its business. Instead, Philip Morris chose
18 to lie, lie, lie — systematically, repeatedly, brazenly. Justice demands that Philip Morris
19 and its owners be made worse off by that choice. Society must preserve the ability of
20 people to trust others not to defraud them, an important component of social capital. Philip
21 Morris betrayed that trust, preying on consumers like Richard Boeken who believed its
22 assurances about the safety of its products. Only punishment exceeding the profits
23 achieved by Philip Morris through its fraud can deter Philip Morris and others from engaging
24 in such fraud schemes in the future.

25 Entry of the full amount of the jury’s verdict is an important step toward that objective.
26 Although the figure returned by the jury is large by ordinary standards, this is no ordinary
27 case. The \$3 billion punitive damages award is only 10% of the approximately \$30 billion
28 that Philip Morris agreed in 1997 would be reasonable for it to pay in total punitive damages

1 for its pre-1997 misconduct. It is only 8.6% of a conservative estimate of Philip Morris's
2 wealth (\$35 billion), as established by uncontroverted expert testimony. And it is only 3.1%
3 of the \$96.57 billion in profits that Philip Morris earned from 1954 onward through the
4 tobacco business that it preserved by its fraud scheme. Future punitive damage awards
5 will presumably extract more of those illicit profits, until every dollar Philip Morris obtained
6 by defrauding consumers will be paid by a dollar of punitive damages. Eventually, Philip
7 Morris and its owners will be made worse off by its choice to pursue this fraud scheme. For
8 now, the message that honesty pays better than fraud will be greatly reinforced by this
9 Court upholding the jury's award in full.

10 In answering Philip Morris's motion for a new trial, we first demonstrate that the \$3
11 billion punitive damage award does not violate federal substantive due process, because
12 it is rationally defensible in light of the three BMW v. Gore guideposts and one other
13 guidepost. Second, we demonstrate that California law does not require a new trial or a
14 remittitur on the amount of punitive damages, and we urge the Court not to exercise its
15 discretion in favor of Philip Morris to reduce the verdict. Third, we deal with the other
16 grounds advanced by Philip Morris for a new trial.

17 ARGUMENT

18 **I. FEDERAL SUBSTANTIVE DUE PROCESS DOES NOT REQUIRE A** 19 **NEW TRIAL OR REMITTITUR ON THE AMOUNT OF PUNITIVE DAMAGES**

20 Philip Morris makes two different attacks on the amount of punitive damages. First,
21 it argues that the award violates federal substantive due process, invoking primarily the
22 Supreme Court's decision in BMW of North America, Inc. v. Gore (1996) 517 U.S. 559.
23 Memorandum in Support of Motion for a New Trial ("NT Mem.") at 1, 5. Second, Philip
24 Morris argues that the award fails the criteria for evaluating the excessiveness of punitive
25 damages articulated by the California Supreme Court in Neal v. Farmers Ins. Exchange
26 (1978) 21 Cal.3d 910, and subsequent cases. NT Mem. at 1, 5. Philip Morris suggests
27 that the standard for reviewing the jury's verdict under each source of law is the same,
28 requiring "a de novo evaluation of the punitive damages award" under which this Court

1 apparently is required to redecide the issue as if this were a bench trial. Id. at 4-5.

2 Philip Morris is incorrect. Review of the jury verdict under federal law is extremely
3 deferential to the jury, and review under California law is only slightly less so. For analytical
4 clarity, we address the federal law challenge first, and the California law challenge
5 separately in Part II.

6 **A. Standard of Review**

7 The jury was instructed, without objection, that in awarding punitive damages against
8 Philip Morris “for the sake of example and by way of punishment,” it should consider “the
9 reprehensibility of the conduct of the defendant,” the amount necessary to “have a
10 deterrent effect” on Philip Morris “in light of [its] financial condition,” and “the injury, harm
11 or damage actually suffered by the plaintiff.” RT 6304, 6306. So instructed, the jury
12 awarded \$3 billion in punitive damages.

13 The issue under federal law is this: whether, drawing all factual inferences in favor
14 of the award, the \$3 billion in punitive damages is a rational means of punishing Philip
15 Morris for the fraud scheme it pursued for decades, and thereby deter Philip Morris and
16 other companies from engaging in similar wrongdoing in the future. Philip Morris contends
17 that federal substantive due process review of the jury’s verdict involves “a searching,
18 independent review” amounting to “a de novo evaluation of the punitive damages award.”
19 NT Mem. at 4-5. The U.S. Supreme Court has repeatedly held to the contrary.

20 In Pacific Mut. Life Ins. Co. v. Haslip (1991) 499 U.S. 1, 21, the Court rejected a
21 federal substantive due process challenge to the \$4 million award on its finding that the
22 award was “rational” on the record.

23 In TXO Prod. Corp. v. Alliance Resources Corp. (1993) 509 U.S. 443, the Court
24 rejected any “heightened scrutiny” of punitive damage awards, id. at 455-56 (plurality
25 opinion), stated that a jury’s punitive damages award “is entitled to a strong presumption
26 of validity,” id. at 457, engaged in no weight-of-the-evidence review, and upheld the \$10
27 million award despite a 526-to-1 ratio between it and the compensatory award. Id. at 459-
28 62. See also id. at 468-70 (Kennedy, J., concurring) (upholding verdict based on the

1 evidence of reprehensibility); id. at 470-72 (Scalia, J., joined by Thomas, J.) (upholding
2 verdict based on the view that no punitive damage award rendered in a procedurally valid
3 manner should be disturbed on federal substantive due process grounds).

4 In Honda Motor Co. v. Oberg (1994) 512 U.S. 415, the Court described the nature
5 of federal due process review of punitive damage awards as similar to the review afforded
6 criminal defendants who attack the sufficiency of the evidence to support their convictions:
7 that is, an inquiry into “whether ‘no rational trier of fact could have’ reached the same
8 verdict.” Id. at 432 n.10 (quoting Jackson v. Virginia (1979) 443 U.S. 307, 324).¹ The
9 Jackson review standard uses an objective test that focuses on the facts and pertinent
10 legal considerations and that “does not permit a court to make its own subjective
11 determination of guilt or innocence,” nor to inquire into “how rationally the verdict was
12 actually reached” based on “scrutiny of the reasoning process actually used by the
13 factfinder — if known.” Jackson, 443 U.S. at 319-20 n.13. “This familiar standard gives
14 full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to
15 weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts,”
16 thus “imping[ing] upon ‘jury’ discretion only to the extent necessary to guarantee the
17 fundamental protection of due process of law.” Id. at 319. See, e.g., People v. Rodriguez
18 (1999) 20 Cal.4th 1, 11; People v. Holt, (1997) 15 Cal.4th 619, 667; People v. Alvarez
19 (1996) 14 Cal.4th 155, 224; People v. Osband (1996) 13 Cal.4th 622, 690; People v. Caro
20 (1988) 46 Cal.3d 1035, 1050-51; People v. Alcalá (1984) 36 Cal.3d 604, 623.

21 Contrary to Philip Morris’s suggestion (NT Mem. at 4-5), in BMW v. Gore the Court
22 did not signal any departure from the traditional “rational factfinder” framework. BMW v.
23 Gore simply set forth a non-exclusive list of three “guideposts” for use in deciding whether
24

25 ¹ The idea that a defendant in a civil case faced with the mere loss of money is somehow entitled to more
26 searching review than is a criminal defendant facing imprisonment was never seriously suggested in Oberg.
27 Indeed, it was explicitly abandoned by the petitioner once Justice O’Connor suggested the incongruity of such
28 a position. See Tr. of Oral Argument in Honda Motor Co. v. Oberg, No. 93-644 (Apr. 20, 1994), 1994 U.S.
Trans. LEXIS 150, at *13-14 (questioning by Justice O’Connor as to “why should the constitutionally mandated
review be any more than is required in a criminal case” under “the Jackson standard,” leading petitioner’s
counsel Andrew L. Frey to state: “I have no problem with that standard. That’s what we would like to see the
Court supply.”).

1 an award is rationally sustainable. 517 U.S. at 575-85. In deciding whether a jury’s award
2 of punitive damages is rational and hence not violative of federal substantive due process,
3 a court must consider: (1) the degree of reprehensibility of the defendant’s conduct, id. at
4 575-80; (2) the ratio between the punitive damages and the actual or potential harm to
5 plaintiff and others, id. at 580-83; and (3) the civil and criminal penalties that could be
6 imposed for comparable misconduct. Id. at 583-85.

7 Philip Morris is likewise wrong in arguing that the Supreme Court’s recent decision in
8 Cooper Indus., Inc. v. Leatherman Tool Group, Inc. (2001) 121 S. Ct. 1678, requires courts
9 to engage in “de novo evaluation of the punitive damages award” returned by a jury. NT
10 Mem. at 5. The Court stated in Cooper that it was not revisiting “the question of the
11 substantive standard for determining the jury award’s conformity with due process in the
12 first instance.” Id. at 1682 n.4. That question, it noted, had “already been answered” in
13 BMW v. Gore and in TXO, which had rejected any “‘heightened scrutiny’ of punitive
14 damages awards.” Id. at 1683 n.4 (quoting TXO, 509 U.S. at 456) (plurality opinion). At
15 issue in Cooper was only the standard of federal appellate review of a federal trial judge’s
16 BMW v. Gore ruling on excessiveness. The Court required de novo appellate review of trial
17 court rulings on excessiveness — not any sort of de novo review of the underlying jury
18 verdicts. See also id. at 1682-93 n.4 (stating that “the question we agreed to review” was
19 “the proper standard for reviewing the District Court’s due process determination”).

20 In sum, it is well settled that the task of this Court in resolving Philip Morris’s federal
21 substantive due process attack on the jury’s punitive award is to decide whether that award
22 is rational in light of the facts of the case and California’s interest in protecting consumers
23 from fraudulent business schemes such as the one pursued by Philip Morris for decades.

24 **B. The \$3 Billion Punitive Damage Award is Rationally Defensible Based**
25 **on the Three BMW v. Gore Guideposts and One Other Guidepost**

26 Under the relevant guideposts, the jury’s \$3 billion award, while obviously large, is
27 rational and not violative of federal substantive due process. We address Philip Morris’s
28 arguments where pertinent under each of the guideposts.

1 **1. The Deeply Reprehensible Nature of Philip Morris’s**
2 **Fraud Scheme Supports the Full \$3 Billion Award**

3 The Supreme Court has identified reprehensibility as “[p]erhaps the most important
4 indicium of the reasonableness of a punitive damages award.” BMW v. Gore, 517 U.S. at
5 575 & n.23. “[S]ome wrongs are more blameworthy than others,” and the punitive
6 damages imposed on a wrongdoer “should reflect ‘the enormity of his offense.’” Id. at 575
7 (quoting Day v. Woodworth, (1852) 54 U.S. (13 How.) 363, 371). Many lower courts have
8 emphasized the importance of focusing on evidence of the level of reprehensibility of the
9 defendant’s misconduct.² Yet Philip Morris provides no examination of the record evidence
10 in its analysis of the BMW v. Gore reprehensibility guidepost. It merely advances legal
11 objections to any theory that would base punitive damages on a strict product liability failure
12 to warn, NT Mem. at 11-13, or that would consider harm done to consumers outside
13 California. NT Mem. at 13-16. We address those legal objections against the backdrop
14 of the overwhelming evidence of extreme reprehensibility presented at trial, but ignored by
15 Philip Morris.

16 The fraud scheme pursued by Philip Morris over the past half century in an effort to
17 preserve its tobacco franchise bears all the earmarks of reprehensibility identified by the
18 Supreme Court in BMW v. Gore.

19 ***Trickery, Deceit, and Intentional Malice.*** In BMW v. Gore, the Supreme Court
20 recognized that the aggravating factors of “trickery and deceit” and “intentional malice” are
21 particularly “blameworthy” and call for substantial punitive damages. 517 U.S. at 575-76
22 (citation omitted). The record concerning Philip Morris’s fraud scheme contains numerous
23 examples of such reprehensible misconduct. This Court is of course quite familiar with the
24 record evidence, so we provide only a brief summary.

25
26

² E.g., United States v. Big D. Enterprises (8th Cir. 1999) 184 F.3d 924, 933-34, cert.denied (2000) 529
27 U.S. 1018; Shea v. Galaxie Lumber & Constr. Co. (7th Cir. 1998) 152 F.3d 729, 736; Dean v. Olibas (8th Cir.
28 1997) 129 F.3d 1001, 1006; Wightman v. Conrail (Ohio 1999) 715 N.E.2d 546, 553, cert.denied (2000) 529
 U.S. 1012; Jacque v. Steenberg Homes, Inc. (Wis. 1997) 563 N.W.2d 154, 164; Barnett v. La Societe
 Anonyme Turbomeca France, (Mo. App. 1997) 963 S.W.2d 639, 662, cert. denied, (1998) 525 U.S. 827;
 Wilson v. IBP, Inc. (Iowa 1996) 558 N.W.2d 132, 146, cert. denied (1997) 522 U.S. 810.

1 Philip Morris was fully aware decades ago that its cigarettes were causing vast
2 numbers of people to die from lung cancer, and that for practical purposes no real doubt
3 about the matter existed. E.g., RT 1333-38, 1360-62, 2115-21; see also Exs. 35, 65,
4 10,016 (unless otherwise noted, all references to exhibits contained herein are to plaintiff's
5 trial exhibits admitted into evidence, which are attached to the accompanying Declaration
6 of Michael J. Piuze). Philip Morris knew it had a duty to disclose this knowledge and inform
7 consumers that it agreed with the scientific consensus. RT 3673-74 (Bible). Instead, for
8 decades Philip Morris publicly insisted that no causal link had been proven, and it
9 championed that false position through a gigantic public relations machine. E.g., Ex. 363;
10 see also Exs. 54, 65, 270, 295, 340, 342,363, 404, 456, 514, 648, 2,340, 9,455, 9,456,
11 10,019, 10,021; RT 2690-99. Only in the year 2000 did Philip Morris publicly state what it
12 had known all along: that its products cause lung cancer and other fatal diseases.

13 Similarly, Philip Morris was fully aware decades ago that in terms of their impact on
14 consumers, its cigarettes were a drug-delivery device for the drug nicotine, a drug that is
15 at least as addictive as drugs such as heroin and cocaine. E.g., Exs. 3, 130, 148, 226, 388,
16 423, 1,642, 9,455. It also knew that, once addicted, most smokers would have enormous
17 difficulty quitting, and many would find it impossible to quit. But Philip Morris did not
18 disclose this knowledge. To the contrary, for decades it falsely denied that its products
19 were addictive or that there was any proof of harm posed by them, at the same time it was
20 doing scientific research specifically to allow it to engineer its cigarettes to more easily
21 addict beginning smokers, and then hold those smokers to the addiction over the long term.
22 E.g., Exs. 3, 54, 65, 130, 148, 226, 270, 340, 342, 363, 388, 423, 456, 514, 648, 1,642,
23 2,340, 9,078, 9,455, 9456, 10,019; RT1951-58, 2690-99. Not until the year 2000 did Philip
24 Morris make even a brief statement acknowledging that its products are addictive.

25 The calculated trickery at the heart of this fraud scheme was proved with
26 contemporaneous documents drawn from the files of Philip Morris and its coconspirators.
27 Philip Morris knew that its products in fact caused cancer and were addictive, so that it was
28

1 scientifically impossible to prove otherwise. It also knew that if it did nothing, consumers
2 would reduce or quit smoking on the basis of health concerns, as they did in 1953 when
3 the scientific proof of the link between smoking and lung cancer was widely publicized. In
4 response, Philip Morris and its coconspirators adopted a plan that was designed to “create
5 doubt about the health charge without actually denying it.” Ex. 330. By creating doubt,
6 Philip Morris’s aim was able to provide smokers with a basis to convince themselves in their
7 own minds — however baseless in scientific terms — that they were not risking their lives
8 by smoking, and thus they did not need to quit. RT 1991-96.

9 This doubt was created partly by a public relations effort designed to undermine the
10 public’s confidence in the existing scientific information, information that Philip Morris knew
11 to be accurate. But the doubt was fueled largely by the promise of Philip Morris and its
12 coconspirators to fund a massive scientific research effort to get to the bottom of the health
13 issue, and thereby protect the health of smokers. Ex. 363. In the decades during which
14 Philip Morris pretended to be engaged in a bona fide scientific effort, its top executives
15 publicly stated (once even under oath) that if they discovered that consumers were dying
16 from their cigarettes, Philip Morris would shut down its business. Ex. 2,340, 9,347
17 (Weissman); RT 3670-71 (Bible).

18 Yet for decades, as it publicly pronounced that it would do its utmost to get to the
19 scientific truth, and would pull its products from the market if the truth weighed against its
20 products, Philip Morris along with its coconspirators designed the scientific research effort
21 so that it could not produce scientifically important information about the health issue. Exs.
22 67, 10,025, 10,030. It worked tirelessly to conceal and suppress any research that might
23 advance public health, and when on occasion the research effort threatened to produce
24 results that would confirm the scientific consensus that smoking was deadly and addictive,
25 Philip Morris ruthlessly worked to suppress this information. E.g., Exs. 82, 85, 91, 130,
26 132, 207, 219, 295, 305, 330, 331, 404, 422, 423, 507, 10,024, 10,026.

27 Philip Morris pursued a further scheme of trickery beginning in the 1970s when,
28 despite its fraudulent campaign of misinformation, public concern about the hazards of

1 cigarette smoking continued to mount. Philip Morris reconfigured its products so that the
2 “smoking machines” that the Federal Trade Commission used to measure tar and nicotine
3 content would register much lower tar and nicotine; it then heavily marketed these
4 cigarettes based on these lower tar and nicotine numbers. It did so out of an awareness
5 of smokers’ health concerns, to induce smokers to switch to these new cigarettes rather
6 than quit, and by allowing smokers to believe that they would consume less tar and nicotine
7 and hence would incur less health risk. Yet Philip Morris knew that in actual practice
8 smokers obtained just as much tar and nicotine from these new cigarettes, both because
9 Philip Morris added ammonia and other chemicals to increase the impact of the nicotine
10 in the cigarette, and because of the way smokers managed (without conscious thought) to
11 obtain the needed nicotine fix by “compensating” through more puffs, by drawing smoke
12 deeper into the lungs, and by covering the exhaust vents. Thus, through trickery Philip
13 Morris induced smokers not to quit on the false belief that these new cigarettes greatly
14 reduced the health risks of smoking. E.g., RT 1483-86, 1535-40; Ex. 120, 9,426.

15
16 As a final example, Philip Morris was aware that if people did not start smoking its
17 products by age 19, it was unlikely they would ever become its customers, because people
18 who are mature enough to understand the risks involved and who are not already addicted
19 do not begin smoking. Philip Morris also knew that it was illegal to market cigarettes to
20 people under age 18. Rather than conduct a legal marketing effort aimed at young adults
21 aged 18 and 19, Philip Morris focused its marketing on children as young as 14. In a
22 particularly repugnant aspect of its trickery, Philip Morris sought to take advantage of
23 vulnerable adolescents by crafting its advertising to appear where children were mostly
24 likely to see it, and to appeal to the feelings of independence and rebellion against authority
25 that typically mark the adolescent years. E.g., RT 2609-10, 2623-28, 2711-12; Exs. 218,
26 229, 421.

27 This fraudulent scheme of trickery pursued by Philip Morris for decades is repugnant
28 and reprehensible (and yes, thoroughly “disgusting” and “disgraceful,” see NT Mem. at 25)

1 on many levels. Perhaps most fundamental is how this scheme strikes at the root of social
2 order by undermining the ability of people to trust each other — by signaling that major
3 corporations cannot be taken at their word, that consumers must fear that they will seek by
4 trickery to defraud them, possibly at the cost of their lives.³ As a leading scholar on this
5 subject has written, “a nation’s well-being, as well as its ability to compete, is conditioned
6 by a single, pervasive cultural characteristic: the level of trust inherent in the society.”
7 Francis Fukuyama, Trust: The Social Virtues and the Creation of Prosperity 7 (1995). The
8 ability of people to associate with each and trust each other “is critical not only to economic
9 life but to virtually every other aspect of social existence as well.” Id. at 11. “If people who
10 have to work together in an enterprise trust one another because they are all operating
11 according to a common set of ethical norms, doing business costs less.” Id. at 27. “By
12 contrast,” Fukuyama warns:

13 people who do not trust one another will end up cooperating only under a
14 system of formal rules and regulations, which have to be negotiated, agreed to,
15 litigated, and enforced, sometimes by coercive means. This legal apparatus,
16 serving as a substitute for trust, entails what economists call “transaction costs.”
17 Widespread distrust in a society, in other words, imposes a kind of tax on all
18 forms of economic activity, a tax that high-trust societies do not have to pay.

19 Id. at 27-28 (emphasis added); see also id. at 11 (the need to engage in litigation as a
20 result of the inability of people to trust each other “constitute[s] a direct tax imposed by the
21 breakdown of trust in the society.”).

22 Philip Morris’s efforts to prey on those like Richard Boeken who trusted its
23 representations and promises, and trusted that it would disclose anything it knew about its
24 products that might threaten the lives of its customers, came at a dangerous time for
25 American society. As Fukuyama documents, from 1960 to 1993 the percentage of
26 Americans who feel that “most people” can be trusted dropped from 58 percent to 37
27 percent. Id. at 310 (citing Robert D. Putnam, Bowling Alone, 6 J. of Democracy 65 (1995)).
28 Schemes such as Philip Morris’s, under which those who trust the most suffer the most,
obviously “produce greater suspiciousness on the part of those who would normally be

³ This point was made to the jury in closing argument. RT 5981-82 (“I hope, truly, that it hasn’t come down to that, that we can’t trust anything that anyone says about anything any time, any place, anyhow.”).

1 trusting and trustworthy themselves.” *Id.* Such a process of cashing in on the “social
2 capital” of trust among members in society, and thereby depleting that capital, can be
3 marvelous for a particular corporation’s “all-consuming ambition . . . to create wealth” for
4 its owners. RT 3684-85. But it may have irreversible consequences for society in general.
5 “The accumulation of social capital . . . is a complicated and in many ways mysterious
6 cultural process. While governments can enact policies that have the effect of depleting
7 social capital, they have great difficulties understanding how to build it up again.” *Id.* at 11.
8 “[O]nce social capital has been spent, it may take centuries to replenish, if it can be
9 replenished at all.” *Id.* at 321.

10 It follows that fraud schemes such as Philip Morris’s, which rely on trickery and deceit
11 to induce vulnerable people to use an addictive, deadly product, rank very high on the
12 reprehensibility scale. Fraud is the quintessential example of anti-social conduct that merits
13 devastating punishment. Fraud is theft. Where, as here, what is stolen is life, fraud is
14 murder. Professor Owen, one of the leading scholars in the field of punitive damages,
15 could have been discussing this case when he noted that “[m]any punitive damages cases
16 involve an abuse of truth or trust,” observing:

17 If, for personal advantage, one person intentionally and harmfully misleads
18 another person into believing reality is other than what it is, then the actor is a
19 thief who should be punished for stealing the victim’s freedom to pursue his own
20 life plan based upon that truth to which he fairly was entitled. Distorting another
21 person’s view of truth for private gain is blatantly disrespectful of the equal
22 dignity of the other person. Fraud thus is subject to punishment, both in the law
23 of crimes and torts, for it is based upon the deliberate deception of another to his
24 detriment.

21 * * *

22 Punitive damages appear especially deserved in cases of this type, where
23 a powerful person for profit deliberately misleads a vulnerable person to his
24 harm. Moreover, deterrence appears particularly useful in such cases, since
25 abuses of truth and trust by powerful persons may be subtle and hard to detect.

24 David G. Owen, *The Moral Foundations of Punitive Damages*, 40 Ala. L. Rev. 705, 718-19,
25 721 (1985).

26 Philip Morris ignores the above evidence documenting how it spent decades using a
27 fraud scheme to deceive consumers into using what it knew was a deadly and addictive
28 product. Instead, it focuses its argument under the “reprehensibility” guidepost on its

1 theory that in light of a California statute and a federal statute, this Court must conclude as
2 a matter of law that its past actions were not reprehensible. Philip Morris finds refuge in
3 the California legislature’s 1987 enactment of Civil Code § 1714.45 (repealed in 1998),
4 which codified comment i to Section 402A of the Restatement (Second) of Torts (1965).
5 NT Mem. at 11-13. Although Philip Morris’s fraud scheme was set in motion decades
6 before enactment of Section 1714.45, Philip Morris argues that even if it does not preclude
7 Richard Boeken’s lawsuit, Section 1714.45 reveals that “this State’s policy for ten years
8 was to protect the type of conduct subject to punitive damages in this case.” Id. at 13.
9 Specifically, Philip Morris argues that Section 1714.45 “plainly reflected a reasonable policy
10 judgment . . . that the marketing of cigarettes was not ‘reprehensible.’” Id. at 12.

11 But Philip Morris is not being punished for the marketing of cigarettes. As counsel for
12 Mr. Boeken made clear at trial, Philip Morris could have marketed its cigarettes without
13 triggering punishment for fraud if it had from the start simply announced to consumers that
14 its product was “extremely dangerous” and that they should use it “at your own risk while
15 we try to fix this product.” RT 2181. Instead, Philip Morris launched a conspiracy to
16 defraud consumers, a point that was emphasized to the jury.⁴ It has never been the public
17 policy of California, legislative or otherwise, to protect from punishment a company that
18 uses deceitful means to induce consumers to use a deadly and addictive product. To the
19 contrary, the imposition of punitive damages to punish fraud has had the unbroken support
20 since 1872 of both the Legislature and the Judiciary. Egan v. Mutual of Omaha Ins. Co.
21 (1979) 24 Cal.3d 809, 819-20, cert. denied (1980) 445 U.S. 912.

22 Philip Morris likewise cites the Public Health Cigarette Smoking Act of 1969, 15 U.S.C.
23 §§ 1331 et seq., as indicating a policy judgment by Congress “that it is not reprehensible
24 — indeed, that it is fully lawful — to market and advertise cigarettes with the warning
25 prescribed in that statute.” NT Mem. at 13. Again, Philip Morris is not being punished for

26
27 ⁴ E.g., RT 6211-12 (“[O]ur society and Mr. Boeken made choices based upon fraudulent conduct . . . Yes,
28 based upon fraud, based upon misdirection, based upon hidden evidence, based upon creating doubt, based
upon sucking people in. . . . And the incredible ultimate irony is, the ones that they succeeded in fooling,
become mentally deficient, undeserving, liars, idiots. Isn’t that cute. Their best customers, the ones who
believed them, the ones who for[k]ed over the money. Aren’t just disrespected, they are insulted.”).

1 marketing cigarettes. It is being punished for the fraudulent business scheme it used to
2 preserve and expand its tobacco franchise. Philip Morris pursued that scheme for a
3 decade and a half before that Act became law. And even that Act left untouched the ability
4 of California to punish Philip Morris, as it is being punished here, for a violation of its
5 general duty not to deceive. See Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504, 538-
6 30 (plurality opinion); Mangini v. R.J. Reynolds Tobacco Co., 7 Cal.4th 1057, 1065-70, cert.
7 denied (1994) 513 U.S. 1016; Evraets v. Intermedics Intraocular, Inc. (2d Dist. 1994) 29
8 Cal.App.4th 779, 789; Brown v. Philip Morris, Inc. (3d Cir. 2001) 250 F.3d 789, 796;
9 Lindsey v. Tacoma-Pierce County Health Dep't (9th Cir. 1999) 195 F.3d 1065, 1071; Philip
10 Morris Inc. v. Harshbarger (1st Cir. 1997) 122 F.3d 58, 70.

11 ***Nationwide Pattern of Repeated Tortious Conduct, With Knowledge of Its***
12 ***Unlawful Nature.*** In BMW v. Gore the Court also indicated that proof that the defendant's
13 actions toward the plaintiff were "part of a nationwide pattern of tortious conduct" that the
14 "defendant has repeatedly engaged in . . . while knowing or suspecting that it was unlawful
15 would provide relevant support for an argument that strong medicine is required to cure the
16 defendant's disrespect for the law," because "repeated misconduct is more reprehensible
17 than an individual instance of malfeasance." 517 U.S. at 576-77 (citing TXO, 509 U.S. at
18 462 n.28 (plurality opinion)).

19 The record contains ample evidence of a nationwide pattern of tortious conduct. Philip
20 Morris's fraud scheme did not merely single out California consumers; everyone who might
21 purchase a pack of its cigarettes was targeted as a potential fraud victim. The fraud
22 scheme itself was carried out by Philip Morris employees acting throughout the country.
23 Further, there is ample evidence that Philip Morris carried out this scheme while actually
24 knowing that what it was doing was unlawful. The CEO of Philip Morris Cos. testified that
25 since 1954 the company had "a duty to tell consumers what it knows about the risks of its
26 product, . . . had a duty not to make false promises regarding its product," and "had a duty
27 not to make a misrepresentation about its products." RT 3673-74. Of course, Philip
28 Morris's own documents reveal that it regularly and knowingly violated those duties. For

1 example, one official noted that if the world were to learn what Philip Morris knew about the
2 harmful qualities of its cigarettes, the company would have “no defense” in court. Ex. 136.
3 Another official emphasized the importance of ensuring that the tobacco companies
4 conduct no legitimate research on the hazards of smoking, as doing legitimate research
5 would amount to “digging our own grave.” Ex. 132.

6 Notwithstanding the Supreme Court’s observation in BMW v. Gore that one guidepost
7 in assessing the reprehensibility of a defendant’s misconduct toward the plaintiff is whether
8 it was “part of a nationwide pattern of tortious conduct,” 517 U.S. at 576-77 (emphasis
9 added) (citing TXO, 509 U.S. at 462 n.28 (plurality opinion)), Philip Morris contends that
10 “this Court must disregard any evidence of conduct or harm outside of California” on the
11 theory that “[i]mposing a punitive damage award based on conduct or harm not within this
12 State would violate principles of interstate comity and exceed the constitutional limits of this
13 State’s power.” NT Mem. at 13. This argument flouts the holdings in TXO and BMW v.
14 Gore.

15 In TXO, the plaintiffs won a \$10 million punitive damage award after convincing a
16 West Virginia jury that TXO, their business partner, had attempted (unsuccessfully) to set
17 up a fraudulent chain of title in order to pressure the plaintiffs to take a reduced royalty on
18 their property. 509 U.S. at 447-51. In arguing that heavy punishment was warranted, the
19 plaintiffs urged that TXO’s “slander of title” was part of a broader nationwide effort by TXO
20 to cheat its business partners at every opportunity, so that TXO should be treated as a
21 repeat offender. Unlike this case, the plaintiffs in TXO had no internal documents and no
22 former insiders through which to prove a nationwide scheme. Rather, the plaintiffs in TXO
23 simply called four attorneys who knew of past complaints of cheating by TXO, and who
24 related several anecdotes of how TXO had cheated other people in other states, in ways
25 that were quite dissimilar from the underlying events in West Virginia.⁵

26
27 ⁵ As TXO pointed out in the U.S. Supreme Court without contradiction, the plaintiffs’ evidence of a
28 nationwide pattern or practice of wrongdoing consisted of showing the jury “videotaped depositions of out-of-
state attorneys who testified regarding their opinions as to alleged conduct by TXO in other States,” none of
which “had anything to do with this case or slander of title.” Reply Brief of Petitioner, 1993 WL 469326, at *8-
*9. These attorneys “reviewed allegations made in five cases,” three of which “had been settled without any

1 Despite this limited evidence of nationwide misconduct in TXO, the Court upheld the
2 award in full, specifically relying on the evidence of TXO’s nationwide pattern of cheating
3 people. See 509 U.S. at 462 (plurality opinion) (noting “the fact that the scheme employed
4 in this case was part of a larger pattern of fraud, trickery and deceit”); id. at 469 (Kennedy,
5 J., concurring) (noting evidence that “this was not an isolated incident on TXO’s part,” but
6 instead “part of a pattern and practice by TXO to defraud and coerce those in positions of
7 unequal bargaining power.”) (quotation omitted). Further, the Court rejected TXO’s
8 objection to “the admission of evidence of its alleged wrongdoing in other parts of the
9 country,” pointing out that “[u]nder well-settled law, . . . factors such as these are typically
10 considered in assessing punitive damages.” Id. at 462 n.28 (citation omitted). The Court
11 reaffirmed this holding in BMW v. Gore. 517 U.S. at 576-77 (citing id.). Thus, the jury in
12 this case was properly allowed to consider the fact that Philip Morris’s defrauding of
13 California consumers was part of a nationwide pattern of tortious conduct, and to weigh that
14 fact in setting the amount of punitive damages. Of course, Philip Morris never objected to
15 the jury’s consideration of out-of-state information, and hence has waived any claim of trial
16 error.⁶

17 Having waived the point before the jury, as a fallback Philip Morris argues that
18 “seeking a jury instruction is not a prerequisite to this Court’s de novo review of the punitive
19

20 admission of liability,” two of which “were still pending,” and the last of which TXO later won at trial. Id. at *9
21 & n.17. See also Brief of Respondents, 1993 WL 469320, at *12-14 (summarizing the “other acts” evidence).
22 In its opinion in the case, the West Virginia Supreme Court had not disputed these points, but upheld the trial
23 court’s admission of this pattern-or-practice evidence on the ground that it helped “establish a lack of good
24 faith by TXO.” (W. Va. 1992) 419 S.E.2d 870, 881. See also id. at 881-84.

25 ⁶ Philip Morris did move to block any reference to its wrongdoing in other countries, a motion this Court
26 granted. RT 3148-64. At this juncture, Philip Morris objects to a handful of references that counsel made to
27 the nationwide damage to the public health caused by Philip Morris’s fraud scheme. NT Mem. at 14-15. But
28 no objections were made at trial, so these points have been waived. In any event, such comments were
entirely proper given the Supreme Court’s holdings in TXO and BMW v. Gore.

Philip Morris complains that “[n]othing in the Court’s instructions told the jury that it was barred from
considering conduct or injury outside California.” NT Mem. at 15. But it requested no such instruction. It only
requested that the Court instruct the jury to ignore all harm done by Philip Morris to persons other than Richard
Boeken, regardless of where those persons lived. Id. That request lacked merit. E.g., TXO, 509 U.S. at 460
(plurality opinion) (jury may consider “the possible harm to other victims”). But nothing in the request drew
any distinction between conduct or injury occurring inside California versus outside California. Hence any
claim of trial error based on an extraterritoriality objection has been waived.

1 damages award,” and that “[i]n re-weighing the evidence, this Court has power and
2 responsibility to disregard evidence that is constitutionally infirm.” NT Mem. at 16 n.12. But
3 as noted in Part I-A, supra, in passing on the federal substantive due process objection this
4 Court’s responsibility is not to “re-weigh” the evidence; it is to decide if the jury’s verdict was
5 rational. Nor is there anything to the argument that evidence involving other states must
6 be ignored. As is clear even from the snippet of BMW v. Gore quoted by Philip Morris, an
7 extraterritoriality issue arises only where a punitive damage award is entered “with the
8 intent of changing the tortfeasors’ lawful conduct in other States.” 517 U.S. at 572
9 (emphasis added) (quoted in NT Mem. 14).

10 We doubt there is any state in which it is lawful to subject consumers to a fraud
11 scheme designed to induce them to use a deadly and addictive product, and Philip Morris
12 identifies none. In BMW v. Gore there was no evidence that BMW had acted in bad faith,
13 and there was every indication that in not disclosing to consumers minor repairs made to
14 its vehicles, it operated in “reasonabl[e] rel[iance]” on what it believed to be the “strictest”
15 state law among the 50 States. 517 U.S. at 577-79.⁷ By contrast, in this case the CEO of
16 Philip Morris Cos. admitted that at all times the company knew that it had a duty to fully
17 disclose its knowledge of the risks of its product, and to refrain from fraudulent promises
18 and representations. RT 3673-74. If some aspect of Philip Morris’s scheme was by
19 chance lawful in some state, the jury would still be entitled to take such evidence into

21 ⁷ The key to the Supreme Court’s ultimate holding in BMW v. Gore that the \$2 million in punitive damages
22 was excessive was its conclusion that BMW’s nationwide policy was not especially reprehensible because
23 BMW had not “repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful,”
24 so that there was no need for “strong medicine” to “cure the defendant’s disrespect for the law.” 517 U.S. at
25 576-77. In particular, the Court noted the “diverse policy judgments of lawmakers in 50 States” over whether
or not to require disclosure of pre-delivery repairs demonstrated that “reasonable people may disagree about
the value of a full disclosure requirement,” id. at 569-70, and observed that “there is no evidence that BMW
persisted in a course of conduct after it had been adjudged unlawful on even one occasion, let alone repeated
occasions.” Id. at 579.

26 It also bears emphasis that in Gore, three Justices (each needed for the five-member majority) wrote
27 separately to emphasize that procedural weaknesses in Alabama’s system of imposing punitive damages —
28 of a type wholly absent here — played a central role in their decision to hold that award unconstitutional. Id.
at 586-97 (Breyer, J., joined by O’Connor and Souter, JJ., concurring). These Justices explained that
“Members of this Court have generally thought . . . that if ‘fair procedures were followed, a judgment that is
the product of that process is entitled to a strong presumption of validity.’” Id. at 586-87 (citation omitted). The
concurring Justices departed from that principle in Gore only because the Alabama procedure “provided no
significant constraints or protection against arbitrary results.” Id. at 588.

1 account in deciding on the level of punishment appropriate to the circumstances. Even with
2 respect to the apparently lawful out-of-state conduct involved in BMW v. Gore, the Court
3 held that this conduct could still properly be considered in determining “the degree of
4 reprehensibility of the defendant’s conduct.” 517 U.S. at 574 n.21.⁸

5 ***Concealment of Evidence, and Deliberate False Statements.*** As a final factor
6 bearing on the “reprehensibility” guidepost, the Court in BMW v. Gore reiterated its view
7 that schemes involving “deliberate false statements” and the “concealment of evidence of
8 improper motive” are to be regarded as especially reprehensible. 517 U.S. at 579 (citations
9 omitted). Examples of such misconduct abound in this case. Philip Morris repeatedly lied
10 — to consumers, to the courts, and to Congress — in carrying out its fraud scheme, and
11 in attempting to conceal its operation. For example, after publicly promising in 1954 to fund
12 objective research into the health effects of smoking, and release the results for all to
13 judge, Philip Morris and its coconspirators cast a cloak of secrecy over their scientists.
14 Biological testing was conducted on a “top secret” basis, and never disclosed to the public.
15 When Philip Morris scientists, chafing at the company line, pushed to publish results that
16 had significant public health implications, their efforts were crushed, if necessary through
17 threats of litigation. E.g., Exs. 67, 82, 85, 91, 130, 132, 207, 219, 295, 305, 330, 331, 404,
18 422, 423, 507, 10,030; RT 1681-98, 1706-15, 1889-90. Extraordinary efforts were made
19 to keep secret Philip Morris’s scientific information proving it knew full well the hazards of
20 its products. E.g., Ex. 130 (noting that if the study proves that nicotine is addictive, “we will
21

22 ⁸ Even in the context of criminal sentences, where the interests of a defendant are greater than the
23 interests of a defendant facing the imposition of punitive damages, see Pacific Mut. Life Ins. Co. v. Haslip, 499
24 U.S. 1, 23 n.11 (1991); Browning-Ferris Indus. v. Kelco Disposal, Inc. (1989) 492 U.S. 257, 260, criminal
25 penalties are routinely upheld despite being predicated on the consideration of out-of-state conduct — even
26 where that conduct has not been adjudicated unlawful, and even where that conduct is in fact lawful. See,
27 e.g., Williams v. New York (1949) 337 U.S. 241, 247 (“fullest information possible concerning the defendant’s
28 life and characteristics” traditionally considered); United States v. Tucker (1972) 404 U.S. 443, 446 (inquiry
may be “broad in scope, largely unlimited either as to the kind of information [the court] may consider, or the
source from which it may come.”); Nichols v. United States (1994) 511 U.S. 738, 747 (defendant’s past
criminal behavior may be considered, “even if no conviction resulted from that behavior”); United States v.
Watts (1997) 519 U.S. 148, 151-56 (per curiam) (trial judge is free to consider evidence of alleged offenses
even where the defendant has already been acquitted by a jury on all the allegations, so long as trial judge
believes that the offenses have been demonstrated “by a preponderance of the evidence”). This point was
reaffirmed by the Court in BMW v. Gore, 517 U.S. at 573 n.19.

1 want to bury it. Accordingly, there are only two copies of this memo, the one attached and
2 the original which I have.”); Ex. 423 (“Our attorneys, however, will likely continue to insist
3 upon a clandestine effort in order to keep nicotine the drug in low profile.”); Ex. 507 (“If
4 important letters have to be sent please send to home. I will act on them and destroy.”).

5 In sum, the “reprehensibility” guidepost weighs heavily in favor of upholding the full
6 award of punitive damages in this case.

7 **2. Comparable Legislatively Authorized** 8 **Penalties Support the Full \$3 Billion Award**

9 A second BMW v. Gore guidepost — one ignored entirely by Philip Morris in its brief
10 — involves a comparison between “the punitive damages award and the civil or criminal
11 penalties that could be imposed for comparable misconduct.” 517 U.S. at 583 (emphasis
12 added). The civil and criminal penalties that could be imposed on Phillip Morris on account
13 of its fraud scheme are massive.

14 Philip Morris’s scheme of using deceit to induce consumers to use a deadly and
15 addictive product obviously violates the Unfair Trade Practices Act, which forbids “any
16 unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or
17 misleading advertising.” Cal. Bus. & Prof. Code § 17200. Each Philip Morris employee
18 who helped carry out its fraudulent business practices could be imprisoned for six months.
19 Id. § 17100. Further, these employees, and Philip Morris itself, could be fined \$1,000 for
20 “each single violation,” for example, for each person induced by the fraud to buy Philip
21 Morris cigarettes, and perhaps even \$1,000 for each pack sold.⁹

24 ⁹ Assessing the maximum amount of fines that Philip Morris could face would require treating each act
25 injuring a consumer — that is, each pack of cigarettes sold as a result of the fraud scheme — as a separate
26 violation. For example, the U.S. Court of Appeals for the D.C. Circuit recently applied the “comparable
27 penalties” guidepost of BMW v. Gore in upholding against a federal excessiveness attack a \$37 million penalty
28 assessed against a person who, for many years, had failed to disclose information about the control of a bank
that was required to be disclosed under federal banking laws. Pharaon v. Board of Governors of the Federal
Reserve (D.C. Cir.) 135 F.3d 148, 156, cert. denied (1998) 525 U.S. 947. It relied on the penalty that theo-
retically could be assessed under the relevant statute (12 U.S.C. § 1847(b)) — 8299 days of nondisclosure,
at \$25,000 per day for most of the period, and \$1,000 a day for the remainder of the period, for a total of
\$111.5 million — without any showing that such maximum penalties had ever been assessed in the past, and
without any explanation of why the regulators had picked \$37 million as the total penalty.

1 Separately, each Philip Morris employee who participated in this scheme could be
2 prosecuted for theft and/or conspiracy to obtain money by false pretenses, and sentenced
3 to a year in prison; they and Philip Morris could also be fined \$10,000 for each violation —
4 again, quite possibly for each smoker injured by the scheme. See Cal. Penal Code §§
5 182(4), 484(a), 487(a), 489(b); see also People v. Ashley (1954) 42 Cal.2d 246, 159-65;
6 People v. Whight (3d Dist. 1995) 36 Cal.App.4th 1143, 1151-52. Also, the employees who
7 participated in the scheme could be prosecuted for conspiring to commit an act injurious
8 to the public health, in violation of Cal. Penal Code § 182(5), and sentenced to one year
9 in prison; they and Philip Morris could also be fined \$10,000 for each violation.

10 Obviously, the conviction and sentencing of the Philip Morris employees who carried
11 out this fraud would have a devastating effect on Philip Morris, exponentially exceeding the
12 cost of the punishment beyond that directly experienced by the convicted employees. The
13 fines, separately assessed for each smoker victimized by the scheme, and perhaps for
14 each pack of cigarettes that Philip Morris profited off through the scheme, could run into the
15 billions of dollars. Those penalties, and the criminal incarceration of key employees that
16 could be imposed as punishment for the scheme, indicate that the “comparable penalties”
17 guidepost weighs heavily in favor of upholding the jury’s \$3 billion award.

18 **3. Comparison With the Actual and Potential Harm to** 19 **to Plaintiff and Others Supports The Full \$3 Billion Award**

20 The third BMW v. Gore guidepost requires analysis of the ratio between the punitive
21 damage award and the actual or potential harm to plaintiff and others. 517 U.S. at 580-83.
22 Contrary to Philip Morris’s argument, NT Mem. at 6-7, what is involved here is not simply
23 a mathematical exercise in which the punitive damage award is divided by the
24 compensatory damage award that the plaintiff in a particular case happens to receive.
25 Rather, the Supreme Court has directed that where the defendant has engaged in a
26 tortious course of conduct directed not just at the plaintiff but at others, analysis of the
27 “ratio” guidepost should also take into consideration the actual or potential harm to others.

28

1 In TXO, the Court specified that the punitive damage award should be compared not
2 only to “the harm that has actually occurred” to the plaintiff as a result of the defendant’s
3 conduct, but also to “the possible harm to other victims that might have resulted if similar
4 future behavior were not deterred.” TXO, 509 U.S. at 460 (plurality opinion) (quoting
5 Haslip, 499 U.S. at 21). There, the Court upheld the \$10 million award, which bore a 526-
6 to-1 ratio to the compensatory damages recovered by the plaintiffs, based partly on the
7 lower court’s conclusion that “TXO’s pattern of behavior ‘could potentially cause millions
8 of dollars in damages to other victims.’” Id. at 460-61 (quoting 419 S.E.2d 970, 889).

9 Consistent with this principle, in BMW v. Gore the Court considered a \$2 million
10 punitive award and a \$4,000 compensatory award to Dr. Gore for BMW’s failure to disclose
11 its repainting of his new automobile, but it did not rigidly set the relevant ratio at 500 to 1.
12 Rather, the Court indicated that the harm done to the thirteen other Alabama victims of
13 BMW’s nondisclosure, who had each arguably suffered \$4,000 in damage, might properly
14 be counted — yielding a total harm denominator of \$56,000, and a ratio of 35 to 1. See
15 517 U.S. at 582 & n.35; see also id. at 589-90 (Breyer, J., joined by O’Connor and Souter,
16 J.J.) (agreeing that the denominator could properly be calculated as \$56,000, reflecting the
17 total “purely economic harm” done by BMW to Alabama consumers). And the Court
18 warned against any “categorical approach” to the “ratio” guidepost, noting that it had
19 “consistently rejected the notion that the constitutional line is marked by a simple
20 mathematical formula, even one that compares actual and potential damages to the
21 punitive award.” Id. at 582.

22 Once one eschews the categorical approach advocated by Philip Morris, but rejected
23 in TXO and BMW v. Gore, it is plain that the “ratio” guidepost weighs strongly in favor of
24 upholding the full \$3 billion punitive damage award. Unlike BMW v. Gore, this case does
25 not involve purely economic harm done to consumers. It involves horrible suffering and
26 death caused by an addictive product that Philip Morris induced millions of Americans to
27 use through fraudulent means. But for analytical purposes, if one places an economic
28 value of merely \$2 million on each death (much less than the damages received by

1 Boeken), and assumes that only a small fraction of those who died from Philip Morris
2 cigarettes smoked because of Philip Morris's deceit, one obtains a denominator in the
3 billions of dollars. For example, as Philip Morris correctly notes, using conservative
4 assumptions 10,000 Californians die each year from its cigarettes. NT Mem. at 20. Merely
5 considering the last ten years of carnage, if just 5% of these 100,000 Californians would
6 not have smoked but for Philip Morris's fraud scheme, then 5,000 Californians fell victim
7 to the scheme. Valuing each of these 5,000 deaths at \$2 million produces a harm to
8 Californians in just the past decade as a result of Philip Morris's wrongdoing totaling \$10
9 billion. Using these extremely conservative assumptions, based on Philip Morris's own
10 math, the relevant ratio in this case is thus not a multiple (**540 to 1**, as asserted by Philip
11 Morris, see NT Mem. at 6), but a fraction: \$3 billion/\$10 billion, or **3 to 10**.

12 The propriety of calculating the relevant denominator in the many billions of dollars in
13 deciding whether the punitive damage award in this case is excessive is corroborated by
14 the "Proposed Resolution" forged between the major tobacco companies and the Attorneys
15 General and announced on June 20, 1997. See Proposed Resolution, available at
16 <<http://stic.neu.edu/settlement/6-20-settle.pdf>>. In it, the tobacco companies agreed that
17 they would make payments during the following 25 years totaling an estimated \$368.5
18 billion. Id. at 34. The board of directors of Philip Morris unanimously approved the
19 Proposed Resolution on June 25, 1997, and in it Philip Morris agreed that it would pay \$6.5
20 billion of the initial \$10 billion payment, and would then pay a share of the remaining \$368.5
21 billion based on its market share — that is, roughly 50% of the payments (assuming the
22 continuation of current market share). Id. at 34-34; "Statement From Philip Morris Board
23 of Directors Regarding Tobacco Settlement," Business Wire, June 25, 1997 ("We accept
24 this compromise"); Barry Meier, "Philip Morris to Pay Most of First Bill," New York Times,
25 June 25, 1997, at D1.

26 In negotiating the resolution, Philip Morris and the other companies won an agreement
27 that the legislation embodying it would provide immunity from "punitive damages in
28 individual tort actions." Proposed Resolution at 39. To obtain this provision, the companies

1 agreed to pay an extra \$60 billion (on top of an original figure of \$308 billion) to resolve all
2 past liability for punitive damages in lawsuits brought by individuals.¹⁰ Because Philip
3 Morris was agreeing to make roughly half the payments (subject to future changes in
4 market share), it follows that in adding to the agreement an additional \$60 billion in
5 payments in exchange for immunity from punitive damage awards, Philip Morris was
6 agreeing to the reasonableness of it paying at least \$30 billion to resolve punitive damage
7 liability for its pre-1997 conduct.

8 In truth, the actual amount that Philip Morris was agreeable to paying in 1997 to
9 resolve punitive damages for its pre-1997 conduct may be more in the range of \$81 billion.
10 After all, under the 1997 Proposed Resolution, the tobacco companies agreed to pay
11 \$368.5 billion for a deal under which their punitive damage liability for past acts was
12 extinguished. Congress rejected the Proposed Resolution. Pursuant to the 1998
13 settlement later reached with the Attorneys General alone, under which the tobacco
14 companies received no immunity from punitive damages, the companies were only willing
15 to pay \$206 billion. Using Philip Morris's 50% market share liability for the payments
16 involved, the bottom line is that Philip Morris was willing to pay an extra \$81 billion for a
17 deal that extinguished its punitive damage liability for past acts.

18 Whether one concludes that Philip Morris believed it reasonable to pay \$81 billion as
19 punishment for its past misdeeds, or only \$30 billion, the magnitude of the punishment
20 Philip Morris was willing to accept certainly corroborates the view that the total harm
21 caused to consumers by Philip Morris's fraud scheme runs into the billions of dollars, and
22 that such numbers should be figured into the denominator in assessing the "ratio"
23 guidepost. In particular, the fact that Philip Morris explicitly took the position that \$30 billion

24
25 ¹⁰ See Oversight Hearing Regarding: The Tobacco Settlement: Views of Tobacco Industry Executives,
26 105th Congress, (January 29, 1998) ("Oversight Hearing"), Statement of Geoffrey C. Bible, Philip Morris
27 Companies Inc., at 15 ("with respect to past conduct, the industry would pay more than \$60 billion in
28 settlement of any claims of punitive damages.") (available at <http://www.house.gov/commerce/issues/tobacco/Tobacco_Settlement.html>); Oversight Hearing Transcript (testimony of Steven
F. Goldstone, CEO of RJR Nabisco (referring to "the \$360 billion, or \$368 billion, which is \$60 billion in punitive
damages — and I do agree with my colleague that that is as far as I know by far the largest — the largest
punitive — it's more than any — all companies in all the history of the United States have ever paid."); "The
Deal: 'Punishment for Their Past Misconduct,'" New York Times, June 21, 1997, § 1, at 10.

1 dollars was an appropriate amount to resolve punitive liability for its pre-1997 conduct,
2 combined with the fact that Philip Morris has not yet paid a penny in punitive damages,
3 strongly points to the propriety of upholding the full \$3 billion punitive damages award in
4 this case. It is just 10% of the total amount Philip Morris voluntarily agreed to pay in total
5 punitive damages for its pre-1997 conduct.

6 In sum, given conservative assumptions based on Philip Morris's own math on the
7 total number of victims of its fraud scheme, and given the huge damages inevitably
8 suffered by the average victim, it is apparent that thousands of other California consumers
9 have been harmed by the scheme, and have suffered billions of dollars of damage. This
10 case is thus the antithesis of BMW v. Gore, in which the Court indicated that only 14
11 Alabama consumers had been harmed by BMW's scheme, suffering total damages of only
12 \$56,000 — a tiny fraction of the \$2 million punitive damage award. Here, the harm to
13 California consumers greatly exceeds the \$3 billion punitive damage award. Therefore, the
14 "ratio" guidepost weighs heavily in favor of upholding the full award.

15 Because this is a fraud case, the importance of the Supreme Court's rejection of any
16 "categorical approach" or "simple mathematical formula" in assessing the ratio guidepost,
17 BMW v. Gore, 517 U.S. at 582, must be emphasized. In cases involving intentional torts,
18 often an award of compensatory damages will be relatively low when compared with the
19 total societal harm caused by the defendant, and when compared with the illicit profits
20 received by the defendant (or that it expected to receive, see TXO, 509 U.S. at 450, 461-
21 62) through its wrongdoing. For example, here Mr. Boeken's compensatory recovery was
22 \$5.5 million. But the total societal harm caused by Philip Morris through its fraud scheme
23 has been exponentially higher, because on even the most conservative estimate Mr.
24 Boeken is just one of many thousands of victims who suffered, collectively, many billions
25 of dollars of damages. Similarly, the profits that Philip Morris has received through the
26 tobacco franchise it preserved by its fraud scheme also run into the many billions of dollars.
27 Based on the financial figures contained in its annual reports, during the pendency of its
28 scheme from 1954 through 2000 Philip Morris earned a total of \$96.57 billion (in 2000

1 dollars) on account of its tobacco business, even though it paid out about half of these
2 profits in dividends each year rather than reinvesting them to earn greater profits in the
3 future. See Appendix hereto.¹¹

4 In cases such as this, where any one victim has relatively low damages compared
5 with the defendant's vast profits from its wrongdoing and the attendant societal harm,
6 effective deterrence of intentional torts requires an award of punitive damages that is vastly
7 higher than the compensatory award to the particular plaintiff.¹² Thus, once a scheme of
8 intentional wrongdoing, particularly a fraud scheme such as Philip Morris's, has been
9 identified, the legal system should target it for heavy punishment at the earliest available
10 opportunity. It should not try to "optimize" punishment by doling out punishment in
11 measured doses cases by case, to fit particular punitive/compensatory ratios. As the
12 Supreme Court has noted, "[s]ociety has an interest in deterring and punishing all
13 intentional or reckless invasions of the rights of others." Smith v. Wade (1983) 461 U.S.
14 30, 54 (Rehnquist, J.).

15 Fraud is a core invasion of the rights of others. Fraud is theft. It involves a "bare
16 wealth transfer" from the victim to the wrongdoer, and the "market impairment arising from
17 loss of consumer trust in legitimate marketing representations and the efforts of consumers
18

19 ¹¹ The data on net profits and dividend distributions were compiled from the following pages of Phillip
20 Morris's annual reports, available on its corporate website, <<http://www.pmdocs.com>>: 1959 Annual Report,
21 p. 13 (document numbers **1005221152**, **1005221168**); 1973 Annual Report, pp. 40-41 (document numbers
22 **1005229391**, **1005229431-32**); 1988 Annual Report, pp. 30-31 (document numbers **1005230583**,
23 **1005230614-15**); and 2000 Annual Report, pp. 33 (available at [www.philipmorris.com/investors/
annual_reports.asp](http://www.philipmorris.com/investors/annual_reports.asp)>. All dollar figures were rounded to the nearest \$10,000. Data for years prior to 2000
24 were adjusted for inflation using the Consumer Price Index data maintained by the United States government,
25 using the "Inflation Calculator" posted at the website of the Bureau of Labor Statistics,
<<http://stats.bls.gov/cpihome.htm>>. To the extent warranted in its ruling on the objections in Philip Morris's
new trial motion, this Court may take judicial notice pursuant to Cal. Evid. Code § 452(h) of facts contained
in Philip Morris's annual reports, and of official government statistics on inflation. E.g., Smiley v. Citibank, N.A.
(1995) 11 Cal.4th 138, 145 n.2, aff'd, (1996) 517 U.S. 735; BMW v. Gore, 517 U.S. at 594-95, 597-97 (Breyer,
J., joined by O'Connor and Souter, JJ., concurring).

26 ¹² See, e.g., Cooper v. Casey (7th Cir. 1996) 97 F.3d 914, 919 (Posner, C.J.) ("The smaller the
27 compensatory damages, the higher the ratio of punitive to compensatory damages has to be in order to fulfill
the objectives of awarding punitive damages.") (citation omitted); Thomas C. Galligan, Jr., Augmented Awards:
28 The Efficient Evolution of Punitive Damages, 51 La. L. Rev. 3, 65 (1990) ("The greater the divergence between
the compensatory damages awarded and the actual costs the conduct imposes upon society, the greater the
need for an award greatly exceeding the compensatory damages.").

1 to investigate vendors and otherwise protect themselves from fraud entail real net costs.”
2 Richard S. Gruner, Just Punishment and Adequate Deterrence for Organizational
3 Misconduct: Scaling Economic Penalties Under the New Corporate Sentencing Guidelines,
4 66 S. Cal. L. Rev. 225, 235 (1992). “By deterring all fraud, society can eliminate” these
5 heavy costs “and realize a net social gain,” so that “eradication of fraud” should be the
6 objective. Id.; see also pp. 10-11, supra. In short: “The optimal amount of fraud is zero.”
7 Ackerman v. Schwartz (7th Cir. 1991) 947 F.2d 841, 847 (Easterbrook, J.).

8 Phillip Morris is an entity driven by an “all-consuming ambition . . . to create wealth.”
9 RT 3684-85. To deter such entities from attempting coercive wealth transfers such as
10 fraud, society must be prepared to impose punishment exceeding the profits earned from
11 fraud. See, e.g., Richard A. Posner, Economic Analysis of Law 220 (4th ed. 1992) (“[T]he
12 proper sanction for a pure coercive transfer such as theft is something greater than the
13 law’s estimate of the victim’s loss We can be more precise: The extra something
14 should be the difference between the victim’s loss and the injurer’s gain, and then some.”)
15 (footnote omitted); David D. Haddock, Fred S. McChesney & Menahem Spiegel, An
16 Ordinary Economic Rationale for Extraordinary Legal Sanctions, 78 Calif. L. Rev. 1, 13
17 (1990) (observing that attempts at contractual bypass “have no social value at any level:
18 their optimal level is zero. To eradicate such activities, efficient law would . . . reduce to
19 zero the expected gain available to the defendant from the injurious activity, leaving no
20 incentive for him to attempt the activity in the first place”) (second emphasis added).

21 This framework makes the proper analysis of the “ratio” guidepost, and of Philip
22 Morris’s motion, straightforward. Philip Morris has earned \$96.57 billion since 1954 (in
23 2000 dollars) while pursuing its fraudulent business scheme designed to preserve and
24 extend its tobacco franchise. The \$3 billion punitive damage award is 3.1% of that amount.
25 Any reduction of the punitive damage award would render even more distant the objective
26 of extracting the illicit profits obtained by Philip Morris through its scheme, and would signal
27 that California is not serious about ensuring that honest business pays better than fraud.
28 To reduce the punitive award to conform to some sort of categorical “ratio” test out of a

1 sense of abstract “fairness” and “proportionality” cannot be justified because this type of
2 categorical rule would make all members of society worse off, at least when one is dealing
3 with intentional torts such as fraud by which some members of society prey on others to
4 effect an illegitimate wealth transfer. See generally Louis Kaplow and Steven Shavell,
5 Fairness Versus Welfare, 114 Harv. L. Rev. 961, 1234-59, 1281-1304 (2001).

6 **4. Philip Morris’s Wealth Supports the Full \$3 Billion Award**

7 The Court in BMW v. Gore, in setting forth three guideposts that should be analyzed
8 in evaluating a federal substantive due process attack on a punitive damage award, did not
9 purport to exhaust the guideposts that might be relevant in deciding whether an award is
10 rational. Another guidepost weighing heavily in favor of the rationality of the \$3 billion
11 punitive damages award is the wealth of Philip Morris.

12 Philip Morris, for the first time in a posttrial brief, attempts to “assert and preserve the
13 argument that consideration of a defendant’s financial condition (other than in mitigation)
14 is never an appropriate factor in determining an award of punitive damages.” NT Mem. at
15 8 n.8. The objection comes too late, and this Court should rule that it has been waived.
16 Philip Morris had the right to a bifurcated trial on punitive damages under Cal. Civ. Code
17 § 3295(d), under which no evidence of wealth would have been admitted until the jury had
18 rendered a verdict on punitive damages liability. The Court was surprised that Philip Morris
19 did not elect bifurcation, apparently gambling that it would obtain a better result if the jury
20 deliberated only once. Philip Morris must accept the consequences of that decision.
21 Further, Philip Morris failed to object to the introduction of evidence on wealth at trial. And
22 if it could be error for the jury to consider wealth, Philip Morris invited any error by
23 proposing that the jury be instructed to consider its wealth in setting punitive damages.
24 However, it could not be error. Philip Morris is wrong in asserting that the U.S. Supreme
25 Court “has never reached the issue” of whether wealth can constitutionally be considered
26 in setting punitive damages. NT Mem. at 8 n.8. The Court has repeatedly held that wealth
27

28

1 may be considered.¹³

2 Because consideration of a defendant's wealth is a primary factor in assessing a
3 punitive damages award under California law, to avoid repetition we analyze the relevance
4 of wealth, and the arguments concerning wealth raised by Philip Morris, in Part II-B-2, infra,
5 hereby incorporated by reference.

6 * * *

7 In sum, the three guideposts set out in BMW v. Gore, in addition to the wealth
8 guidepost, all confirm that the jury's \$3 billion punitive damage award is a rational means
9 of deterring wrongdoers from pursuing fraudulent business schemes such as the one
10 pursued by Philip Morris for decades. It follows that Philip Morris's substantive due process
11 attack on the verdict provides no basis for a new trial or a remittitur. The only remaining
12 question concerning the amount is whether the award, even though proper under federal
13 law, should be retried or remitted under California law.

14 **II. CALIFORNIA LAW DOES NOT REQUIRE A NEW TRIAL OR REMITTITUR**
15 **ON THE AMOUNT OF PUNITIVE DAMAGES, AND THIS COURT SHOULD**
16 **NOT EXERCISE ITS DISCRETION IN FAVOR OF PHILIP MORRIS**

17 Although we recognize that the Court has substantial discretion in this area, we urge
18 the Court to hold that there is no justification under California law for reducing the \$3 billion
19 punitive damage award. Philip Morris, motivated by an "all-consuming ambition . . . to
20 create wealth," RT 3684-85, for decades used deceit to induce children and young adults
21 in California to buy its addictive and deadly products. Nothing in California law requires that
22 the award be reduced. California law should not be used, in effect, to subsidize an

23 _____
24 ¹³ In TXO, for example, the Court noted the "well-settled law" that the size of a punitive damage award may
25 be justified as constitutionally reasonable by reference to a defendant's wealth. TXO, 509 U.S. at 462 n.28
26 (plurality opinion). Justice Breyer, joined by Justices O'Connor and Souter, explained in BMW v. Gore that
27 "one can understand the relevance of this factor to the State's interest in retribution." 517 U.S. at 591
28 (concurring opinion); see also Haslip, 499 U.S. at 21-22; Browning-Ferris Indus. v. Kelco Disposal, Inc. (1989)
492 U.S. 257, 300 (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part); Newport v.
Fact Concerts, Inc. (1981) 453 U.S. 247, 270 (evidence of wealth "is traditionally admissible as a measure of
the amount of punitive damages that should be awarded"); Washington Gas Light Co. v. Lansden (1979) 172
U.S. 534, 551. See also Restatement (Second) of Torts § 908(2) & comment e (1979); Annotation, Punitive
Damages: Relationship to Defendant's Wealth, As Factor in Determining Propriety of Award, 87 A.L.R.4th
141, 151 (1995) (noting that the "vast majority of courts" permit wealth to be considered).

1 intentional fraud scheme by reducing this punitive damage award below the level already
2 shown to be permissible under federal law. Nor is Philip Morris deserving of any leniency
3 that this Court could provide through the exercise of its discretion.

4 **A. Standard of Review**

5 Philip Morris incorrectly describes the standard for this Court’s review of the jury’s
6 verdict under California law. Philip Morris suggests that punitive damages are generally
7 disfavored under California law, and that as a consequence this Court has carte blanche
8 to substitute its view of the proper amount of punitive damages for that of the jury. NT
9 Mem. at 4-5. In fact, punitive damages have been favored in California, by both the
10 Legislature and the Judiciary, since 1872. See Egan v. Mutual of Omaha Ins. Co. (1979)
11 24 Cal.3d 809, 819-20, cert. denied (1980) 445 U.S. 912; see also Neal v. Farmers
12 Insurance Exchange (1978) 21 Cal.3d 910, 990 n.13 (“The purpose of punitive damages
13 is to punish wrongdoers and thereby deter the commission of wrongful acts.”); Dyna-Med.
14 Inc. v. Fair Employment & Housing Comm’n (1987) 43 Cal.3d 1379, 1387 (“punitive
15 damages serve but one purpose — to punish and through punishment, to deter.”)

16 “‘How much’ in punitive damages is enough” to deter a wrongdoer “and others from
17 repeating the wrongful conduct in the future” is a matter “not susceptible to mathematical
18 definition.” Wyatt v. Union Mortgage Co. (1979) 24 Cal.3d 773, 790; see also Devlin v.
19 Kearny Mesa AMC/Jeep/Renault, Inc. (4th Dist. 1984) 155 Cal.App.3d 381, 388 (no “single
20 formula for calculating punitive damages” exists, and “properly so”). Thus, a jury’s setting
21 of punitive damages involves “a fluid process of adding or subtracting depending on the
22 nature of the acts and the effect on the parties and the worth of the defendants.” Walker
23 v. Signal Cos. (4th Dist. 1978) 84 Cal.App.3d 982, 998; see also Devlin, 155 Cal.App.3d
24 at 291 (“there is a range of reasonableness for punitive damages reflective of the fact
25 finder’s human response to the evidence presented.”). Given the absence of any formula
26 for setting punitive damages, juries are necessarily afforded “a wide discretion in
27 determining what is proper.” Id. Indeed, as the California Supreme Court has long
28 recognized, “[i]n the matter of punitive damages it is clear from the authorities that juries

1 have wider discretion in this regard than they have in the matter of compensatory
2 damages.” Scott v. Times-Mirror Co. (1919) 181 Cal. 345, 367 (citations omitted).

3 Of course, a jury’s discretion in setting the amount of punitive damages is not
4 absolute. The defendant may argue that the verdict is “excessive as a matter of law,”
5 asking the trial court to rule, in its discretion, that the amount of the verdict is simply too
6 high to be sustained. Neal, 21 Cal.3d at 924, 927-29. On such an argument, the
7 presumption lies against granting a new trial or remittitur. The Legislature has directed, in
8 relevant part, that “[a] new trial shall not be granted . . . upon the ground of excessive or
9 inadequate damages, unless after weighing the evidence the court is convinced from the
10 entire record, including reasonable inferences therefrom, that the . . . jury clearly should
11 have reached a different verdict or decision.” Cal. Civ. Code § 657; see also Cal. Civ. Code
12 § 662.5 (authorizing remittitur orders only where the grant of a new trial on damages “would
13 be proper”). Where the trial court is convinced that interference with the jury’s verdict is
14 necessary, it must “specify the ground or grounds upon which it is granted and the court’s
15 reason or reasons for granting the new trial upon each ground stated.” Id.; see also Neal,
16 21 Cal.3d at 931-32.

17 By contrast, where the trial court is not convinced that the jury’s verdict must be
18 disturbed, the trial court need not issue an opinion, but may simply deny the motion. Given
19 the basic presumption in favor the jury’s award, the trial court is not required to set out
20 reasons for denying the motion. See, e.g., Stevens v. Owens-Corning Fiberglass Corp.
21 (1st Dist. 1996) 49 Cal.App.4th 1645, 1656-57. Thereafter, on appeal, “[t]he presumptions
22 are all in favor of the correctness of the verdict,” and “[t]o this presumption is added the
23 sanction of the court below in denying the motion for a new trial.” Scott, supra, 181 Cal.
24 at 366; see also Devlin, 155 Cal.App.3d at 387-88 (“Whether punitive damages should be
25 awarded and the amount of such an award are issues for the jury and for the trial court on
26 a new trial motion. All presumptions favor the correctness of the verdict and judgment.”);
27 Stevens, 49 Cal.4th at 1658.) “[G]reat weight is accorded the actions of the jury and the trial
28 court,” Liberty Transp., Inc. v. Harry W. Gorst Co., (2d Dist. 1991) 229 Cal.App.3d 417,

1 435-35, and the trial court’s “ruling will not be disturbed absent an abuse of discretion.”
2 Schelbauer v. Butler Mfg. Co. (1984) 35 Cal.3d 442, 452; see also Neal, 21 Cal.3d at 927;
3 Finney v. Lockhart (1950) 35 Cal.2d 161, 164; Vallbona v. Springer (4th Dist. 1996), 43
4 Cal.App.4th 1525, 1536 n.10; Downey Savings & Loan Ass’n v. Ohio Casualty Ins. Co. (2d
5 Dist. 1987) 189 Cal.App.3d 1072, 1099, cert. denied (1988) 486 U.S. 1036; Nevada Nat’l
6 Leasing Co. v. Hereford (1984) 36 Cal.3d 146, 153; Ferraro v. Pacific Fin. Corp. (1970) 8
7 Cal.App.3d 339, 351; Sullivan v. Matt (1955) 130 Cal.App.2d 134, 143.

8 Under California law, three specific factors must be considered, and weighed together,
9 in assessing whether or not the jury’s award of punitive damages is excessive: (1) the
10 reprehensibility of the wrongful conduct that the award is designed to punish and deter; (2)
11 the ability of the defendant to pay the full award, in light of its financial condition; and (3)
12 the ratio of the award to the harm suffered by the plaintiff. See, e.g., Adams v. Murakami
13 (1991) 54 Cal.3d 105, 109-10; Neal, 21 Cal.3d at 928.

14
15 **B. The \$3 Billion Punitive Damage Award Satisfies California’s Three-Part
Test for Assessing Whether a Particular Award is Excessive**

16 Each of the three factors supports entry of the \$3 billion award in its entirety.

17 **1. Reprehensibility of Defendant’s Wrongdoing**

18 As discussed above, based on the framework for “reprehensibility” review articulated
19 by the Supreme Court in BMW v. Gore, and based on fundamental principles drawn from
20 the fields of law and economics and sociology, Philip Morris’s decades-long scheme to
21 preserve its tobacco franchise by fraudulently inducing consumers to use a deadly and
22 addictive product must be regarded as deeply reprehensible. It also flouts California law.
23 California law has long targeted such schemes for heavy punishment.

24 As the California Supreme Court put it a quarter century ago: “Protection of unwary
25 consumers from being duped by unscrupulous sellers is an exigency of the utmost priority
26 in contemporary society.” Vasquez v. Superior Court (1971) 4 Cal.3d 800, 808. This
27 priority is especially strong with respect to the risk of corporate misconduct. A main
28 purpose of punitive damages under California law is “to deter acts deemed socially

1 unacceptable and, consequently, to discourage the perpetuation of objectionable corporate
2 policies.” Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal.3d 809, 819, cert. denied (1980)
3 445 U.S. 912. Accordingly, numerous California cases have upheld substantial punitive
4 damages imposed on corporations that have carried out fraud schemes that prey on the
5 trust of consumers, even where the injuries were principally economic in nature.¹⁴

6 Of course, the reprehensibility of a corporate fraud scheme is vastly higher where, as
7 here, that scheme results in the slow and painful premature death of millions of people.
8 Because Philip Morris’s fraud scheme foreseeably caused this human carnage, this is the
9 type of case that “cannot be compared to punitive damages involving a business fraud
10 resulting only in economic harm.” Rufo v. Simpson (2d Dist. 2001) 86 Cal.App.4th 573,
11 623-24. If deliberate corporate misconduct kills millions of people, “the reprehensibility of
12 the defendant’s conduct” should “have the greatest weight legally possible.” Id. at 623.

13 Philip Morris asserts that it has now mended its ways, and that society has nothing
14 more to fear from it. NT Mem. at 17-20. This Court need not consider the assertion. As
15 a matter of general deterrence, it is imperative that wrongdoers understand that if and when
16 caught, they will receive a punishment sufficient to deter others from engaging in similar
17 misconduct in the future. To reduce the punishment on the theory that the particular
18 defendant in the case at bar has reformed would only encourage others to believe that in
19 the future they will be permitted to keep the fruits of wrongdoing if, once caught, they too
20 promise to behave.

21 Thus, the reprehensibility aspect of California law strongly supports upholding the
22 jury’s \$3 billion punitive damage award in full.

24 ¹⁴ E.g., Sanchez-Corea v. Bank of America (1985) 38 Cal.3d 892, 909 (affirming \$1 million punitive award
25 for bank’s fraud against one plaintiff); Leonardini v. Shell Oil Co. (3d Dist. 1989) 216 Cal.App.3d 547 (affirming
26 \$5 million award for malicious prosecution of action against one plaintiff), cert.denied, (1990) 498 U.S. 919;
27 Ballou v. Master Properties No. 6 (2d Dist. 1987) 189 Cal.App.3d 65 (affirming \$2 million award for defendant’s
28 fraud against one plaintiff). See also Neal, 21 Cal.3d at 986-97 (targeting policy of taking advantage of
insureds in financial difficulty to force lowball settlements); Campbell v. Cal-Gard Surety Servs., Inc. (1998)
62 Cal.App.4th 563, 568-71 (targeting policy of fraudulently misrepresenting anti-theft insurance on
automobiles, and then not investigating claims, and delaying payment on them, in the event of a loss); Downey
Savings, 189 Cal.App.3d at 1098 (targeting policy of conducting claim investigations that focused on finding
facts to support the denial of the claim).

1 **2. Defendant’s Wealth and Financial Ability to Pay the Full Punitive Award**

2 Evidence of a defendant’s wealth and financial condition has long been considered
3 in reviewing the size of a punitive damage award, both under federal law, see note 13,
4 supra, and under California law. E.g., Bertero v. Nat’l Gen. Corp. (1974) 13 Cal.3d 43, 65
5 (“the wealthier the wrongdoing defendant, the larger the award of exemplary damages need
6 be in order to accomplish the statutory objective.”).

7 A principal rationale for consideration of a defendant’s wealth is that extremely wealthy
8 wrongdoers such as Philip Morris possess so much more power to damage society than
9 does an ordinary person. See, e.g., Owen, supra, 40 Ala. L. Rev. at 716-17 (“Many
10 punitive damages cases involve an abuse of power. Power is the control that one person
11 has over the welfare of another. . . . The more resources possessed by X, and the fewer
12 possessed by Y, the greater is X’s power relative to Y. . . . If and when the two interact,
13 X’s power status is reflected by Y’s commensurate vulnerability.”) Thus, as an entity’s
14 “power increases, so does the responsibility to avoid harming the rights of others.” Id. at
15 717. Philip Morris ignored that responsibility, and instead leveraged its enormous wealth
16 to implement and conceal its fraud scheme so as to protect its lucrative tobacco franchise.
17 This case illustrates the fact that the greater the assets controlled by a corporation, the
18 more powerful it is — and the more essential it is to ensure that the punitive damages
19 assessed represent a sizable percentage of wealth as a means of guaranteeing that
20 similarly powerful corporations in the future will not abuse their power by engaging in
21 intentional torts because they have no fear of serious consequences.

22 Indeed, protecting the weak from the powerful has long been the province of punitive
23 damages. “Punitive damages have consistently provided important protection for average
24 citizens against entities too powerful to be restrained by lesser remedies.” Michael Rustad
25 & Thomas Koenig, The Historical Continuity of Punitive Damages Awards: Reforming the
26 Tort Reformers, 42 Am. U. L. Rev. 1269, 1330 (1993). See also id. at 1329-30 (“Just as
27 punitive damages protected less powerful individuals against the King’s agents or brutal
28 employees of the railroads, . . . the remedy continues to protect those unable to protect

1 themselves.”) (footnote omitted); Nina Lempert, Punitive Damages — The Dischargeability
2 Debate, 11 Bank. Dev. J. 707, 713 (1995) (“Historically, the primary motivation for the
3 award of punitive damages has been to restrict the abuse of the weak by the powerful.”).
4 As the Supreme Court has observed, “[t]he dignity and value of the right assailed, and the
5 power and authority of the source from which the assault proceeds, are elements to be
6 considered in the computation of damages, if they are to be, not only compensation for the
7 direct loss inflicted, but a remedy and prevention for the greater wrong and injury involved
8 in the apprehension of its repetition.” Barry v. Edmunds (1886) 116 U.S. 550, 566
9 (emphasis added).

10 There is an independent reason why punitive damages should be set at a sizable
11 percentage of a corporation’s wealth where the corporation has pursued a profit-motivated
12 fraud scheme such as in this case. A bigger award is needed to “attract the . . . attention”
13 of a large corporation. TXO Production Corp. v. Alliances Resources Corp., (W. Va. 1992)
14 419 S.E.2d 870, 889, aff’d (1993) 509 U.S. 443. This is a particular problem with a
15 corporation such as Philip Morris, a publicly traded corporation with diffuse ownership of
16 shares, which is thus subject to the well-documented “agency” problem of corporate
17 management — the problem of corporate managers who are only distantly accountable to
18 the owners of the corporation (who each own only a tiny share, and have little incentive to
19 closely monitor corporate operations, so that legal penalties must be large enough as a
20 percentage of assets to get their attention and motivate them to better monitor
21 management). See, e.g., Michael C. Jensen & William H. Meckling, Theory of the Firm:
22 Managerial Behavior, Agency Costs, and Ownership Structure, 3 J.Fin.Econ. 305 (1976);
23 Menichini v. Grant (3d Cir. 193) 995 F.2d 1224, 1232-33; International Ins. Co. v. Johns
24 (11th Cir. 1989) 874 F.2d 1447, 1465-66; Morrissey v. Curran (2d Cir. 1981) 650 F.2d
25 1267, 1273.

26 Under California law, in assessing whether or not a jury’s award is excessive, a trial
27 court should consider the impact of the award on the defendant “in light of the defendant’s
28 financial condition.” Adams, 54 Cal.3d at 110-11) (citations omitted). The deterrent

1 function of punitive damages will not be served if the financial condition of a defendant
2 allows it to “absorb the award with little or no discomfort.” Id. at 110 (quoting Neal, 21
3 Cal.3d at 928). The test here is a practical one: where “[t]here is nothing in the financial
4 data presented” by a defendant “which suggests the award will unduly interfere with or
5 hamper with [the defendant’s] future operations,” the factor of financial condition provides
6 no basis for reducing the award. Devlin, 155 Cal.App.3d at 391. Under California law,
7 financial condition may be assessed by reference to the defendant’s wealth, its net income,
8 or both. Little v. Stuyvesant Life Ins. Co. (4th Dist. 1977) 67 Cal.App.3d 451; Wetherbee
9 v. United States Ins. Co. of Am. (1st Dist. 1971) 18 Cal.App.3d 266, 271.

10 As a general rule, as long as a punitive damage award for reprehensible conduct does
11 not exceed 10% of a defendant’s wealth, California law does not call for a reduction of the
12 award.¹⁵ The \$3 billion award in this case falls within that range, and thus California law
13 does not call for any reduction. Plaintiff introduced uncontroverted expert testimony that
14 a conservative estimate of the wealth of the Philip Morris domestic tobacco subsidiary,
15 based on an imputed market capitalization, is \$35 billion. RT 3609-11, 3630-31 (Johnson).
16 The jury’s verdict is 8.6% of that figure.

17 Philip Morris argues that this was a “misleading” theory of valuation, and that plaintiff’s
18 expert should have ignored everything except Philip Morris’s cash in the bank and other
19 hard assets. NT Mem. at 9-10. But Philip Morris offered no evidence disputing the \$35
20 billion conservative valuation. In response to its assertion that its wealth must be
21 determined only by adding up hard assets immediately on hand, plaintiff introduced expert
22 testimony that this would be a false measure of the wealth of Philip Morris. Such a “net
23 worth” valuation arbitrarily ignores the major asset owned by Philip Morris: its cigarette
24 brands, and their established customer base, built up through billions of dollars of

25
26 ¹⁵ See Goshgarian v. George, (5th Dist. 1984) 161 Cal.App.3d 1214, 1228 (citation omitted) (“[T]he figure
27 10 percent does not appear particularly shocking; rather, it seems a reasonable compromise between
28 punishment and leniency.”). See, e.g., Vallbona v. Springer, (4th Dist. 1996) 43 Cal.App.4th 1525, 1539-41
(punitive award of 23.1% of wealth upheld); Devlin, 155 Cal.App.3d at 391-92 (17.5% of wealth upheld);
Storage Services v. Oosterbaan, (1st Dist. 1989) 214 Cal.App.3d 498, 514-17 (remitting to 13.3% of wealth),
review denied, Dec. 15, 1989; Schomer v. Smidt, (4th Dist. 1980) 113 Cal.App.3d 828, 836-37 (10% of wealth
upheld).

1 advertising over the years.¹⁶ According to plaintiff's uncontroverted testimony, a "net worth"
2 calculation taking into account the value of Philip Morris's intangible assets would value the
3 company at a minimum of \$70 billion, which represents a "floor value" for the company.
4 RT 3612-21; see also RT 3649-51. The jury's award constitutes just 4% of a "net worth"
5 approach to valuation that includes the value of Philip Morris's intangible assets rather than
6 arbitrarily excluding that value. This testimony was uncontradicted.

7 Whether the jury's verdict here is viewed as being 8.6% of Philip Morris's wealth, or
8 only 4%, the fact that the \$3 billion award is not excessive in light of the company's financial
9 condition is further confirmed by the expert testimony concerning its current profits. The
10 aim of deterring intentional misconduct "will not be served if the wealth of the defendant
11 allows him to absorb the award with little or no discomfort'" Rufo, 86 Cal.App.4th at
12 620; see also Adams, 54 Cal.3d at 110. Currently, Philip Morris earns \$14.7 million in net
13 profits each day. RT 3621-22. Philip Morris thus can pay off the entire award in only 204
14 days. This relatively minimal discomfort cannot begin to compare with the suffering and
15 death inflicted by Philip Morris on Richard Boeken and the many thousands of other
16 Californians whom it has victimized through its fraud scheme during the past several
17 decades. Surely a penalty that requires Philip Morris to pay 204 days of net profits cannot
18 be considered excessive under California law.

19 Indeed, Philip Morris does not contend that its business operations would be
20 materially disrupted if it is forced to devote the 204 days following the jury's verdict to

22 ¹⁶ The limitations of focusing on a defendant's "net worth" as measured by current hard assets on hand are
23 well recognized. "[N]et worth' is subject to easy manipulation," and blind adherence to it, or any other one
24 standard, "could sometimes result in awards which neither deter nor punish or which deter or punish too
25 much." Lara v. Cadag (1993) 13 Cal.App.4th 1061, 1065 n.3. Thus, the Supreme Court in Adams declined
26 to endorse "net worth" as "the best measure" of ability to pay, refusing "to prescribe any rigid standard for
27 measuring a defendant's ability to pay." Adams, 54 Cal.3d at 116 n.7; see also Kenly v. Ukegawa, (4th Dist.
28 1993) 16 Cal.App.4th 49, 57 & n.6; Vossler v. Richards Mfg. Co. (5th Dist. 1983) 143 Cal.App.3d 952, 967-68
(noting relevance of "figures on gross sales, gross income, or gross wealth").

It is worth noting in this connection that the current "net worth" of Philip Morris, measured by hard
assets, is at the relatively low level of \$5 billion largely because the company needs relatively minimal hard
assets on hand to run its operations (compared with, for example, General Motors Corp.), and because
between 1954 and 2000 in carrying out its fraud scheme, the company paid \$40.19 billion in dividends
(measured in 2000 dollars) rather than retaining the money. See note 11, supra, and Appendix A, infra. Had
Philip Morris instead retained these profits and earned only enough return on them to keep up with inflation,
it would now have on hand \$45 billion in hard assets, not \$5 billion.

1 paying this award rather than, for example, paying out the money in dividends. Instead,
2 Philip Morris warns that if this Court does not reduce the punitive damages award,
3 particularly in light of other punitive awards it has recently suffered, this Court may render
4 the company unable to pay compensatory damages to the other victims of its fraudulent
5 scheme. NT Mem. at 20-21. This argument has several flaws.¹⁷

6 First, Philip Morris cites no legal authority that would permit this Court to make an
7 Olympian determination that it is better to reduce an otherwise warranted punitive award,
8 and thereby undermine deterrence of fraud schemes, out of a hypothetical concern for
9 future victims. Under Philip Morris's logic, no punitive damages could be awarded against
10 it, for fear of disrupting later compensation. Historically, however, the common-law right
11 to obtain appropriate punishment of a wrongdoer was regarded as having at least as much
12 importance as the right to obtain compensatory damages. See David J. Seipp, The
13 Distinction Between Crime and Tort in The Early Common Law, 76 B.U. L. REV. 59, 66-67,
14 83-84 (1996). See also Defender Indus. v. Northwestern Mut. Life Ins. Co. (4th Cir. 1991)
15 938 F.2d 502, 507 ("An assessment by a jury of the amount of punitive damages is an
16 inherent and fundamental element of the common-law right to trial by jury."). Traditionally,
17 our society has relied on the bankruptcy laws — not ad hoc decisions by particular judges
18 — to determine whether a defendant's resources are too limited to pay all valid claims and,
19 if so, how the available funds are most fairly distributed.

20 Second, if it wished to make this argument, Philip Morris was required to present to
21 the jury evidence of the past punitive damage awards which it now references, and
22 evidence of the effect of a large punitive damage award on its ability to pay compensatory
23

24 ¹⁷ Also flawed is Philip Morris's specific argument that the \$25 million punitive damage award in the Henley
25 case, as remitted, should create a ceiling or at least a benchmark for evaluating the propriety of the jury's
26 punitive damages award in this case. NT Mem. at 20-21. Henley did not involve "essentially the same
27 record," as Philip Morris suggests. Id. at 20. For example, in Henley the parties stipulated to Philip Morris's
28 wealth as being just \$3.4 billion (not the \$30 billion to \$70 billion proved by plaintiff's expert in this case), and
there was no evidence presented as to Philip Morris's level of profitability. Further, in Henley the plaintiff
received \$1.5 million in compensatory damages, and the jury awarded punitive damages in an amount (\$50
million) more than three times what the plaintiff requested (\$15 million). The \$25 million upheld by the trial
judge was \$10 million more than the plaintiff requested. Further, the trial judge in Henley did not have the
benefit of the particular method of analysis set out in this brief in defense of the jury's award in this case.

1 damages to other victims in the future. See Stevens v. Owens-Corning Fiberglass Corp.
2 (1st Dist. 1996) 49 Cal.App.4th 1645, 1661 (“We conclude that evidence of punitive
3 damages imposed in other cases must be presented to the jury in the first instance.”).

4 Third, even if Philip Morris was entitled to introduce evidence on this point in support
5 of its posttrial motions, it failed to do so. Philip Morris has offered no evidence that it lacks
6 the financial ability to pay compensatory damages to victims who sue it in the future (for
7 example, through the affidavit of a corporate risk manager); it has offered only the
8 assertions of its counsel, which are not evidence. E.g., Mosier v. Maynard (10th Cir. 1991)
9 937 F.2d 1521, 1525; British Airways Board v. Boeing Co. (9th Cir. 1978) 585 F.2d 946,
10 952, cert. denied (1979) 440 U.S. 981. In particular, Philip Morris has submitted no
11 evidence to contradict the reports that have circulated for the past several years that it has
12 considerable insurance to cover both defense costs and large verdicts in tobacco
13 litigation.¹⁸ Philip Morris’s failure to negate the existence of insurance to cover judgments
14 that it might suffer in the future (or, for that matter, this judgment) defeats its attempt to
15 plead poverty. As Chief Judge Posner has noted, although a defendant should always be
16 permitted to argue that a fine or punitive damages award “should be waived or lowered
17 because he cannot possibly pay it,” he “should not be allowed to plead poverty if his
18 employer or an insurance company is going to pick up the tab.” Kemezy v. Peters (7th Cir.

19
20
21 ¹⁸ See, e.g., Jan H. Schut, “Where There’s Smoke,” Institutional Investor, July 1997, at 147 (reporting that
22 “Philip Morris had 12 different insurers from 1949 to 1973,” that the comprehensive general liability policies
23 sold to tobacco companies “from 1949 to 1966 have no tobacco exclusions or aggregate limits,” and that some
24 policies “were written in the ‘60s and ‘70s expressly for tobacco liabilities”); Dan Lonkevich, “BAT Indicates
25 It Has Tobacco Claim Coverage,” National Underwriter, May 25, 1998, at 3 (noting that “[f]or the first time, a
26 tobacco company,” BAT, “has indicated the existence of insurance policies from older years which don’t
27 contain full tobacco exclusions,” and stating that a Philip Morris attorney declined to comment “on whether
28 Philip Morris has similar policies”); Dan Lonkevich, “Tobacco Cos. Could Wage Coverage War, Analysts Say,”
National Underwriter, July 12, 1999, at 1 (summarizing the conclusion of a securities analyst that under one
tobacco health liability policy written by St. Paul Fire & Marine for the 1973-76 period, “St. Paul is liable for up
to \$30 million for each individual plaintiff suing Philip Morris.”); Dan Lonkevich, “Fed’s Tobacco Suit Might
Prompt Ins. Claims,” National Underwriter, Sept. 27, 1999, at 42 (citing one insurance attorney who had
“reviewed over 1,400 insurance policies written for tobacco companies and found ample evidence of
significant coverage.”); James Moore, “Tobacco Maverick Strikes Fear in Reluctant Insurers,” The Times
(London), July 25, 2000, Business (“The Times has been given access to policies issued to tobacco
companies including Philip Morris . . . * * * Underwriters today tend to be alive to the dangers of loosely
worded policies and ensure they cover themselves against risks by writing in exclusions. But they were not
in the recent past and some of the policies shown to The Times are notably lacking in exclusions.”).

1 1996) 79 F.3d 33, 36-37.¹⁹

2 In sum, consideration of Philip Morris’s wealth and financial condition cuts strongly in
3 favor of upholding the entire punitive damage award.

4 **3. Ratio Between the Punitive Award and the Actual Harm Suffered**

5 The final “relevant yardstick” in assessing whether a given punitive damages award
6 is excessive under California law involves comparing the award to “the actual harm
7 suffered” as a result of the defendant’s misconduct. Neal, 21 Cal.3d at 928. Part of the
8 societal harm is measured by “the amount of the compensatory damages awarded” to the
9 particular plaintiff. Id. But as the U.S. Supreme Court has done with its substantive due
10 process review, see pp. 19-26, supra, the California courts have recognized that often the
11 compensatory damages awarded to a particular plaintiff will measure only a portion of the
12 societal harm caused by a defendant’s wrongdoing.

13 Thus, where a jury is asked to punish a corporation for its “invidious practices, thereby
14 discouraging a repeat thereof, we give the ratio of punitive to compensatory damages little
15 weight.” Downey Savings, 189 Cal.App.3d at 1099. In such a context, to limit an award
16 of punitive damages to a particular multiple of the compensatory damages that happen to
17 be awarded to the plaintiff in a given case “may thwart the purpose of punitive damages.”
18 Id. at 1098; see also Moore, 150 Cal.App.3d at 636 (given “evidence of fraudulent claims
19 practices” of insurance company “potentially affecting numerous insureds other than the
20 plaintiff, strong reliance on the reasonable relation rule may defeat the object and purpose
21 of punitive damages”).

24 ¹⁹ The burden here is clearly on Philip Morris to affirmatively demonstrate an inability to pay both this
25 award and possible future awards even after accounting for its insurance. This Court “can properly consider
26 the existence of [an indemnity] agreement as obviating the need to determine whether a defendant’s limited
27 financial resources justifies some reduction in the amount that would otherwise be awarded. It would be
28 entirely inappropriate for a defendant to raise the issue of his limited financial resources if there existed an
indemnity agreement placing the burden of paying the award on someone else’s shoulders.” Mathie v. Fries
(2d Cir. 1997) 121 F.3d 808, 816. Thus, whether a defendant has insurance covering a punitive damages
award is a matter that should be considered “at the post-trial review stage when the judge is asked either to
set the award aside entirely or enter a remittitur.” Garnes v. Fleming Landfill, Inc. (W. Va. 1991) 413 S.E.2d
897, 910.

1 **III. THE REMAINING ARGUMENTS FOR A NEW TRIAL ARE WITHOUT MERIT**

2 Beyond its attacks on the size of the punitive damage award, Philip Morris makes
3 several other arguments in support of a new trial. They are without merit.

4 **A. Nearly All of Philip Morris's Objections to the Conduct of the Trial**
5 **Were Waived and, in Any Event, the Objections Are Baseless**

6 First, Philip Morris argues that there was misconduct by plaintiff's counsel that
7 inflamed the jury, requiring a new trial. NT Mem. at 21-25, 44.

8 There was no misconduct of counsel. Almost every instance claimed by Philip Morris
9 to constitute misconduct arose from the testimony of its own witnesses. For example, the
10 reference to the Devil came from Philip Morris' chosen corporate representative Ellen
11 Merlo, who indicated a belief that the company and its employees were being "demonized."
12 RT 4436, 4438. In fact, she admitted that Philip Morris had determined some people
13 believed it to be the Devil incarnate. RT 4503-04. It was also Ms. Merlo who testified that
14 neither the Attorney General nor the Superintendent of Schools would trust Philip Morris'
15 claims that it no longer marketed to kids. RT 4396-97. She admitted that the Organization
16 for Tobacco Free Kids had publicly stated that it would not trust her any further than it could
17 throw her. RT 4425.

18 Similarly, it was Philip Morris' own expert witness, Dr. Elizabeth Cobbs Hoffman who
19 produced an editorial cartoon comparing tobacco executives to Noriega. RT 4065-66. It
20 was also Dr. Hoffman who brought to the jury's attention the image of tobacco executives
21 in a smoke-filled room laughing about making a profit at the expense of their customers'
22 health. And she acknowledged that it was our Proposition 99 that paid for these images
23 to be run on television in California for six years. RT 4092-95.

24 When attorney misconduct is alleged as grounds for new trial, prejudicial error is
25 committed only when the conduct of counsel consists of willful or persistent efforts to place
26 before a jury clearly incompetent evidence, or the statements or remarks of counsel are of
27 such a character as to manifest a design on his or her part to awaken the resentment of the
28 jury, to excite their prejudices or passions against the opposite party, or to enlist their

1 sympathies in favor of the client or against the cause of the adversary, and the instructions
2 of the court to the jury to disregard such offered evidence or objectionable remarks of
3 counsel could not serve to remove the effect or cure the evil. See, e.g., Tingley v. Times
4 Mirror Co. (1907) 151 Cal. 1, 23, 89 P. 1097; Dominguez v. Pantalone (1989) 212 Cal.
5 App.3d 201, 210-211. In assessing that prejudice, each case must ultimately rest on the
6 court's view of the overall record, taking into account such factors, among others, as the
7 nature and seriousness of the remarks and misconduct, the general atmosphere, including
8 the judge's control of the trial, the likelihood of prejudicing the jury and the efficacy of
9 objection or admonition under all the circumstances. Id. at 211. Philip Morris's allegations
10 of misconduct are few, inconsequential and patently incorrect.

11 Philip Morris' authorities afford no basis for relief and no basis to infer passion and
12 prejudice of the jury.

13 In Stone v. Foster (1980) 106 Cal.App.3d 334, the case was tried on both fraud and
14 negligence theories but "the cause of action for fraud was not supported by either
15 allegations or the evidence." Id. at 344. Unlike this case in which Philip Morris' misconduct
16 and concealment was never seriously disputed, the misconduct of counsel in Stone
17 occurred precisely because the unsupported fraud count was tried along with the
18 negligence count. "It is clear that the jury was influenced by the evidence purporting to
19 establish fraud and by the behavior of counsel since it awarded punitive damages." 106
20 Cal.App.3d at 355.

21 Stone was decided in 1980 before the Legislature made it more difficult to obtain a
22 punitive damage award, before the burden of proof was clear and convincing evidence, and
23 before 'despicable conduct' was part of a jury instruction. In Boeken the jury was instructed
24 (BAJI 14.71) about despicable conduct. According to the closest available dictionary,
25 'disgusting' is a milder term.

26 Likewise Gordon v. Stawther Enter. (1969) 273 Cal.App.2d 504 (excessive damages
27 arising from a swimming pool accident not involving punitive damages) and Rudolph v.
28 Gorman (1959) 169 Cal.App.2d 666 (excessive damages in a defamation action in which

1 no special damages were sought) do not support any inference of passion and prejudice
2 under the facts of this case.

3 Evidence of and reference to Philip Morris' despicable practices was wholly necessary
4 and appropriate under the facts of this case. Cf. Delos v. Farmers Insurance Group (1979)
5 93 Cal.App.3d 642, 664 (judgment upheld based in part on "an inextricable involvement
6 with conduct aptly described ... as a 'nefarious scheme to mislead and defraud thousands
7 of policyholders' with defendants' decision to deny [plaintiff's] claim."); Moore v. American
8 United Life Ins. Co. (1984) 150 Cal.App.3d 610, 637 ("In part, the jury's award of punitive
9 damages obviously punished defendant for having engaged in a practice "firmly grounded
10 in established company policy" (Citation.) that had the potential of defrauding countless
11 insureds other than plaintiff.").

12 Second, Philip Morris' counsel largely failed to object to counsel's final argument and
13 never requested any limiting instructions or admonitions. The failure to object waived any
14 so-called misconduct. "In the absence of a timely objection, the offended party is deemed
15 to have waived the claim of error through his participation in the atmosphere which
16 produced the claim of prejudice.' (See 4 Witkin, Cal. Procedure (2d ed. 1971) p. 2982 et
17 seq., pointing out the necessity of assigning the allegedly objectionable conduct as
18 misconduct and asking that the jury be instructed to disregard it. If this is not done, the
19 error is waived unless the misconduct was of so aggravated a character that it could not
20 be cured by any instruction. (id. at p. 2983.)" Whitfield v. Roth (1974) 10 Cal.3d 874,
21 891-892.

22 The purpose of this rule is similar to the one governing surprise -- to prevent a party
23 who has knowledge of misconduct during the proceedings from gambling on the outcome
24 while secretly preserving error to be raised during a motion for new trial. This case bears
25 no resemblance to Simmons v. Southern Pacific Transportation System (1976) 62
26 Cal.App.3d 341 where numerous objections were made and admonitions sought.

27 The general atmosphere including the Judge's control of the trial (a factor cited in
28 Dominguez) was exemplary. Not only did counsel immediately abandon questioning or

1 argument to which the infrequent objection was sustained, he sometimes did so even when
2 the Court overruled the objections. On rare occasions when the Court would observe, sua
3 sponte, that although a question or argument was proper, it was getting close to a 352
4 area, counsel invariably changed the subject.

5 Philip Morris obtained a fair trial. Its allegations of misconduct are patently incorrect
6 or have been waived.

7
8 **B. This Court Properly Refused Philip Morris's Proposed Instruction
on the Scope of Preemption Under the FCLAA**

9 Second, Philip Morris argues that it is entitled to a new trial because this Court failed
10 to instruct the jury on the scope of preemption under the FCLAA. NT Mem. at 26-31.

11 **1. The Court Properly Limited Preempted Claims to
12 Conduct Occurring Before July 1, 1969**

13 The only claims to which preemption applies are post-1969 failure to warn through
14 advertising and promotional activities. Contrary to Philip Morris's assertion in its moving
15 papers, the jury was not incorrectly allowed to impose liability on Philip Morris for
16 preempted claims, because this Court correctly limited the ambit of preempted to claims
17 to the period before July 1, 1969, the effective date of the Federal Cigarette Labeling Act.

18 Philip Morris argues that post-1969 failure to warn, fraudulent concealment/
19 suppression, and fraudulent neutralization claims are all preempted and that any evidence
20 that Boeken introduced in support of such claims was irrelevant and should have been
21 excluded. Either Philip Morris has misread the Cigarette Labeling Act and the U.S.
22 Supreme Court's decision in Cipollone v. Liggett Group, Inc. 60 U.S.L.W. 4703, 120 L. Ed.
23 2d 407, 439, or it is purposefully misleading this Court.

24 Any preemption of state law in cigarette cases comes from the 1969 Cigarette
25 Labeling Act and its express preemption provision:

26 "(a) No statement relating to smoking and health, other than the statement
required by section 1333 of this title, shall be required on any cigarette package.

27
28 "(b) No requirement or prohibition based on smoking and health shall be
imposed under State law with respect to the advertising or promotion of any
cigarettes the packages of which are labeled in conformity with the provisions of

1 this chapter. 15 U.S.C. 1334.

2 The Defendant in this case, and the Third Circuit’s opinion (overruled) in Cipollone,
3 advanced the discredited doctrine of implied preemption. Under this discredited theory, any
4 evidence that so much as implies that the post-1970 warning label is inadequate is
5 supposedly to be rejected. This is not what the United States Supreme Court held. Rather
6 it expressly rejected the implied preemption theory that was the holding of the Third Circuit
7 (Cipollone’s lower court.)²⁰

8 “In our opinion, the preemptive scope of the 1965 act and the 1969 act is
9 governed entirely by the express language in §5 of each act. . . “When congress
10 has considered the issue of pre-emption and has included in the enacted
11 legislation a provision explicitly addressing that issue, and when that provision
12 provides a reliable indicium of congressional intent with respect to state
13 authority,” There is no need to infer congressional intent to pre-empt state laws
14 from the substantive provisions” of the legislation. Such reasoning is a variant
15 of the familiar principle of expressio unius est exclusio alterius: Congress’
16 enactment of a provision defining the preemptive reach of a statute implies that
17 matters beyond that reach are not preempted. In this case, the other provisions
18 of the 1965 and 1969 acts offer no cause to look beyond | 5 of each act.
19 Therefore, we need only identify the domain expressly preempted by each of
20 those sections.”

21 The Supreme Court discussed the test of express preemption, which is:

22 “[Whether the legal duty that is the predicate of the common law damages action
23 constitutes a requirement or prohibition based on smoking and health . . . imposed
24 under State law with respect to . . . advertising or promotion, giving that clause a fair
25 but narrow reading.”

26 The Court specifically held that section 5(b) does not preempt state-law obligations
27 to avoid marketing cigarettes with manufacturing defects [strict liability] or to use a
28 demonstrably safer alternative design for cigarettes.

How does the rejection of implied preemption in favor of express preemption affect the
ultimate conclusion about what is preempted? The Supreme Court discussed the test of
express preemption as it applies to the Cigarette Labeling Act, which is “whether the legal
duty that is the predicate of the common law damages action constitutes a ‘requirement or
prohibition based on smoking and health . . . imposed under State law with respect to . .
. advertising or promotion.” Id. at 524.

²⁰ Cipollone v. Liggett Group, Inc. (3rd Cir. 1990) 893 F.2d 541.

1 Applying that test, what claims did the Cipollone court find were preempted, and what
 2 were not? Cipollone states that preemption bars only “claims” that assert that post-1969
 3 advertising or promotions should have included better warnings.

4 The following is a table of the *Cipollone* Court’s conclusions on preemption:

Claim	Basis	Preempted ?	Reference
All pre-1970 claims, including failure to warn, strict liability, misrepresentation	various state law bases	NO	“[W]e conclude that section 5 of the 1965 Act only pre-empt state and federal rulemaking bodies from mandating particular cautionary statements and did not pre-empt state law damages actions.” <u>Cipollone</u> at 519-520.
Post-1969 failure to warn	“requirements or prohibitions based on smoking and health in advertising or promotion”	YES	“Petitioner’s claims are preempted to the extent that they rely on a state-law requirement or prohibition . . . with respect to . . . advertising or promotion. Thus, insofar as claims under either failure-to-warn theory require a showing that respondents’ post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are preempted.” <u>Id.</u> at 524.
Express Warranty	duty voluntarily undertaken	NO	“While the general duty not to breach warranties arises under state law, the particular “requirement . . . based on smoking and health . . . with respect to the advertising or promotion [of] cigarettes” in an express warranty claim arises from the manufacturer’s statements in its advertisements” and “is not preempted by the 1969 Act.” <u>Id.</u> at 526-527.

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Claim	Basis	Preempted ?	Reference
Misrepresentation	Duty "not to deceive"	NO	"[P]etitioner's fraudulent misrepresentation claims that do arise with respect to advertising and promotions most notably claims based on allegedly false statements of material fact made in advertisements) are not pre-empted by section 5(b). Such claims are not predicated on a duty 'based on smoking and health' but rather on a more general obligation - the duty not to deceive." <u>Id.</u> at 528-529.
Fraudulent concealment	Duty "not to make false statements... or to conceal facts"	NO	"intentional fraud and misrepresentation both by false representation of a material fact [and by] conceal[ment of] a material fact. The predicate of this claim is a state law duty not to make false statements of material fact or to conceal such facts. . . . Petitioner's claims that respondents concealed material facts are therefore not preempted insofar as those claims rely on a state law duty to disclose such facts through channels of communication other than advertising and promotion." <u>Id.</u> at 528
Conspiracy	Duty "not to commit fraud"	NO	"The predicate duty underlying this claim is a duty not to conspire to commit fraud... we conclude that the 1969 Act does not pre-empt petitioner's conspiracy claim." <u>Id.</u> at 530.
Strict Liability	State law duty to avoid selling defective product	NO	"That the pre-emptive scope of section 5(b) cannot be limited to positive enactments does not mean that section pre-empts all common law claims. For example, as respondents concede, section 5(b) does not generally pre-empt 'state-law obligations to avoid marketing cigarettes with manufacturing defects or to use a demonstrably safer alternative design for cigarettes.'" <u>Id.</u> at 523.

Claim	Basis	Preempted ?	Reference
Failure to test or do adequate research	State law duty to test	NO	“The Act does not, however, pre-empt petitioner’s claims that rely solely on respondents’ testing or research practices or other actions unrelated to advertising or promotion.” <i>Id.</i> at 524-525.
Failure to utilize non-advertising, non-promotional means to warn	General duty to warn and duty voluntarily undertaken	NO	“The act does not, however, pre-empt petitioner’s claims that rely solely on respondents’ testing or research practices or other actions unrelated to advertising or promotion...” <i>Id.</i> at 524-525. “[A] common law remedy for a contractual commitment voluntarily undertaken should not be regarded as “a requirement . . . imposed under State law” within the meaning of § 5(b).” <i>Id.</i> at 526.

The jury was properly instructed as to which causes of action were limited to the period before July 1, 1969, the effective date of the Federal Cigarette Labeling Act. Thus, there was no prejudicial error by this Court and Philip Morris’s Motion for New Trial on the basis of preemption should be denied.

2. There Was No Prejudicial Instructional Error Concerning the Scope of Preemption

Philip Morris attacks the fraud and punitive damages verdicts by claiming that this Court committed evidentiary and instructional error regarding the scope of federal preemption. This contention is based on Philip Morris’s erroneous claim that the Court “improperly permitted the jury to predicate liability on conduct protected by federal preemption.” Not so. This Court committed no error because it correctly ruled (under U.S. Supreme Court authority) that the 1969 Act does not bar any claims that Philip Morris after 1969 committed affirmative fraud by making false statements (as opposed to concealment) in any way, including in advertisements and promotion. Moreover, Philip Morris cannot show any prejudice from any asserted error, as shown below.

Philip Morris’s contention that the 1969 Act preempts claims based on any of their

1 “conduct” after 1969 is simply wrong. As this Court correctly ruled, some post-1969 fraud
2 claims are preempted, some are not. The purpose of the 1969 Act was only to specify one
3 uniform warning for all cigarette packages and ads, thereby protecting interstate commerce
4 from the states’ “diverse” and “nonuniform” warnings. 15 U.S.C. § 1331. Hence, the 1969
5 Act preempts any state law “requirement or prohibition based on smoking and health . . .
6 with respect to the advertising or promotion of [labeled] cigarettes.” 15 U.S.C. § 1334,
7 subd. (b), RJN Exh. 1.

8 Consistent with this purpose, the U.S. Supreme Court in Cipollone held that the 1969
9 Act preempts only post-1969 “failure to warn” claims that (1) a manufacturer “should have
10 included additional, or more clearly stated, warnings,” (2) cigarette “advertising” or
11 “promotions,” though not false, “neutralized” the “federally mandated warning labels,” and
12 (3) ads or promotions “concealed” material facts. P. 524, 527-528. Hence, this Court
13 correctly instructed the jury that those three types of claims could only be based on pre-
14 1969 conduct.

15 But other claims, including affirmative fraud, are not preempted.

16 The U.S. Supreme Court and the California Supreme Court agree that there is a
17 “strong presumption against preemption,” requiring courts to “construe” preemption
18 “narrowly.”²¹ Thus, Cipollone narrowly construed the 1969 Act, holding that the Act does
19 not preempt claims for misrepresentation by false statements – even in “advertising or
20 promotion” – because those claims are based “not on a duty ‘based on smoking and
21 health’ but rather on a more general obligation – the duty not to deceive.” 505 U.S. at 528-
22 529. Therefore this Court correctly allowed the jury to find Philip Morris liable for affirmative
23 fraud after July 1, 1969. Hence, this Court committed no instructional error.

24
25 **3. There was No Evidentiary Error: This Court Did
Not Admit Evidence Solely on Preempted Claims**

26 The 1969 Act preempts only claims, not evidence. See 15 U.S.C. § 1334; Cipollone,

27
28 ²¹ Cipollone, *supra*, 505 U.S. at 523; Mangini v. R.J. Reynolds Tobacco Co., 7 Cal.4th 1057, 1066, *cert. denied* (1994) 513 U.S. 1016 (unanimously construing 1969-Act preemption narrowly to allow prohibition of ads targeting minors).

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2 supra, 505 U.S. at 530 (1969 Act preempts “claims based on a failure to warn”). And if
3 evidence is relevant to both (1) a preempted claim and (2) one or more nonpreempted
4 claims, then that evidence is admissible, subject to an instruction limiting the jury’s use of
5 the evidence to the nonpreempted claims. See Evid. Code § 350 Because evidence that
6 Philip Morris made false public claims after 1969 was relevant to non-preempted claims for
7 affirmative fraud (as shown above), this Court committed no evidentiary error. Under
8 Cipollone, Boeken’s claims based on post-1969 fraudulent statements were not preempted,
9 as shown above. In sum, this Court committed no prejudicial error regarding preemption.

10 **C. The Jury’s Finding of Reliance Was Supported**
11 **by the Weight of the Evidence**

12 Next, Philip Morris argues that the jury’s finding of reliance was against the weight of
13 the evidence because “plaintiff failed to prove ‘indirect reliance’ by Mr. Boeken.” NT Mem.
14 at 32:18-24. As in its motion for JNOV, Philip Morris completely fails to acknowledge its
15 successful scheme to defraud the American public into believing that smoking does not
16 cause cancer, thereby keeping the public smoking (and dying) while the cigarette business
17 thrived. See JNOV Opp. at 2-4.²²

18 Only in light of Philip Morris’s massive fraud scheme can this Court recognize the
19 sufficiency of Mr. Boeken’s evidence that he relied on that fraud in starting and continuing
20 to smoke. And plaintiff’s JNOV Opposition shows ample evidence of his reliance.

21 Reliance does not require, as Philip Morris pretends to believe, recall of specific
22 representations among the thousands which Mr. Boeken began to see as a child. Indeed,
23 a plaintiff who never saw a misrepresentation himself could still justifiably rely upon a
24 misrepresentation to a third party where the tortfeasor intended to influence him by
25 representations made to others, which they in turn pass on to Mr. Boeken. Philip Morris
26 repeatedly and systematically, for many years, sought to target opinion leaders, childhood

27 _____
28 ²² For brevity, plaintiff refers the Court to his Opposition to Defendant’s Motion for Judgment
Notwithstanding the Verdict, which sets forth in detail Philip Morris’s massive fraud.

1 peer groups and slightly older children (whom younger children emulate). In addition, Philip
2 Morris made representations to Mr. Boeken's specific friends and to his family. These
3 representations filtered their way into Mr. Boeken's attitudes toward smoking. Indeed, he
4 developed the very views that Philip Morris tried to foster: that starting to smoke was a
5 necessary rite of passage into adulthood; that the hazards of smoking were questionable;
6 that the motives of anti-tobacco advocates were "political" rather than health-based; that
7 filter-tip and "light" cigarettes eliminated whatever hazards there were; etc. This is
8 sometimes called "indirect reliance". JNOV Opp. at 8-18.

9 Philip Morris cites to several "propositions" that it erroneously contends show that Mr.
10 Boeken must have believed that smoking causes health risks, contrary to Mr. Boeken's
11 testimony and that of Boeken's experts. Mot. 34:15-28; 35:1-2. Philip Morris cites to no
12 evidence that contradicts Mr. Boeken's testimony concerning his beliefs,²³ or reliance upon
13 Philip Morris's misrepresentations, but rather wants this Court to infer that Boeken must
14 have been lying.

15 Philip Morris's claim is without merit because Mr. Boeken learned through the news
16 media that the cigarette companies, including Defendant, disputed and disagreed that there
17 were health risks associated with smoking, and Mr. Boeken believed the public position of
18 the cigarette companies, including Philip Morris. Boeken Depo. at 82-86. Additionally, the
19 fact of warnings does not establish that he believed the warnings²⁴ and the jury could have
20 found that even if Mr. Boeken occasionally saw warnings on cigarette packages they did
21 not register because he was addicted. Moreover, Mr. Boeken's belief, despite the warnings,
22 that smoking does not cause cancer is consistent with the U.S. Supreme Court's

23
24 ²³ Philip Morris has cited to no testimony by Mr. Boeken's family, friends, acquaintances or persons who
25 otherwise knew Mr. Boeken that disputes Mr. Boeken's testimony concerning his beliefs about the health risks
26 of smoking or his reliance on Philip Morris's misrepresentations. Rather, it wants this Court to conclude that
27 Mr. Boeken must have been lying about these issues. The jury had the opportunity to consider Mr. Boeken's
28 beliefs and reliance and rejected Philip Morris's argument. This Court should do the same.

²⁴ Even if Mr. Boeken had carefully read a "Surgeon General" warning it would have had no effect because
he believed the warning was "more political than anything else" and "thought the Government, the Surgeon
General, was on a vendetta of his own personal stride, and he accomplished this — this small fete [sic]."
Boeken Depo. at 79.

1 acknowledgment in Cipollone²⁵ that, even after the warnings existed, people could still rely
2 on the Industry's fraud.²⁶ Expert testimony and Industry admissions all showed that the
3 Industry's fraud rendered the common consumer, such as Mr. Boeken, "unaware" of the
4 magnitude of smoking's risks.

5 As is more fully set forth in plaintiff's JNOV Opposition, Mr. Boeken relied on Philip
6 Morris' misrepresentations and concealments.

7
8 **D. This Court's Exclusion of Evidence of Boeken's Felony
Convictions Was Neither Erroneous Nor Prejudicial**

9 Next, Philip Morris argues that it is entitled to a new trial because of this Court's
10 excluded evidence of Richard Boeken's felony convictions. NT Mem. at 35-36. It made
11 similar arguments on three occasions to this Court, which properly rejected them.

12 In general, specific wrongful acts of a witness in a civil action cannot be used to
13 impeach. The exception is that for the purpose of attacking a witness' credibility, it may be
14 shown that he has been convicted of a felony. Ev. C. §788. If a proper objection to the
15 use of the conviction is made, the trial judge must carry out the weighing process required
16 by Evidence Code Section 352 to determine whether the prejudicial effect of admitting the
17 evidence outweighs its probative value. Robbins v. Wong (1994) 27 Cal. App.4th 261, 274.
18 Only felonies involving "moral turpitude" may be used to impeach, and these are subject
19 to discretionary exclusion where their probative value is outweighed by their prejudicial
20 effect, People v. Castro (1985) 38 Cal.3d 301, 314, even where a felony conviction has
21 taken place.

22 Mr. Boeken's cancer has nothing to do with the fact that was convicted of several
23 crimes as long ago as the early 1970's. The crimes themselves did not involve a lack of
24 veracity. Mr. Boeken served no time in state prison. He was (or may have been) convicted

25
26 _____
27 ²⁵ Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504, 528-529.

28 ²⁶ In Cipollone the high court held that the federal "warnings" statute does not preempt claims that the Industry committed affirmative fraud by making false statements, thereby recognizing that the required warnings did not make smoking's health hazards common knowledge. 505 U.S. 504 at 528, 529.

1 of possessing burglary tools in the early 1970's,²⁷ possessing a small amount of heroin in
2 1976 and wire fraud or securities violations that occurred around 1987. This last conviction
3 followed the Federal Government's pursuit of Mr. Boeken's boss, its desire to have Mr.
4 Boeken as a prosecution witness and its use of technical charges against him for leverage.
5 The government got his testimony and Mr. Boeken got probation. He has had no other
6 association with the criminal justice system for almost 2 decades.

7 As set forth below, such evidence is not relevant or, if marginally relevant, so highly
8 prejudicial that it was properly excluded under Evidence Code section 352.

9 **1. Not Relevant**

10 Arrests and criminal charges are not admissible evidence. Long v. Barbieri (1932)
11 120 Cal.App. 207, 218. It is improper to inquire into previous arrests or "trouble" with the
12 police. People v. Gutierrez (1957) 152 Cal.App.2d 115; People v. Duvernay (1941) 43
13 Cal.App.2d 823, 826. The fact that Mr. Boeken may have been charged with various
14 crimes was not admissible in this proceeding.

15 Moreover, the criminal record and character of Mr. Boeken simply has no legal or
16 logical relationship to his tobacco-caused cancer and are totally irrelevant on the issue of
17 liability or damages. Cf. Strandt v. Cannon (1938) 29 Cal.App.2d 509, 518; Stafford v.
18 United Farm Workers (1983) 33 Cal.3d 319, 325; In re Cheryl H. (1984) 153 Cal.App.3d
19 1098, 1123-1124.

20 **2. Remote Felony Convictions Unrelated to Veracity Should be Excluded**

21 Evidence Code section 786 makes evidence of character traits other than honesty or
22 veracity, or their opposites, inadmissible. Except for one carefully limited exception,
23 specific instances of wrongful acts cannot be used for impeachment. Evidence Code
24 section 788. Evidence Code section 788, allowing the use of felony convictions, is the only
25 exception and that exception has been judicially limited.

26 _____
27 ²⁷ It is doubtful that this crime was even a felony or could be treated as a valid conviction. Mr. Boeken was
28 not personally present in court when his counsel may have entered a plea for him. This might suffice for a
misdemeanor but not a felony. Cf. People v. Kriss (1979) 96 Cal.App.3d 913, 916 ("It has been said that
where the charge amounts to a felony, the defendant must be present at all stages of the trial").

1 The Court must balance the evidence based upon Evidence Code section 352.
2 People v. Woodard (1972) 23 Cal.3d 329, 338 ("Accordingly, the discretion called for by
3 section 352 and by the Beagle line of decisions of this court must be exercised whenever
4 a party - plaintiff or defendant, in a civil or criminal case - moves for the exclusion of a
5 witness' prior felony conviction."); Robbins v. Wong (1994) 27 Cal.App.4th 261, 264 ("Under
6 Evidence Code section 352, however, the trial court is required to balance probative value
7 against potential prejudicial effect, upon a timely and specific objection.").

8 The convictions dated back almost 30 years. He served no time in state prison. The
9 convictions are so old and unrelated to veracity that they were properly excluded. People
10 v. Beagle (1972) 6 Cal.3d 441 (admissibility of felony convictions must be balanced by an
11 application of Evidence Code section 352; relevant factors include whether the conviction
12 was for an act of dishonesty as opposed to a violent or assaultive crime and the
13 remoteness of the conviction.); People v. Antick (1975) 15 Cal.3d 79, 99 (evidence of
14 forgery convictions in 1955 and 1957 should have been excluded at a 1973 trial); People
15 v. Burdine (1979) 99 Cal.App.3d 442 (robbery conviction 15 years before trial should have
16 been excluded); People v. Pitts (1990) 223 Cal.App.3d 1547, 1553-1554 ("In our view
17 establishing 10 years as the presumptive cut-off date for prior convictions is an exercise
18 of discretion."); cf. Federal Rules of Evidence, Rule 609(b) (statutory presumption that after
19 10 years such evidence would be too remote and unduly prejudicial).

20 **3. Unduly Prejudicial**

21 Assuming any marginal relevance exists, evidence of the "bad" character of Mr.
22 Boeken would have unduly distracted the jury from its consideration of the facts of this
23 case, would have consumed undue time on collateral matters and, thus, were properly
24 excluded pursuant to Evidence Code section 352. The probability for undue prejudice
25 exists because the evidence would have been used for an improper purpose despite any
26 limiting instruction. Hrnjak v. Graymar, Inc. (1971) 4 Cal.3d 725, 732-733; O'Gan v. King
27 City Joint Union High School Dist. (1970) 3 Cal.App.3d 641, 645. In Marocco v. Ford Motor
28 Co. (1970) 7 Cal.App.3d 84, 94 the court found that evidence of unrelated manufacturing

1 defects should have been excluded as inadmissible character evidence pursuant to
2 Evidence Code sections 1101-1105. The court also provided guidance in the event the
3 evidence were found marginally relevant:

4 “[R]elevance is not always enough. There may remain the question, is its value
5 worth its costs? There are several counterbalancing factors which may move
6 the court to exclude relevant circumstantial evidence if they outweigh its
7 probative value. In order of importance, they are these. First, the danger that
8 the facts offered may unduly arouse the jury’s emotions of prejudice, hostility or
9 sympathy’ (McCormick, Evidence, p. 319.)”

10 The defense must not be allowed to try the case by innuendo and character
11 assassination. It would have been an undue and futile waste of time to attempt to explain
12 the circumstances surrounding Mr. Boeken’s ancient convictions or the technical nature of
13 those allegations. On the other hand, the probative value is virtually non-existent. Philip
14 Morris cannot justify its tobacco-related conduct based upon Mr. Boeken’s criminal record.
15 Cf. Springer v. Reimers (1970) 4 Cal.App.3d 325, 340 (evidence of plaintiff’s drinking habits
16 was relevant on damages but inadmissible because it had an improper and prejudicial
17 effect on the issue of liability).

18 Evidence of the criminal record and character of Mr. Boeken, if not entirely irrelevant,
19 would have been unduly prejudicial, would have improperly inflamed the jury, wasted time
20 on collateral issues, and was properly excluded pursuant to Evidence Code section 352.

21 **4. Not Relevant to Compensatory Damages**

22 Philip Morris knows, but did not state, that Mr. Boeken testified that he had not been
23 selling securities during the time prohibited. He testified that his conduct was legal under
24 Regulation B (Boeken Depo P 251-252) and that he had hired a salesman who did the
25 offerings and sales for him during the prohibited time (Boeken Depo P. 432).

26 **E. No New Trial is Warranted on the Products Liability and Negligence Claims**

27 Next, Philip Morris argues that it is entitled to a new trial on the strict products liability
28 and negligence claims. NT Mem. at 37-44.

As demonstrated in Mr. Boeken’s JNOV Opposition, the jury’s findings of liability on
Boeken’s causes of action for strict products liability under the consumer expectation test,

1 risk/benefit test, pre-1969 failure to warn and for negligence were fully supported by the
2 evidence. JNOV Opp. at 24-36. Additionally, the Boeken presented substantial credible
3 evidence that the ordinary consumer was unaware that smoking causes lung cancer and
4 other serious disease. JNOV Opp. at 20-22.²⁸

5 **1. The Jury was Properly Instructed That a Defect in**
6 **Design Could be Found Under the Risk/Benefit Test**

7 Philip Morris claims that “the Court erred in failing to charge the jury that defendants
8 cannot be held liable simply for the sale of cigarettes.” Mot. at 40. Philip Morris goes on
9 to state, “a design defect claim must be predicated on an avoidable design flaw.”

10 The Court did not merely instruct the jury that a product is defective in design if the
11 risks of the product outweigh its benefits. Had the Court done so, such an instruction
12 would, potentially, have allowed the jury to hold Philip Morris liable “simply for the sale of
13 cigarettes.” Rather the Court properly instructed the jury that:

14 “A product is defective in design:

* * *

15 “B. If there is a risk of danger inherent in the design, which outweighs the
16 benefits of the design, defendant’s burden of proof is to prove by a
17 preponderance of the evidence that the benefits of the product as a whole
outweigh the danger inherent in the design.

18 “In determining whether the benefits of the design outweigh such risks you may
19 consider, among other things, the gravity of the danger posed by the design, the
20 likelihood that such danger would prove damage, the mechanical feasibility of a
21 safer alternative design at the time of manufacture, the existence or non-
22 existence of warnings, the financial cost of an improved design, and the adverse
23 consequences that to the product and the consumer that would result from an
24 alternative design.” BAJI 9.00.5. (Emphasis added.)

25 The instruction given by the Court repeatedly refers to the risks and benefits inherent
26 in the design of the product (in this case cigarettes) and not to the risks and benefits
27 inherent in the product itself. Clearly, this instruction informed the jury that they could not
28 hold Philip Morris liable for the mere sale of cigarettes, but rather had to find that there was
a defect in the design of the cigarettes. Additionally, the instruction does not talk of a “safe”

²⁸ For the sake of brevity, Mr. Boeken will not repeat the arguments and evidence set forth in his Opposition to Defendant’s Motion for Judgment Notwithstanding the Verdict on these issues, but hereby incorporates herein such evidence and arguments.

1 alternative design, but rather a “safer” alternative design, thereby allowing Philip Morris to
2 avoid liability if the jury believed that there was no safer alternative design.

3 **2. There are “Reasonable Alternative Cigarette Designs**
4 **That Could have Reduced Boeken’s Risk of Injury**

5 Philip Morris argues that it cannot be held liable under the risk/benefit test for products
6 liability because there is no reasonable alternative design²⁹ that would make cigarettes
7 completely safe. However, this is not the standard set forth in the Restatement of the Law
8 Third, Torts: Products Liability upon which Philip Morris is apparently relying, nor is it the
9 standard set forth in BAJI 9.00.5 set forth above. Rather, a product may be found defective
10 in design if there was a safer alternative design or if risk of harm could have been reduced
11 :

12 Under Section 2 of the Restatement of the Law Third, Torts: Products Liability:

13 “A product is defective when, at the time of sale or distribution, it contains a
14 manufacturing defect, is defective in design, or is defective because of
15 inadequate instructions or warnings. A product: . . .

16 “(b) is defective in design when the foreseeable risks of harm posed by the
17 product could have been reduced or avoided by the adoption of a reasonable
18 alternative design by the seller or other distributor, or a predecessor in the
19 commercial chain of distribution, and the omission of the alternative design
20 renders the product not reasonably safe; . . .”

21 Mr. Boeken’s experts testified that there were reasonable alternative cigarette designs
22 that would have been safer and that would have reduced the dangers of smoking. William
23 Farone is a Ph.D. in physical chemistry who was employed by Philip Morris from 1976
24 through 1984. He was the Director of Applied Research for Phillip Morris during that period
25 of time. His job duties included directing the research by which Philip Morris was
26 investigating the toxicity of tobacco and his job took him into close personal contact with
27 all of the higher executives of Philip Morris. RT 1464-1465. Dr. Farone ran a research

28 ²⁹ Reasonable alternative designs can be demonstrated by expert testimony, even in the absence of a
manufactured prototype utilizing the alternative design. Restatement of the Law Third, Torts: Products
Liability, Section 2, Comment f. Two California opinions have discussed some of the concepts underlying the
“reasonable alternative design” element of the restatement (Third) and determined that California law did not
require proof of a reasonable alternative design. See Soule v. General Motors (1994) 8 Cal.4th 548; Arena
v. Owens Corning Fiberglass (1988) 63 Cal.App.4th 1178.

1 division which varied in size over time from 50 to as many as 250 people. His job included
2 cigarette design. RT 1479-80.

3 Dr. Farone testified that the technology exists to reduce the key carcinogenic
4 compounds in cigarettes and that some can be virtually eliminated. He testified that the
5 Philip Morris method of air curing “bright tobacco” to replace “burly tobacco” could be
6 replaced. Additionally, Dr. Farone testified that Philip Morris could reduce the use of burly
7 tobacco, and eliminate the use of additives. And further, Philip Morris could use more
8 expanded tobacco; and could decrease additives and sizing on reconstituted tobacco. He
9 described modifications that can be used with unfiltered as well as filtered cigarettes.
10 Further, he testified to the placement of ventilation holes within the cigarette rod and
11 methods reducing tar. He testified that all of these changes in tobacco processing would
12 result in a safer product and the excess danger of Philip Morris’s cigarettes as designed
13 would be substantially eliminated. Dr. Farone’s testimony included his expert opinion that
14 Philip Morris has not used even the most rudimentary or basic techniques which could be
15 used to reduce the potential hazards of its products. RT 1524-25, 1536-38, 1574-77, 1594-
16 98, 1601-04.

17 Mr. Boeken’s expert Dr. Neal Benowitz also testified as to the existence of a safer
18 alternative design. Dr. Benowitz testified that cigarettes could be manufactured with
19 reduced nicotine content, thereby reducing their addictiveness and allowing smokers to quit
20 more easily when they so desired. RT 2033-37.

21 Plaintiff presented evidence from which the jury could properly conclude that there
22 were safer alternative cigarette designs that would have reduced the risk of injury to Mr.
23 Boeken and millions of other smokers. The jury, being properly instructed regarding the
24 application of the risk/benefit analysis, decided the evidence warranted a finding of
25 defective design.

26
27
28

1 **3. The Ordinary Consumer Did Not Know of the Risks Associated with**
2 **Smoking When Boeken Began Smoking, Because of the Massive**
3 **Conspiracy Engaged in by Philip Morris Denying Said Health Risks**

4 Mr. Boeken presented ample evidence that the “ordinary consumer” of the 1960s did
5 not expect that smoking causes cancer.³⁰ By the 1960s Philip Morris and the Industry had
6 buried the truth about smoking and cancer under an avalanche of falsehoods.³¹ As
7 plaintiff’s experts testified, Philip Morris’ scheme denied the ordinary consumer knowledge
8 of smoking’s true risks. Additionally, addicted smokers (like Mr. Boeken) were particularly
9 vulnerable to the Industry’s false denials.

10 Philip Morris continually argues that to have heard the Surgeon General’s warnings
11 regarding cigarettes or to have read watered down labels of danger on the cigarette
12 package is equal to “expectations” that cigarettes are dangerous.³² While this may or may
13 not be true in the ordinary case, it is not and should not be the case where the
14 manufacturer has conducted a massive and fraudulent public relations campaign to
15 specifically convince consumers that the warnings on the product’s labels are false. Philip
16 Morris should not be allowed to now take the position that Mr. Boeken should not have
17 believed what they said! Whether or not ordinary consumers, including addicted cigarette
18 smokers, were basing their “knowledge” of the health risks of smoking on the fraud being
19 consistently committed by Philip Morris was a question of fact for the jury; a question which

20 ³⁰ As asbestos cases show, a jury can determine consumers’ “expectations” about a product’s safety 30
21 to 40 years ago. E.g., Arena v. Owens-Corning Fiberglass Corp. (1st Dist., Div. 1, 1998) 63 Cal. App.4th
22 1178, 1185-1187 (discussing applicability of consumer expectations test to asbestos latent-disease
cases); Morton v. Owens-Corning Fiberglass Corp. (1st Dist., Div. 2 1995) 33 Cal.App.4th 1529, 1534-1535.

23 ³¹ See, e.g., Exs. 54.00; 270.00; 340.00; 342.00; 363.00; 456.00; 514.00; 648.00; 2,340.00; 9,455.00;
24 9,456.00; 10,019.00; RT 2691-2699.

25 ³² Even accepting this proposition as true, the federally mandated warning label on cigarette packages from
26 1970 until 1984 merely stated that “The Surgeon General has Determined that Cigarette Smoking is
27 Dangerous to Your Health.” So, under Philip Morris’s argument, consumers of its products merely expected
28 that smoking cigarettes would be dangerous to their health. However, relying on the warning label, they
clearly did not expect that serious disease, and death, could result from use of the product; that addiction or
habituation was a likely consequence of continued use; that smokers were at a special risk for cancer, heart
disease, and addiction when smoking is begun at an early age; that excessive use brought vastly increased
risks, and that persons who chose to smoke would be advised to moderate their consumption; nor that many
ingredients in cigarette smoke were known carcinogens, nor the fact that many ingredients had never been
tested adequately for carcinogenic potential.

1 the jury resolved in Mr. Boeken's favor.

2 **4. Mr. Boeken Would Have Utilized "Safer"**
3 **Cigarettes if They Had Been Available**

4 Contrary to Philip Morris's assertion that Mr. Boeken would not have utilized safer
5 cigarettes had they been available, Mr. Boeken testified as follows:

6 "Q. Previously in your testimony, you mentioned [Marlboro] Lights. Do you
7 remember that?"

8 "A Yes, I do.

9 "Q Can you remember when you switched to Lights?"

10 "A About 1984, '85, I'm pretty -- as they came out, I don't know -- I don't know the
11 exact year. As they came out, I got myself to switch down.

12 "Q Why?"

13 "A Bronchitis.

14 Q When you say "down," what do you mean by "down?"

15 A Well, they were supposed to be low, low tar, low nicotine, milder, less harmful
16 to your throat." Ex. 12, Boeken Depo. p. 219:11-24.

17 Mr. Boeken switched to cigarettes that he believed to be less harmful. Thus, had
18 Philip Morris utilized the safer design alternatives testified to by Dr. Neal Benowitz and/or
19 William Farone, the jury was entitled to infer that Boeken would have utilized them, just as
20 he switched to Marlboro Lights based upon Philip Morris's representations concerning the
21 increased safety of low-tar and/or "light" cigarettes.

22 **F. This Court Acted Within Its Discretion in Excusing Juror No. 5**

23 See Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's
24 Motion for New Trial Re: Excusing of Juror No. 5, filed under seal.

25 **G. Philip Morris Received a Fair Trial**

26 Philip Morris concludes that it should be granted a new trial because the verdict was
27 the product of passion and prejudice - this in addition to the complaints about the Court's
28 rulings on the law and the evidence. Philip Morris blames plaintiff's counsel and the jury,
as well as the Court's rulings, for being brought to justice.

1 Philip Morris concludes that Mr. Boeken was at fault for having believed the lies fed
2 to him by Philip Morris. Philip Morris concludes that every smoker is at fault for having
3 believed the lies fed to them by Philip Morris. Philip Morris engages in the ultimate
4 hypocrisy by basing its defense on the proposition that anyone who believed Philip Morris
5 or its executives was mentally deficient. Philip Morris' defense is as disgusting as Philip
6 Morris' conduct over 50 years.

7 Philip Morris blames everyone but Philip Morris. Philip Morris put profit above human
8 life. Philip Morris got what it deserved, maybe not all that it deserved at that.

9 **CONCLUSION**

10 The motion for a new trial should be denied in its entirety, and the judgment should
11 be upheld in full. Justice has prevailed.

12 Dated: July 26, 2001.

13 LAW OFFICES OF MICHAEL J. PIUZE

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16 By: _____
MICHAEL J. PIUZE
Attorney for Plaintiff

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1 **APPENDIX**

2 **(Profits and Dividends Attributable to 1954 Tobacco Business of Philip Morris)**

3

4	<u>Year</u>	<u>Net Income</u>	<u>In 2000 Dollars</u>	<u>Dividends Paid</u>	<u>In 2000 Dollars</u>
5	1954	\$12.06 million	\$77.20 million	\$10.03 million (83.21%)	\$64.21 million
6	1955	\$12.76 million	\$81.99 million	\$9.93 million (77.83%)	\$62.80 million
7	1956	\$14.40 million	\$91.16 million	\$9.95 million (69.08%)	\$62.99 million
8	1957	\$15.76 million	\$96.58 million	\$10.45 million (66.30%)	\$64.04 million
9	1958	\$17.09 million	\$101.83 million	\$10.96 mill(63.54%)	\$65.30 million
10	1959	\$19.59 million	\$115.92 million	\$12.16 million (62.09%)	\$74.41 million
11	1960	\$20.98 million	\$122.05 million	\$14.10 million (67.17%)	\$82.03 million
12	1961	\$21.51 million	\$123.88 million	\$14.18 million (65.93%)	\$81.67 million
13	1962	\$21.95 million	\$125.16 million	\$14.0 million (63.79%)	\$79.83 million
14	1963	\$22.05 million	\$124.09 million	\$13.81 million (62.62%)	\$77.72 million
15	1964	\$22.61 million	\$125.59 million	\$13.82 million (61.11%)	\$76.77 million
16	1965	\$26.51 million	\$144.92 million	\$13.84 million (52.20%)	\$75.66 million
17	1966	\$34.18 million	\$181.66 million	\$16.02 million (46.88%)	\$85.14 million
18	1967	\$43.60 million	\$224.79 million	\$16.15 million (37.04%)	\$83.26 million
19	1968	\$48.87 million	\$241.82 million	\$19.68 million (40.27%)	\$97.38 million
20	1969	\$58.34 million	\$273.74 million	\$22.68 million (38.88%)	\$106.42 million
21	1970	\$77.50 million	\$343.96 million	\$25.32 million (32.67%)	\$112.37 million
22	1971	\$101.50 million	\$431.56 million	\$31.83 million (31.36%)	\$135.34 million
23	1972	\$124.47 million	\$512.77 million	\$34.57 million (27.78%)	\$142.42 million
24	1973	\$148.63 million	\$576.44 million	\$37.26 million (25.07%)	\$144.51 million
25	1974	\$176.00 million	\$614.75 million	\$43.22 million (24.56%)	\$150.96 million
26	1975	\$212.00 million	\$678.56 million	\$53.82 million (25.38%)	\$172.26 million
27	1976	\$266.00 million	\$805.01 million	\$68.40 million (30.27%)	\$207.00 million
28	1977	\$335.00 million	\$951.93 million	\$93.56 million (27.93%)	\$265.86 million

	<u>Year</u>	<u>Net Income</u>	<u>In 2000 Dollars</u>	<u>Dividends Paid</u>	<u>In 2000 Dollars</u>
2	1978	\$409.00 million	\$1.080 billion	\$124.15 million (30.36%)	\$327.89 million
3	1979	\$508.00 million	\$1.205 billion	\$155.64 million (30.64 %)	\$369.16 million
4	1980	\$549.00 million	\$1.147 billion	\$199.64 million (36.36%)	\$417.21 million
5	1981	\$660.00 million	\$1.250 billion	\$250.00 million (37.88%)	\$473.60 million
6	1982	\$782.00 million	\$1.395 billion	\$301.74 million (38.59%)	\$538.44 million
7	1983	\$904.00 million	\$1.563 billion	\$366.15 million (40.50%)	\$633.04 million
8	1984	\$889.00 million	\$1.473 billion	\$417.49 million (46.96%)	\$691.93 million
9	1985	\$1.255 billion	\$2.008 billion	\$479.01 million (38.17%)	\$766.59 million
10	1986	\$1.478 billion	\$2.322 billion	\$590.01 million (39.92%)	\$927.00 million
11	1987	\$1.842 billion	\$2.792 billion	\$748.68 million (40.65%)	\$1.135 billion
12	1988	\$2.337 billion	\$3.410 billion	\$943.65 million (40.38%)	\$1.374 billion
13	1989	\$2.946 billion	\$4.091 billion	\$1.167 billion (39.62%)	\$1.620 billion
14	1990	\$3.540 billion	\$4.664 billion	\$1.438 billion (40.63%)	\$1.900 billion
15	1991	\$3.006 billion	\$3.801 billion	\$1.781 billion (59.26%)	\$2.250 billion
16	1992	\$4.939 billion	\$6.062 billion	\$2.117 billion (42.86%)	\$2.600 billion
17	1993	\$3.091 billion	\$3.684 billion	\$2.298 billion (74.36%)	\$2.740 billion
18	1994	\$4.725 billion	\$5.490 billion	\$2.622 billion (55.49%)	\$3.040 billion
19	1995	\$5.450 billion	\$6.158 billion	\$3.064 billion (56.22%)	\$3.460 billion
20	1996	\$6.303 billion	\$6.918 billion	\$3.605 billion (57.20%)	\$3.950 billion
21	1997	\$6.310 billion	\$6.770 billion	\$3.868 billion (61.30%)	\$4.150 billion
22	1998	\$5.372 billion	\$5.675 billion	\$4.084 billion (76.02%)	\$4.310 billion
23	1999	\$7.675 billion	\$7.933 billion	\$4.399 billion (57.32%)	\$4.550 billion
24	2000	\$8.510 billion	\$8.510 billion	\$4.560 billion (53.58%)	\$4.560 billion
25		_____	_____	_____	_____
26		\$75.33 billion	\$96.57 billion	\$40.19 billion (53.33%)	\$49.35 billion

27
28