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October 20, 2011

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Via Federal Express

The Honorable Chief Justice Tani Cantil-Sakauye
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Bullock v. Philip Morris*; Supreme Court Case No. S196763
Letter in Support of Petition for Review

Dear Hon. Chief Justice Tani Cantil-Sakauye and Hon. Associate Justices:

Amici curiae the American Chemistry Council (ACC) and the International Association of Defense Counsel (IADC) respectfully request that this Court grant the petition for review filed by defendant Philip Morris (PM) in the above-referenced case to determine the propriety of using a defendant's wealth to justify an otherwise unconstitutional punitive damage award.

ACC represents leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to provide innovative products and services that make people's lives better, healthier, and safer. The business of chemistry is a \$720 billion enterprise and a key element of the nation's economy. The business of chemistry in California alone generates a payroll of \$6.96 billion and directly employs 73,872 workers, which represents 6.0 percent of the state's manufacturing workforce.

The IADC is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

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The proper review of punitive damage awards is of particular interest to corporations because, as a RAND Institute for Civil Justice study observed, “[c]orporate defendants are in fact more likely than individuals or public agencies to be the target of such awards.” (Peterson, et al., *Punitive Damages: Empirical Findings* (RAND Institute for Civil Justice 1987), at p. iii). In California, between 1980 and 1984, juries awarded \$311 million in punitive damages, and 57 percent of all liable defendants were businesses. (*Id.* at pp. 42, 47.)

As the United States Supreme Court has repeatedly emphasized, punitive damage claims carry with them an enormous potential for abuse, and raise both procedural and substantive due process concerns. (See, e.g., *State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 417 [“[p]unitive damages pose an acute danger of arbitrary deprivation of property”].) California, too, has long held that reviewing courts must reduce punitive damage awards that appear excessive or are presumptively the product of passion or prejudice. (See *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.) Thus, a reviewing court in California must undertake two separate inquiries to determine whether a punitive damages award is unconstitutional or excessive: first, the court must review the award under the United States Constitution; then, the court must review the award under California law. (See generally *Routh Wrecker Serv. v. Washington* (1998) 335 Ark. 232, 240 [980 S.W.2d 240, 244] [“State appellate courts that have considered the punitive-damages issue in light of *Gore* have adopted a two-step analysis”]; N. William Hines, *Marching to a Different Drummer? Are Lower Courts Faithfully Implementing the Evolving Due Process Guideposts to Catch and Correct Excessive Punitive Damages Awards?* (2011) University of Iowa Legal Studies Research Paper, at p. 22 [“[M]ost state courts treat[] the new constitutional jurisprudence as supplemental to, and not a replacement for, their existing state law governing punitive damages”].)

The guideposts for determining excessiveness under the federal Constitution are: “(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” (*State Farm Mut. Auto Ins. Co. v. Campbell, supra*, 538 U.S. at 418.) The “wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” (*Id.* at p. 427.) The factors to consider under California law are somewhat different: (1) the degree of reprehensibility of the defendant’s conduct; (2) the ratio of punitive to compensatory damages; and (3) the defendant’s financial

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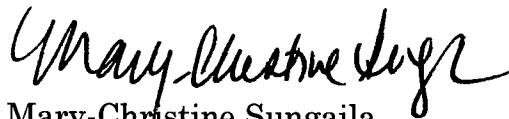
condition. (*Neal v. Farmers Ins. Exchange, supra*, 21 Cal.3d at p. 928.) However, as this Court has observed, while a reviewing court in this state may give “some consideration to the defendant’s financial condition,” “the state may have to partly yield its goals of punishment and deterrence to the federal requirement that an award stay within the limits of due process.” (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1186-1187.)

In this case, the court concluded that an award of \$13.8 million in punitive damages, “approximately 16 times the compensatory damages award,” was not unconstitutionally excessive in light of “extreme reprehensibility, including the vast scale and profitability of Philip Morris’s misconduct, and its strong financial condition.” (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 550) The court therefore conflated the federal and state analyses, and grafted onto the ratio analysis a consideration of wealth to justify a higher punitive damage award. As the dissent noted, a “defendant’s financial condition is irrelevant to the issue of whether a compensatory award is ‘small’ or ‘substantial’ for purposes of the ratio guidepost” and “[a]lthough a defendant’s wealth is a legitimate consideration, it cannot justify punitive damages unconstitutionally disproportionate to compensatory damages or ‘substitute for the high court’s guideposts in limiting awards.’” (*Id.* at p. 578 & n.3) (citations omitted.) Under the majority’s analysis, the ratio guidepost becomes meaningless for large corporate defendants – who most frequently face punitive damage claims – and punitive damage cases will become infused with increased arbitrariness and unpredictability.

This court should grant review to clarify the role of a defendant’s financial condition in determining the constitutionally appropriate measure of punitive damages, including the interplay between California and federal constitutional review of such awards.

Respectfully submitted,

SNELL & WILMER L.L.P.



Mary-Christine Sungaila
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Chemistry Council and International
Association of Defense Lawyers

Proof of Service

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-7689.

On October 20, 2011, I served, in the manner indicated the foregoing document described as **Letter to California Supreme Court in Support of Petition for Review** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

Please see attached Service List

- BY REGULAR MAIL: I caused such envelopes to be deposited in the United States mail at Costa Mesa, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to (C.C.P. § 1013(a)).
- BY ELECTRONIC SERVICE: C.R.C., rule 8.212(c)(2)(A) as indicated on the service list.
- BY FACSIMILE: (C.C.P. § 1013(e)(f)), as indicated on service list.
- BY FEDERAL EXPRESS: I caused such envelopes to be delivered by air courier, with next day service, to the offices of the addressees. (C.C.P. § 1013(c)(d)), as indicated on service list.
- BY PERSONAL SERVICE: I caused such envelopes to be delivered by hand to the offices of the addressees. (C.C.P. § 1011(a)(b)), as indicated on the service list.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 20, 2011 at Costa Mesa, California.



Sandy Carrelli

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