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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JODIE BULLOCK, Plaintiff and Appellant, v. PHILIP MORRIS USA, INC., Defendant and Appellant; MICHAEL J. PIUZE, Objector and Appellant.	B164398, B169083 (Los Angeles County Super. Ct. No. BC249171)

APPEALS from a judgment and order of the Superior Court of Los Angeles County, Warren L. Ettinger, Judge. (Retired judge of the former Mun. Ct. for the Pasadena Jud. Dist., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Judgment affirmed, and order reversed.

Law Offices of Michael J. Piuze, Michael J. Piuze and Geraldine Weiss for Plaintiff and Appellant.

Arnold & Porter, Ronald C. Redcay and Murray R. Garnick for Defendant and Appellant.

Haight, Brown & Bonesteel, Rita Gunasekaran, Maureen Haight Gee; Law Offices of Michael J. Piuze, Michael J. Piuze and Geraldine Weiss for Objector and Appellant.

Philip Morris USA, Inc. (Philip Morris), a cigarette manufacturer, appeals a judgment in favor of Betty Bullock awarding her compensatory and punitive damages after a jury trial. Philip Morris challenges the sufficiency of the evidence to support the verdict on several counts based on products liability and fraud, the jury instructions, the admission of evidence, and the punitive damages award. Jodie Bullock, Betty Bullock's successor in interest, also appeals challenging a conditional new trial order reducing the amount of punitive damages by way of remittitur.[1] Bullock's attorney, Michael J. Piuze, appeals an order awarding attorney fees against him as a sanction.

We conclude that the refusal of Philip Morris's proposed jury instructions on punitive damages was proper and hold that the extreme reprehensibility of Philip Morris's conduct justifies a ratio of punitive damages to compensatory damages significantly greater than a single-digit. We also conclude that Philip Morris has shown no error with respect to liability or punitive damages and that Bullock has shown no error in the remittitur, and therefore affirm the judgment. Finally, we hold that the court had no authority to award attorney fees as a sanction and therefore reverse the sanctions order.

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[1] We ordered the substitution of Jodie Bullock in the place of Betty Bullock in this appeal after the death of Betty Bullock (Code Civ. Proc., § 377.31; Cal. Rules of Court, rule 48(a)). We use the name Bullock to refer to either Jodie Bullock or Betty Bullock, as appropriate in context.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Factual Background*[2]

Bullock smoked cigarettes manufactured by Philip Morris for 45 years from 1956, when she was 17 years old, until she was diagnosed with lung cancer in 2001. She smoked Philip Morris's Marlboro brand of cigarettes until 1966, and then switched to its Benson & Hedges brand.

Scientific and medical professionals in the United States and worldwide generally agreed by the late 1950's that cigarette smoking caused lung cancer, after several epidemiological studies reached that conclusion. Philip Morris and other cigarette manufacturers sought to cast doubt on the increasing body of knowledge supporting the conclusion that smoking caused lung cancer and sought to assuage smokers' concerns. To that end, Philip Morris and other cigarette manufacturers issued a full-page announcement in newspapers throughout the United States in January 1954 entitled "A Frank Statement to Cigarette Smokers." The announcement stated, "Recent reports on experiments with mice have given wide publicity to a theory that cigarette smoking is in some way linked with lung cancer in human beings," and stated, "[d]istinguished authorities point[ed] out" that there was no proof that cigarette smoking caused cancer and that "numerous scientists" questioned "the validity of the statistics themselves."

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[2] Our recitation of the facts is based on the evidence presented at trial viewed in a light most favorable to Bullock, the successful plaintiff (*Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 642, fn. 3.)

The Frank Statement stated, "We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business. [¶] We believe the products we make are not injurious to health. [¶] We always have and always will cooperate closely with those whose task it is to safeguard the public health." It announced the formation of the Tobacco Industry Research Committee and stated, "We are pledging aid and assistance to the research effort into all phases of tobacco use and health. This joint financial aid will of course be in addition to what is already being contributed by individual companies. [¶] . . . [¶] In charge of the research activities of the Committee will be a scientist of unimpeachable integrity and national repute. In addition there will be an Advisory Board of scientists disinterested in the cigarette industry. A group of distinguished men from medicine, science, and education will be invited to serve on this Board. These scientists will advise the Committee on its research activities." In the years that followed, the Tobacco Industry Research Committee and its publicists disseminated the message that there was no proof that cigarette smoking was a cause of lung cancer and other diseases through news releases, distribution of research and editorial materials favorable to the tobacco industry, personal contacts with editors, journalists, and producers, and other means.

Philip Morris for many years publicly continued to insist that there was no consensus in the scientific community that cigarette smoking was a cause of lung cancer and that Philip Morris was actively pursuing scientific research to resolve the purported controversy, while privately acknowledging that there was no true controversy, that its true goal was to discredit reports that linked smoking with lung cancer, and that Philip

Morris had no intention of funding research that would reveal the health hazards of smoking. The Tobacco Institute, a trade organization funded by Philip Morris and other cigarette manufacturers, issued a press release in 1961 discrediting a recent article and stating that the views that smoking caused cancer "are a subject of much disagreement in the scientific world" and "the cause or causes of lung cancer continue to be unknown." The Tobacco Institute stated in a press release in 1963 that the tobacco industry was "vitally interested in getting the facts that will provide answers to questions about smoking and health," and described the industry's research efforts as a "crusade for research – in the agricultural stations, the scientific laboratories, and the great hospitals and medical centers of the nation." It stated, "the industry does not know the causes of the diseases in question."

A cigarette company executive appearing before Congress in 1965 on behalf of several cigarette manufacturers, including Philip Morris, stated that "[n]early everyone familiar with these difficult problems will agree . . . that there is a very high degree of uncertainty" whether "smoking causes cancer or any other disease." Later that year, the Tobacco Institute issued a press release stating, "Research to date has not established whether smoking is or is not causally involved in such diseases as lung cancer and heart disease, despite efforts to make it seem otherwise. The matter remains an open question--for resolution by scientists." The press release stated, "we are earnestly trying to find the answers," and, "If there is something in tobacco that is causally related to cancer or any other disease, the tobacco industry wants to find out what it is, and the

sooner the better. If it is something in tobacco or the smoke, I am sure this can be remedied by the scientists."

Philip Morris's chief executive officer and chairman of the Executive Committee of the Tobacco Institute, Joseph Cullman III, stated on the television news program *Face the Nation* (CBS, Jan. 3, 1971), "if any ingredient in cigarette smoke is identified as being injurious to human health, we are confident that we can eliminate that ingredient." He stated further, "We do not believe that cigarettes are hazardous; we don't accept that." The Tobacco Institute issued a report in 1979 entitled Smoking and Health 1969-1979: the Continuing Controversy, stating, "Scientists have not proven that cigarette smoke or any of the thousands of its constituents as found in cigarette smoke cause human disease." The Tobacco Institute issued a report in 1984 entitled The Cigarette Controversy: Why More Research is Needed, stating, "*it is not known whether smoking has a role in the development of various diseases . . . a great deal more research is needed to uncover the causes and the mechanisms involved in their onset*." The 1984 report stated that the theory that cigarette smoking causes various diseases "is just that, a theory" and stated, "There were basic flaws in the methods used in the major epidemiological surveys that cast doubts on the accuracy of the claimed correlations."

Contrary to its repeated public pronouncements, the evidence shows that Philip Morris privately acknowledged the link between cigarette smoking and lung cancer and other diseases and sought to avoid promoting any research that would reveal that link. An internal document prepared by Philip Morris in 1961 for purposes of research and

development stated, “Carcinogens are found in practically every class of compounds in smoke,” and provided a “partial list” of 40 “carcinogens” in cigarette smoke.

A 1970 memorandum from a Philip Morris research scientist to its president stated of the Council for Tobacco Research, the successor of the Tobacco Industry Research Committee, “It has been stated that CTR is a program to find out ‘the truth about smoking and health.’ What is truth to one is false to another. CTR and the Industry have publicly and frequently denied what others find as ‘truth.’ Let’s face it. We are interested in evidence which we believe denies the allegation that cigaret smoking causes disease.” Notes from a 1978 meeting of cigarette company executives and legal counsel state that the Tobacco Industry Research Committee “was set up as an industry ‘shield’ ” and that the Council for Tobacco Research “has acted as a ‘front.’ ”

Dr. William Farone, a chemist employed by Philip Morris as a scientific researcher beginning in 1976 and as Director of Applied Research from 1977 to 1984, testified at trial that his superiors informed him that cigarette smoking caused cancer and was addictive when he first began to work for the company. Dr. Farone testified that during his years at Philip Morris there was no controversy among its scientists as to whether smoking caused diseases, and that public statements that it was not known whether smoking played a role in the development of various diseases and that a great deal more research was needed to identify the causes of the diseases were false. He testified that another public statement challenging the epidemiological research as inconclusive was a misleading half-truth and that Philip Morris’s scientists knew that cigarette smoke contained carcinogens and that the carcinogens caused cancer.

Dr. Farone testified that Dr. Thomas Osdene, Philip Morris's Director of Research, and others told him on several occasions that Dr. Osdene's real job and the job of scientists working under him was to maintain the appearance of a scientific controversy concerning smoking and health. Moreover, Dr. Farone testified that Philip Morris performed no animal toxicity studies of cigarettes in the United States, pursuant to a "gentleman's agreement" with other cigarette manufacturers, but arranged for a company in Germany to perform toxicity tests on animals there. Other Philip Morris scientists explained to Dr. Farone that the reason for testing cigarettes abroad was so the results would not be available by subpoena in the United States. The test results were sent to Dr. Osdene, usually at his home, who would report the results to other Philip Morris scientists verbally and destroy the written records.

Philip Morris conducted animal research in the United States on the addictive effects of nicotine in the early 1980's. It sought to develop a substitute for nicotine that would produce the same addictive effects but without the adverse cardiovascular effects of nicotine. Philip Morris closely guarded the results of its research and threatened to sue its former scientists who proposed publication of an article. Philip Morris successfully developed nicotine analogs and had the ability to remove nicotine from cigarettes, but did not do so. Moreover, Philip Morris added urea to cigarettes, which becomes ammonia when heated, to enhance the effect of nicotine. Philip Morris added approximately 250 different substances to tobacco in cigarettes to enhance the flavor and for other purposes. A former Philip Morris research scientist who worked for the company in the early 1980's testified, "Never once in my whole time at the company

did I hear any concern for the customer, other than one scientist[] who was complaining that he was repeatedly--repeatedly having his research changed in direction any time he came upon some hot research."

Philip Morris heavily advertised its cigarettes on television in the 1950's and 1960's, until the federal government banned cigarette advertising on television in 1970. Television advertising had a particularly strong influence on youths under the age of 18, for whom there was a positive correlation between television viewing time and the incidence of smoking. Philip Morris's print advertisements for Marlboro and other cigarette brands in 1956, when Bullock began smoking at the age of 17, and generally in the years from 1954 to 1969, depicted handsome men and glamorous young women. Some advertisements featured slogans such as "Loved for Gentleness" and " 'The gentlest cigarette you can smoke.' "

Philip Morris and other cigarette manufacturers entered into a Master Settlement Agreement (MSA) with 46 states, including California, in 1998 settling civil litigation by the states against the manufacturers. The manufacturers denied the allegations of wrongdoing and admitted no liability, but agreed to several restrictions on the advertising and promotion of cigarettes. They also agreed to dissolve the Tobacco Institute, the Council for Tobacco Research, and the Council for Indoor Air Research, and agreed not to target youths as smokers or potential smokers, suppress research on the health hazards of smoking, or make any misrepresentation of fact concerning the health consequences of smoking. The participating cigarette manufacturers also agreed

to pay several billion dollars per year to the states, with each manufacturer responsible for a portion of the total payment according to its market share.

Philip Morris issued a statement on its Internet site in December 1999 acknowledging for the first time, "There is an overwhelming medical and scientific consensus that cigarette smoking causes lung cancer, heart disease, emphysema and other serious diseases in smokers. Smokers are far more likely to develop serious diseases, like lung cancer, than non-smokers. There is no 'safe' cigarette. These are and have been the messages of public health authorities worldwide." The statement also acknowledged that cigarette smoking is addictive.

2. *Trial Court Proceedings*

Bullock sued Philip Morris in April 2001 seeking to recover damages for personal injuries based on products liability and fraud, among other counts. The jury trial commenced on August 20, 2002. The jury returned special verdicts in September 2002 finding that there was a defect in the design of the cigarettes and that they were negligently designed; that Philip Morris failed to adequately warn Bullock of the dangers of smoking before July 1, 1969; that it intentionally and negligently misrepresented material facts and made a false promise; that it intentionally concealed material facts before July 1, 1969; and that each of those acts of misconduct was a cause of Bullock's injury. The jury found that Philip Morris was guilty of malice, fraud, or oppression with respect to each count. The jury awarded Bullock $850,000 in compensatory damages, including $100,000 in noneconomic damages for pain and

suffering, and later awarded her $28 billion in punitive damages. The court entered a judgment on the jury verdicts.

The court denied Philip Morris's motion for judgment notwithstanding the verdict and denied in part its motion for a new trial, but granted the new trial motion as to excessive damages, with the condition that the court would deny the new trial motion if Bullock consented to reduce the punitive damages award to $28 million. Bullock consented to the reduction. The court entered an amended judgment in January 2003 awarding a total of $28,850,000 in compensatory and punitive damages. Philip Morris appealed the amended judgment and the order denying its motion for judgment notwithstanding the verdict. Bullock filed a notice of appeal from "the Order . . . granting a new trial on the issue of punitive damages."[3] Bullock died in February 2003.

Piuze filed judgment liens in California, Virginia, and New York. The parties later stipulated that Philip Morris could deposit United States treasury bills in lieu of a bond to stay enforcement of the judgment pending appeal, and that the stay would become effective upon receipt of the deposit by the court clerk. After learning of the judgment liens, Philip Morris applied ex parte for an order staying enforcement of the judgment. The court granted the ex parte application on April 17, 2003, and entered an order temporarily staying enforcement of the judgment and directing Bullock to

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[3] We construe Bullock's notice of appeal as an appeal from the previously entered amended judgment encompassing the remittitur. It is reasonably clear that Bullock intended to challenge the amended judgment, and Philip Morris was not misled or prejudiced in this regard. (Cal. Rules of Court, rule 1(a)(2); *Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 22.)

withdraw the liens. The court signed an order approving the stipulation on the deposit the same day.

Philip Morris filed a motion on April 29, 2003, for an award of sanctions against Piuze and Bullock under Code of Civil Procedure sections 128.6 and 177.5, arguing that they failed to withdraw the judgment liens as ordered by the court and engaged in other bad faith, frivolous conduct. The court granted the motion against Piuze in June 2003, awarding Philip Morris $45,809.48 in attorney fees payable by Piuze, under Code of Civil Procedure section 128.6. Piuze has appealed from that sanctions order.

CONTENTIONS

Philip Morris contends (1) the evidence failed to establish that Bullock heard and actually relied on a false statement by Philip Morris; (2) the failure to instruct the jury that Philip Morris had a duty to disclose only if the information was not readily accessible to Bullock was error; (3) information that smoking causes lung cancer was readily accessible to Bullock, so Philip Morris had no duty to disclose that fact and cannot be liable for fraudulent concealment; (4) federal law preempts certain state law liability based on the advertising or promotion of cigarettes after July 1, 1969, and the court erred by admitting evidence of advertising and by failing to instruct the jury that certain liability cannot be based on that evidence; (5) the $28 billion punitive damages award was excessive under California law, the jury acted out of passion and prejudice, and the only appropriate remedy is a new trial; (6) Bullock's counsel improperly appealed to the jurors' passion and prejudice, emphasized Philip Morris's wealth, and urged the jury to disregard the requirement that the amount of punitive damages must be

reasonably related to the amount of compensatory damages; (7) the refusal of Philip Morris's proposed instructions on punitive damages was error; (8) the court improperly instructed the jury to award punitive damages in an amount that would have a deterrent effect in light of Philip Morris's financial condition; (9) the evidence of Philip Morris's financial condition is unreliable and does not accurately reflect its ability to pay; and (10) the $28 million punitive damages award after remittitur is unconstitutionally excessive.[4]

Bullock contends the punitive damages award by the jury followed a fair trial, was presumptively correct, and should not have been reduced by remittitur because there was no compelling basis to do so. Piuze contends there was no statutory basis for the attorney fee award against him and also challenges the award on other grounds.

DISCUSSION

1. *We Must Affirm the Judgment if any Count Independently Supports the Judgment*

An appealed judgment is presumed correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) An appellant has the burden to show not only that the trial court erred, but also that the error was prejudicial. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800-802; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 105-106.) The presumption in favor of

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[4] Philip Morris also challenges the verdicts on the products liability counts. As we note below, we can affirm the judgment based on the counts for intentional misrepresentation, false promise, and fraudulent concealment and therefore have no need to reach or discuss the issues relating to products liability.

the judgment compels the conclusion that an error is harmless if another basis for the judgment unaffected by error independently supports the judgment. (*Bresnahan v. Chrysler Corp.* (1998) 65 Cal.App.4th 1149, 1153-1154.)

We conclude that Philip Morris has shown no prejudicial error with respect to the counts for intentional misrepresentation, false promise, and fraudulent concealment, as we shall explain, and that each of those counts independently supports the award of compensatory damages, and also supports an award of punitive damages.

2. *Substantial Evidence Supports the Intentional Misrepresentation and False Promise Verdicts*

Philip Morris contends the evidence fails to establish that Bullock heard and actually relied on a false statement by Philip Morris and therefore does not support liability for intentional misrepresentation or false promise. Philip Morris cites cases holding that fraud must be alleged with particularity as support for the proposition that a plaintiff must prove that he or she actually relied on a particular statement by the defendant or by a third party repeating the substance of the defendant's statement. Philip Morris contends Bullock failed to prove that she actually relied on a particular statement that was shown to be false at trial because she did not testify that she heard any of those statements.

As this record reflects, Bullock presented substantial evidence of extensive efforts by Philip Morris, sometimes in concert with other cigarette manufacturers, to mislead the public about the adverse health effects of smoking cigarettes through press releases, publications, advertising, and other means. Philip Morris sought to cast doubt

on reports of adverse health effects by creating a false controversy as to whether smoking caused lung cancer and other diseases. Philip Morris, individually and through agents and trade associations, discredited the studies showing that smoking was likely a cause of serious illnesses and sought to reassure smokers that Philip Morris and other cigarette manufacturers were sponsoring research to resolve the purported controversy and that the research would be overseen by disinterested scientists.

Substantial evidence shows that contrary to those representations, Philip Morris knew that there was no valid scientific controversy concerning the adverse health effects of smoking, that it carefully avoided conducting or sponsoring research that might reveal the health hazards of smoking and concealed the results of research conducted in Germany on its behalf, and that it sought to maintain the false controversy and to make its cigarettes more addictive in order to increase sales. Philip Morris does not challenge the jury's findings that Philip Morris made one or more material misstatements of fact and false promises with the intention of inducing reliance, or the finding that Bullock's reliance was justified. Philip Morris's sole challenge to the intentional misrepresentation and false promise verdicts is that Bullock failed to prove that she actually relied on particular statements.

A plaintiff need not prove that he or she directly heard a specific misrepresentation or false promise to establish actual reliance. Rather, actual reliance is established if the defendant made a misrepresentation to a third party, the defendant intended or had reason to expect that the substance of the communication would be repeated to the plaintiff and would induce the plaintiff's reliance, and the plaintiff was

misled when the substance of the communication was repeated to the plaintiff. (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1095-1098; *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1660; *Whiteley v. Philip Morris, Inc.*, *supra*, 117 Cal.App.4th at pp. 680-681; see Rest.2d Torts, § 533.) We therefore reject the contention that Bullock must prove that she heard and actually relied on a specific representation and conclude that Philip Morris has not shown error.

Philip Morris's selective recitation of evidence focuses on whether Bullock was a direct recipient of specific representations. Philip Morris does not discuss the evidence tending to show that Philip Morris for many years engaged in a broad-based public campaign to disseminate misleading information and create a false controversy concerning the adverse health effects of smoking with the intention of causing smokers and potential smokers to rely on the substance of that misinformation, and that the misinformation reached Bullock indirectly through various means and media sources and caused her to begin and to continue smoking. We need not further discuss that evidence because by failing to challenge its sufficiency and failing to discuss the issue in any meaningful way, Philip Morris waives any challenge to the sufficiency of the evidence in those regards. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *County of Solano v. Vallejo Redevelopment Agency* (1999) 75 Cal.App.4th 1262, 1274.)

3. *Philip Morris Has Shown No Instructional Error with Respect to Fraudulent Concealment*

Philip Morris requested an instruction pursuant to BAJI No. 12.36 stating, in pertinent part, "A duty to disclose known facts arises where one party knows of material

facts and also knows that such facts are neither known nor readily accessible to the other party." Bullock requested an instruction stating identical language. Philip Morris also requested an instruction pursuant to BAJI No. 12.37, stating, "Intentional concealment exists where a party: [¶] (1) Knows of defects in a product and intentionally conceals them, or [¶] (2) While under no duty to speak, nevertheless does so, but does not speak honestly or makes misleading statements or suppresses facts which materially qualify those stated." Bullock requested an instruction stating only the second of the two enumerated alternatives, in language otherwise identical to the instruction requested by Philip Morris.

The court did not instruct the jury on BAJI No. 12.36, but instructed on BAJI No. 12.37 using the language requested by Philip Morris.[5] The reason for the court's failure to instruct on BAJI No. 12.36 does not appear in the appellate record. The conference on jury instructions was held in chambers and was not reported. No final set of written instructions showing the instructions given and refused appears in the record. There is no indication on either party's proposed instruction on BAJI No. 12.36 that the court refused the instruction. Philip Morris represented to the court after the jury instruction conference that it would file a document showing Philip Morris's proposed

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[5] The reporter's transcript indicates that in instructing the jury the court stated "makes misleading statements or *expresses* facts which materially qualify those stated" (italics added) rather than "makes misleading statements or *suppresses* facts which materially qualify those stated" (italics added). The record does not show that either party attempted to correct the apparent misstatement or that either party attempted to correct the reporter's transcript.

instructions refused by the court. The document later filed by Philip Morris stated that Philip Morris "objected, and objects, to each and every rejection by the Court of jury instructions proposed by Philip Morris," but did not identify the instructions refused by the court. Moreover, Philip Morris did not argue in its new trial motion that the court erroneously refused to instruct on BAJI No. 12.36, so the court had no opportunity to address that argument.

The possible explanations for the court's failure to give an instruction requested by both parties include that the court concluded that the instruction was improper, that one or both parties withdrew its request for the instruction and objected to the instruction during the unrecorded conference, that the parties or the court concluded that the instruction was unnecessary, or that the court or the party who prepared the final set of instructions simply overlooked the requested instruction and mistakenly omitted it.[6] We cannot conclude from the appellate record whether one of these possibilities or some other scenario actually occurred.

An appellant has the burden to provide a record sufficient to support its claim of error. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132.) Absent an indication in the record that an error occurred, we must presume that there was no error. (*Walling v. Kimball* (1941) 17 Cal.2d 364, 372; *Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.) An appellant arguing

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[6] The reporter's transcript shows that Philip Morris assumed responsibility for preparing the final set of instructions.

instructional error must ensure that the appellate record includes the instructions given and refused and the court's rulings on proposed instructions. (*Lynch v. Birdwell* (1955) 44 Cal.2d 839, 846-847;[7] *Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 312.) If the record does not show which party requested an erroneous instruction, the reviewing court must presume that the appellant requested the instruction and therefore cannot complain of error. (*Lynch, supra*, at pp. 846-848.) Similarly, if the record does not show whether an instruction was refused or "withdrawn, abandoned, or lost in the shuffle," the reviewing court must presume that the appellant withdrew the instruction. (*Huber, Hunt & Nichols, supra*, at p. 312.) "[I]t is incumbent upon . . . appellant . . . to make certain that the trial court has ruled [on a requested instruction] and that the record on appeal discloses that ruling before the alleged ruling may be assigned as error. [Citations.]" (*Ibid*.)

We conclude that the record is insufficient to show that the court refused the requested instruction. We presume that Philip Morris either affirmatively withdrew the instruction or omitted the instruction from the final set of instructions that Philip Morris

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[7] "As declared in *Vaughn v. Jonas* (1948), 31 Cal.2d 586, 596 [191 P.2d 432], in making up the record on appeal 'Each instruction should be identified by a number and should indicate by whom it was requested or that it was given by the court of its own motion; on each requested instruction the trial judge should endorse the fact as to whether it was given or refused or given as modified, with the modification, if any, clearly indicated.' [Citation.]" (*Lynch v. Birdwell*, *supra*, 44 Cal.2d at pp. 846-847.)

prepared.[8] Accordingly, Philip Morris has not shown instructional error with respect to fraudulent concealment.[9]

4. *Philip Morris Has Shown No Error With Respect to Preemption*

a. *Applicable Federal Law*

The Federal Cigarette Labeling and Advertising Act (FCLAA) (15 U.S.C. § 1331 et seq.) is "a comprehensive federal scheme governing the advertising and promotion of

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[8] Philip Morris encountered a similar problem and suffered a similar result in *Boeken v. Philip Morris Inc., supra,* 127 Cal.App.4th at pages 1671-1672.

[9] Our conclusion with respect to this claim of instructional error necessarily disposes of Philip Morris's related argument that it had no duty to disclose the fact that smoking causes lung cancer because information that smoking causes lung cancer was readily accessible to Bullock. The court never instructed the jury pursuant to BAJI No. 12.36 that a duty to disclose material facts arises only if a party knew that the facts were not readily accessible to another party, as discussed *ante*. Instead, the court only instructed pursuant to BAJI No. 12.37 that a party is liable for intentional concealment if the party "[k]nows of defects in a product and intentionally conceals them" or "[w]hile under no duty to speak, nevertheless does so, but does not speak honestly or makes misleading statements or expresses [*sic*] facts which materially qualify those stated."

We review the sufficiency of the evidence to support a verdict under the law stated in the instructions given, rather than under some other law on which the jury was not instructed. (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1535.) Each party in a civil proceeding must request complete and comprehensive instructions on its theory of the case; if a party fails to do so, the court has no duty to instruct on its own motion. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 950-951, disapproved on another point in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4; *Finn v. G. D. Searle & Co.* (1984) 35 Cal.3d 691, 701-702.) The jury's responsibility is to decide factual issues and return a verdict in accordance with the law as instructed by the court. (*Null, supra*, at p. 1534; *Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 877.) Absent instructional error, which Philip Morris has not shown, for an appellate court to review a verdict under a rule of law on which the jury was not instructed would allow reversal of a judgment on a jury verdict, requiring a retrial, even though neither the jury nor the court committed error. (*Null, supra*, at pp. 1534-1535.)

cigarettes." (*Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 541 [121 S.Ct. 2404] (*Reilly*); accord, 15 U.S.C. § 1331 [stating the purpose of the act "to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health"].) The express purposes of the act are to adequately inform the public of the dangers of smoking cigarettes and to protect the national economy from the burden of "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." (15 U.S.C. § 1331.)

As originally enacted in 1965 (Pub.L. No. 89-92 (July 27, 1965) 79 Stat. 282), the FCLAA mandated warnings on cigarette packages, preserved the authority of the Federal Trade Commission (FTC) to regulate unfair or deceptive acts or practices in cigarette advertising, and included a preemption provision. The Public Health Cigarette Smoking Act of 1969 (Pub.L. No. 91-222 (Apr. 1, 1970) 84 Stat. 87) amended the FCLAA in several ways, including by strengthening the required warning and modifying the preemption provision. (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 514-515 & fn. 9 [112 S.Ct. 2608] (*Cipollone*).)[10] The preemption provision as amended in 1969 now reads, "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of

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[10] The lead opinion in *Cipollone* by Justice Stevens was the majority opinion as to parts I through IV and a plurality opinion joined in by three other justices as to parts V and VI. Our references to parts V and VI of the opinion will indicate that we are referring to the plurality opinion.

any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."[11] (15 U.S.C. § 1334(b).) A majority of the justices in *Cipollone* held that in light of the express preemption provisions enacted in 1965 and 1969, the scope of preemption under each provision is limited to claims expressly preempted under each provision. (*Cipollone*, *supra*, at p. 517.) Invoking a presumption against preemption of state laws based on the exercise of police powers, the *Cipollone* court stated that Congress's intent to preempt must be "clear and manifest." (*Id.* at pp. 516, 518; accord, *Reilly*, *supra*, 533 U.S. at pp. 541-542.)

A majority of the justices in *Cipollone* concluded that the phrase "[n]o requirement or prohibition . . . imposed under State law" in the current preemption provision (15 U.S.C. § 1334(b)) encompasses regulation both by positive enactments and by common law rules. The plurality opinion by Justice Stevens stated with regard to "requirement or prohibition": "As we noted in another context, '[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.' [Citation.]" (*Cipollone*, *supra*, 505 U.S. at p. 521 (plur. opn. of Stevens, J.).) The plurality also concluded that "under State law," as used in the statute, is not limited to positive enactments. (*Id*. at

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[11] The amendment became effective on July 1, 1969. (Pub.L. No. 91-222, § 3, 84 Stat. 88.)

pp. 522-523.) Justices Scalia and Thomas agreed with these points in a separate opinion. (*Id*. at pp. 548-549 (conc. & dis. opn. of Scalia, J.).)

A plurality of the *Cipollone* court held that section 1334(b) of 15 United States Code preempted state law claims based on failure to warn of the health hazards of smoking to the extent the claims required a showing that the defendants' advertising or promotions after 1969 "should have included additional, or more clearly stated, warnings." (*Cipollone, supra,* 505 U.S. at p. 524 (plur. opn. of Stevens, J.).) The plurality also held that section 1334(b) preempted state law claims for fraudulent misrepresentation based on statements in advertising and promotional materials that minimized the health hazards of smoking and neutralized the required warnings. (*Cipollone, supra,* at pp. 527-528 (plur. opn .of Stevens, J.).) The plurality opinion explained that a fraudulent misrepresentation claim based on such a neutralization theory "is predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking. Such a *prohibition,* however, is merely the converse of a state-law *requirement* that warnings be included in advertising and promotional materials." (*Id*. at p. 527.) The plurality concluded that the plaintiff's fraudulent misrepresentation claim based on a neutralization theory was "inextricably related" to the failure to warn theory and therefore was preempted. (*Id*. at p. 528.)

The *Cipollone* plurality, however, held that section 1334(b) of 15 United States Code did not preempt the plaintiff's state law claims for fraudulent misrepresentation based on false statements of material fact made in advertising because "[s]uch claims

are predicated not on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive." (*Cipollone*, *supra*, 505 U.S. at pp. 528-529 (plur. opn. of Stevens, J.).) The plurality also held that the act did not preempt state law claims for breach of express warranty (*id*. at pp. 525-527) and conspiracy to misrepresent or conceal material facts (*id*. at p. 530).

The United States Supreme Court in *Reilly*, *supra*, 533 U.S. at pages 548-551 held that section 1334(b) of 15 United States Code preempted Massachusetts's regulations restricting outdoor and point-of-sale advertising of cigarettes.[12] The court concluded, "Congress prohibited state cigarette advertising regulations motivated by concerns about smoking and health," and, "the concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health." (*Reilly*, *supra*, at p. 548.) *Reilly* stated, "to the extent that Congress contemplated additional targeted regulation of cigarette advertising, it vested that authority in the FTC" (*ibid*.), and "Congress enacted a comprehensive scheme to address cigarette smoking and health in advertising and pre-empted state regulation of cigarette advertising that attempts to address that same concern, even with respect to youth." (*Id*. at p. 571.) *Reilly* also stated, "we hold only that the FCLAA pre-empts

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[12] The attorney general of Massachusetts promulgated the regulations, in the words of the regulations themselves, " 'to eliminate deception and unfairness in the way cigarettes and smokeless tobacco products are marketed, sold and distributed in Massachusetts in order to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age . . . [and] in order to prevent access to such products by underage consumers.' [Citation.]" (*Reilly*, *supra*, 533 U.S. at p. 533.)

state regulations targeting cigarette advertising. States remain free to enact generally applicable zoning regulations, and to regulate conduct with respect to cigarette use and sales." (*Id*. at p. 550.)

b. *Admission of Evidence*

Philip Morris filed motions in limine before trial seeking to preclude the admission of evidence pertaining to its advertising and promotion of cigarettes after July 1, 1969. Philip Morris argued that the evidence was inadmissible to support claims preempted by the FCLAA, was relevant for no other purpose and, *therefore*, was inadmissible for all purposes. The court concluded that the act did not preempt Bullock's product liability claims or fraud claims based on deceptive advertising, determined that the evidence was relevant and admissible for purposes of those claims, and denied the motions. During trial, Philip Morris objected to evidence of its post-1969 advertising on grounds of preemption. The court overruled the objections.

Philip Morris argues in its opening brief on appeal that the admission of evidence of its advertising after July 1, 1969, was error because the federal act preempts liability based on advertising that minimizes health risks or targets youths. Evidence, however, may be admissible for one purpose but inadmissible for another purpose. (Evid. Code, § 355.) In its opening brief, Philip Morris does not challenge the court's rulings that the evidence was admissible for other purposes and does not argue that the evidence was not admissible for any purpose, but only that the evidence was inadmissible for certain purposes. Philip Morris's argument appears to be that because the evidence was inadmissible for some purposes, it was inadmissible for all purposes. Bullock argues in

her respondent's brief that the evidence was admissible for other purposes and cites the court's rulings to that effect. Philip Morris argues in its reply brief that Bullock has waived the issue by failing to explain the purposes for which the evidence was admissible and argues summarily that the evidence was inadmissible for all purposes, but does not acknowledge the court's determination that the evidence was admissible for particular purposes or explain why that ruling was incorrect.

Moreover, the record in this matter supports the conclusion that evidence of Philip Morris's post-1969 advertising was admissible to support nonpreempted claims, including the counts for misrepresentation and false promise. Those counts were not "based on smoking and health" (15 U.S.C. § 1334(b)) because they were not based on either a positive enactment or a common law "prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking." (*Cipollone*, *supra*, 505 U.S. at pp. 527-528 (plur. opn. of Stevens, J.).) Rather, the counts for misrepresentation and false promise were based on false statements and a duty not to deceive and therefore were not preempted. Philip Morris's post-1969 advertising conveyed the message that smokers were glamorous, healthy, and carefree and supported Philip Morris's efforts to deceive smokers and potential smokers concerning the adverse health effects of smoking. Evidence of Philip Morris's post-1969 advertising therefore was probative on the intent to defraud and reliance elements of Bullock's nonpreempted fraud claims.

Because Philip Morris has not shown that evidence of its post-1969 advertising was inadmissible for *all* purposes and the trial court properly concluded that such

evidence was admissible in support of Bullock's fraud claims, we hold that there was no error in its admission.[13]

c. *Jury Instructions*

Philip Morris filed a set of proposed jury instructions on May 23, 2002, including an instruction on preemption.[14] Philip Morris filed a second set of "Proposed Jury Instructions" on August 19, 2002, including a modified preemption instruction. Philip Morris filed a set of "Proposed Supplemental Preliminary Jury Instructions" on August 21, 2002, including a modified version of the preemption instruction. Philip Morris filed a set of "Revised Proposed Jury Instructions" on August 28, 2002, expressly withdrawing the proposed instructions filed on August 19. The revised set included a preemption instruction identical to the instruction proposed on August 21.[15]

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[13] Philip Morris does not argue on appeal that the evidence should have been excluded under Evidence Code section 352.

[14] The proposed instruction stated in relevant part, "Federal law also limits claims based on advertising and promotion of cigarettes after July 1, 1969. With one exception that I will tell you about, you cannot find liability or award damages based on any claim that the advertising or promotion of cigarettes was wrongful or inappropriate after July 1, 1969. You cannot find liability or award damages based on any claim that the effect of the required warnings was neutralized, diminished or undermined by the imagery or implied messages contained in advertising or promotion of cigarettes after July 1, 1969. You cannot find liability or award damages based on a claim that advertising or promotion of cigarettes was targeted or directed at underage youth after July 1, 1969. [¶] There is one exception to the rule that liability or damages cannot be based on advertising or promotion of cigarettes. Federal law does not limit a claim that advertising or promotion of cigarettes contains a false statement of fact."

[15] The instruction proposed on August 28, 2002, stated, "Federal law limits the claims that plaintiff can make in this case. The United States Congress has required that tobacco companies, including defendant Philip Morris, put specific warning labels on

Philip Morris then filed a set of "Supplemental Proposed Jury Instructions" on September 24, 2002, including two modified instructions on preemption. In that final set of proposed instructions, Philip Morris stated that the court held jury instruction conferences off the record on August 29 and September 11, 18, and 19, 2002, and that the attached instructions were proposed as alternatives to instructions previously submitted by Philip Morris and rejected by the court. The conferences on instructions were unrecorded, and no final set of instructions given and refused appears in the appellate record, as we have noted. The court instructed the jury that Philip Morris's liability for fraudulent concealment and liability for failure to warn of a design defect were limited to acts and omissions prior to July 1, 1969, but did not instruct that other counts were similarly restricted.

Philip Morris contends the court erred by refusing to instruct that liability for misrepresentation and false promise could not be based on advertising after July 1,

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every pack of cigarettes sold in the United States since 1966, and on brand advertisements for its cigarettes since 1971. [¶] The law also says that, since July 1, 1969, the required warnings are legally sufficient to warn the public, including smokers, of any harmful effects of smoking, including addiction. That means that you cannot find liability, award damages or punish the defendant in this case based on any claim that, after July 1, 1969: [¶] • Philip Morris should have provided more or different information to the public about the health risks of smoking or the addictive nature of smoking. [¶] • Philip Morris concealed or suppressed information about the health risks of smoking or the addictive nature of smoking. [¶] • Philip Morris' advertising or promotion of cigarettes was wrongful or inappropriate after July 1, 1969. [¶] There is one exception to the rule that liability or damages cannot be based on advertising or promotion of cigarettes after July 1, 1969. Federal law does not limit a claim that advertising or promotion of cigarettes contains a false statement of fact."

1969, that minimized health risks or targeted youths.[16] In its opening brief, Philip Morris quotes only the fourth sentence of its proposed instruction filed on May 23, 2002 (quoted *ante* in fn. 14), fails to mention its later proposed instructions, and argues without citation to the record that the court "refused to give the jury any preemption instructions relating to plaintiff's misrepresentation and false promise claims." Bullock argues in her respondent's brief that Philip Morris fails to cite or discuss its revised proposed instruction filed on August 28, 2002, that the instruction was argumentative and confusing and the court properly refused it, and that Philip Morris has waived any error by failing to show that the requested instruction was proper.[17] In its reply brief, Philip Morris acknowledges that the proposed instruction filed on May 23 was superseded, but argues that the proposed instruction filed on August 28 was substantially the same. Philip Morris cites the August 28 proposed instruction in its reply brief, but does not discuss it or explain why it was proper. Philip Morris does not respond to the argument that the instruction was argumentative and confusing or the argument that Philip Morris has waived any error by failing to explain why the instruction was proper.

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[16] We address Philip Morris's contention that the court erred by refusing other proposed instructions on preemption in the punitive damages phase of trial in section 7.b., *post*.

[17] Bullock acknowledges that the court refused the proposed instruction filed on August 28, 2002. The proposed instruction bears the handwritten notation "refused."

A party is entitled to an instruction on each theory of the case that is supported by the pleadings and substantial evidence if the party requests a proper instruction. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 (*Soule*); *Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1107-1108.) A court may refuse a proposed instruction that incorrectly states the law or is argumentative, misleading, or incomprehensible to the average juror, and ordinarily has no duty to modify a proposed instruction. (*Shaw v. Pacific Greyhound Lines* (1958) 50 Cal.2d 153, 158; *Boeken v. Philip Morris Inc*., *supra*, 127 Cal.App.4th at p. 1678; *Munoz v. City of Union City*, *supra*, at p. 1108; *Levy-Zentner Co. v. Southern Pac. Transportation Co.* (1977) 74 Cal.App.3d 762, 782.) A court may refuse a proposed instruction if other instructions given adequately cover the legal point. (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1185, fn. 11.) Moreover, the refusal of a proper instruction is prejudicial error only if " 'it seems probable' that the error 'prejudicially affected the verdict.' [Citations.]" (*Soule*, *supra*, at p. 580.) "[W]hen deciding whether an error of instructional omission was prejudicial, the court must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled. [Fn. omitted.]" (*Id*. at pp. 580-581.)

An appealed judgment or challenged ruling is presumed correct. (*Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 564; *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) An appellant must affirmatively demonstrate error through reasoned argument, citation to the appellate record, and discussion of legal

authority. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) Accordingly, we cannot conclude that the refusal to give an instruction was error absent an adequate showing that the proposed instruction was proper. (*Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 39.) The extent of the showing required to demonstrate error depends on the complexity of the issues presented. Philip Morris's proposed instruction of August 28, 2002, addressed complex legal issues and ran over 200 words. By failing to discuss the entire instruction and failing to explain why it was proper, Philip Morris fails to carry its burden to demonstrate error.

Moreover, the instructions given on each count obviated the need for a more general preemption instruction of the type proposed. The court instructed the jury that Philip Morris's liability for fraudulent concealment and liability for failure to warn of a design defect were limited to acts and omissions prior to July 1, 1969. The court also instructed that an essential element of the counts for negligent and intentional misrepresentation was a false representation of fact or actionable opinion, and that Philip Morris could be held liable for false promise only if it made a promise that it did not intend to perform. The counts for misrepresentation and false promise were not "based on smoking and health" within the meaning of the preemption provision because they were not based on either a positive enactment or a common law "prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking." (*Cipollone*, *supra*, 505 U.S. at pp. 527-528 (plur. opn. of Stevens, J.).) Rather, the counts for misrepresentation and false promise

were based on false statements and a duty not to deceive and therefore were not subject to preemption. By limiting liability for failure to warn or fraudulent concealment to acts and omissions before July 1, 1969, and by requiring a finding of a misrepresentation of fact or actionable opinion or a false promise to support liability for misrepresentation or false promise, the instructions given precluded liability based on a claim that Philip Morris's advertising or promotion after July 1, 1969, either "should have included additional, or more clearly stated, warnings" (*Cipollone*, *supra*, 505 U.S. at p. 524 (plur. opn. of Stevens, J.).) or minimized the health hazards associated with smoking and neutralized the required warnings. We conclude that Philip Morris's requested instruction was unnecessary, that it unduly repeated and emphasized a defense, that it was verbose and confusing, and that the court properly refused it.

5. *Philip Morris Has Shown No Error under California Law in the Denial of a New Trial on Punitive Damages*

a. *Remittitur Was a Proper Remedy for the Jury's Excessive Award*

Philip Morris challenges the punitive damages award under both California law and the Fourteenth Amendment due process clause. Philip Morris contends the $28 billion punitive damages award was excessive under California law, the jury acted out of passion and prejudice, and the *only* appropriate remedy is a new trial. The trial court, in ruling on Philip Morris's new trial motion, determined that the amount awarded by the jury *was* excessive and that $28 million was an appropriate amount.

Code of Civil Procedure section 662.5, subdivision (b) authorizes a court granting a new trial motion on the ground of excessive damages to make its order

subject to the condition that the motion is denied if the plaintiff consents to a reduction of the award to an amount that the court independently determines to be fair and reasonable.[18] A court exercising this authority acts as an independent trier of fact. (*Ibid*.; *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 933.) We must affirm the court's decision if the court states adequate reasons for the decision and substantial evidence supports the decision. (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412; *Neal v. Farmers Ins. Exchange*, *supra*, at pp. 931-933 & fn. 18.) "[W]hen a trial court grants a new trial on the issue of excessive damages, whether or not such order is conditioned by a demand for reduction, the presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the order." (*Neal v. Farmers Ins. Exchange*, *supra*, at p. 932.) Accordingly, the relevant amount for purposes of our review is not the amount awarded by the jury, but the reduced amount ordered by remittitur. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 419.)

Code of Civil Procedure section 662.5 compels the conclusion that a new trial was not the only appropriate remedy for the excessive jury verdict. Rather, a

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[18] "In any civil action where after trial by jury an order granting a new trial limited to the issue of damages would be proper, the trial court may in its discretion: [¶] . . . [¶] (b) If the ground for granting a new trial is excessive damages, make its order granting the new trial subject to the condition that the motion for a new trial is denied if the party in whose favor the verdict has been rendered consents to a reduction of so much thereof as the court in its independent judgment determines from the evidence to be fair and reasonable." (Code Civ. Proc., § 662.5.)

conditional new trial order with a remittitur resulting in the denial of the new trial motion was a proper alternative remedy.

b. *Attorney Misconduct*

Philip Morris contends Bullock's counsel during closing argument improperly appealed to the jurors' passion and prejudice, emphasized Philip Morris's wealth, and urged the jury to disregard the requirement that the amount of punitive damages must be reasonably related to the amount of compensatory damages. The challenged statements include comparisons to September 11 and Osama bin Laden,[19] comments that "reasonable relationship" is "vague" and "is in the eye of the beholder,"[20] and

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[19] Bullock's counsel stated in closing argument: "Less than 3,000 people died in the Twin Towers terrorist attack. When I say 'less than,' that sounds really weird because what an unbelievable human toll; but in the terms we are talking about here, just so we can bring this down, that's a 30-day toll in California alone right now from smoking cigarettes."

"Philip Morris is a resourceful foe. Never, ever think Philip Morris is done or cornered or has no options, ever. Picture this, please: Special forces in the desert, after a lot of work and effort, they corner bin Laden. 'I won't do it again. I won't do it any more.' I could go back in history to bigger worse people and bigger worse atrocities, but think about the concept of what you heard here today, that after an evildoer, a wrongdoer, is run to the ground, all that person has to say is, 'Oh, okay. I won't do it any more.' Well, that's trivializing what happened here."

[20] Bullock's counsel stated in closing argument: "And the last thing the judge mentioned is that the punitive damages have to bear a reasonable relationship to the damages sustained by Betty Bullock, whatever that means. And, of course, that is stuff that lawyers, appellate lawyers, and judges and appellate judges talk about, but that's not today. Today we are the equal branch of government; and regardless of whatever happens--and this is a true fact--regardless of whatever happens, your voice is important. Your voice is important for the judges to come to hear."

demonization of Philip Morris and its chief executive officer Geoffrey Bible.[21] Philip Morris contends the denial of its motion for a new trial on the ground of attorney misconduct was error.

A party ordinarily cannot complain on appeal of attorney misconduct at trial unless the party timely objected to the misconduct and requested that the jury be admonished. (*Whitfield v. Roth* (1974) 10 Cal.3d 874, 891-892.) The purpose of these requirements is to allow the trial court an opportunity to remedy the misconduct and avoid the necessity of a retrial; a timely objection may prevent further misconduct, and an admonition to the jury to disregard the offending matter may eliminate the potential prejudice. (*Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th at pp. 794-795; *Horn v. Atchinson T. & S. F. Ry. Co.* (1964) 61 Cal.2d 602, 610.) The failure to timely object and request an admonition waives a claim of error unless the misconduct was so prejudicial that it could not be cured by an admonition (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000-1001; *Whitfield v. Roth*, *supra*, at p. 892), an objection or request for admonition would have been futile (*People v. Hill* (1998) 17 Cal.4th 800, 820), or

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[21] After suggesting an award of $20 billion in punitive damages, Bullock's counsel stated in closing argument: "Who would sell poison to kill people slowly, painfully, over a long period of time? That's question one. Who would make the stuff so attractive, especially to young kids--use the stuff and be glamorous, use the stuff and attract guys, and use the stuff and be macho, use the stuff and be a cowboy, use the stuff and be cool--knowing it would kill? That's question number two. . . . And if you've answered all those questions or don't have an answer to all those questions, who would name the CEO of their company 'Bible'? And so I have an alternative number. If you want people to hear about this verdict, billion, million, thousand, I think an appropriate alternative number is $6,666,666,666."

the court promptly overruled an objection and the objecting party had no opportunity to request an admonition (*Cassim*, *supra*, at pp. 794-795). Attorney misconduct is incurable only in extreme cases. (*Horn v. Atchinson T. & S. F. Ry. Co.*, *supra*, at p. 610; see, e.g., *Simmons v. Southern Pac. Transportation Co.* (1976) 62 Cal.App.3d 341, 351-355 (*Simmons)*.)

Philip Morris did not object to any part of the closing argument. Philip Morris contends objections would have emphasized the offending statements and exacerbated the prejudice, citing *Simmons*, *supra*, 62 Cal.App.3d at page 355. *Simmons* stated that the plaintiff's counsel "from the very beginning of the trial embarked on a campaign of hate, vilification and subterfuge for the sole purpose of prejudicing the jury" and engaged in "many instances of unfair conduct." (*Simmons*, *supra*, at p. 351.) The defense counsel objected to much of the misconduct and requested admonitions in some instances, but on many occasions failed to object or objected but failed to request an admonition. (*Id*. at p. 355.) *Simmons* stated that the admonitions given "were mostly inadequate" and that further objections "would have overemphasized the objectionable material and . . . alienated the jury." (*Ibid*.) *Simmons* stated, "even in the absence of an objection and request for admonition, where there are flagrant and repeated instances of misconduct, an appellate court cannot refuse to recognize the misconduct." (*Ibid*.) We construe this last quoted statement to mean that in light of the persistence of the misconduct, despite many objections and requests for admonition, and in light of the inadequate admonitions given by the trial court, the *Simmons* court concluded that additional objections and requests for admonition would have been futile. Here, in

contrast, there was no objection, no request for an admonition, and no indication that an objection or request for admonition would have been futile. Moreover, the challenged statements were not so egregious or persistent as to support the conclusion that an admonition would have been ineffective.[22] We therefore conclude that Philip Morris's failure to object and request an admonition precludes our consideration of the point on appeal.

c. *Financial Condition*

Philip Morris contends Bullock presented no meaningful evidence of its financial condition and ability to pay, so the denial of its motion for a new trial on this ground was error. California law requires evidence of the defendant's financial condition to support an award of punitive damages. "A reviewing court cannot make a fully informed determination of whether an award of punitive damages is excessive unless the record contains evidence of the defendant's financial condition." (*Adams v. Murakami* (1991) 54 Cal.3d 105, 110.) The California Supreme Court in *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1184-1185 (*Simon*), stated, "California law permits the recovery of punitive damages 'for the sake of example and by way of punishing the defendant.' (Civ. Code, § 3294, subd. (a).) As we explained in *Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal.3d at page 928, and *Adams v. Murakami*, *supra*, 54 Cal.3d at pages 110-112, the defendant's financial condition is an essential

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[22] In light of our conclusion, we need not decide whether any particular statement by Bullock's counsel in closing argument was prejudicial misconduct.

factor in fixing an amount that is sufficient to serve these goals without exceeding the necessary level of punishment. '[O]bviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort.' (*Neal v. Farmers Ins. Exchange*, *supra*, at p. 928.) '[P]unitive damage awards should not be a routine cost of doing business that an industry can simply pass on to its customers through price increases, while continuing the conduct the law proscribes.' (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405,427 [93 Cal.Rptr.2d 60, 993 P.2d 388] (conc. opn. of Brown, J.).) On the other hand, 'the purpose of punitive damages is not served by financially destroying a defendant.' (*Adams v. Murakami*, *supra*, at p. 112.)" The *Simon* court concluded that "the defendant's financial condition remains a legitimate consideration in setting punitive damages" after *State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408 [123 S.Ct. 1513] (*State Farm*) and *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589] (*Gore*).[23] (*Simon*, *supra*, at p. 1185.)

The plaintiff in *Adams v. Murakami* presented no financial evidence of any kind. (*Adams v. Murakami*, *supra*, 54 Cal.3d at p. 116, fn. 7.) The California Supreme Court held that the award of punitive damages must be set aside and declined to decide the appropriate measure of a defendant's "ability to pay." (*Id*. at pp. 116, fn. 7 & 123.) Courts of Appeal in other cases have held that evidence of the defendant's net worth is

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[23] Accordingly, we reject Philip Morris's contention that the court erred by instructing the jury to award punitive damages in an amount that would have a deterrent effect in light of Philip Morris's financial condition.

required (*Dumas v. Stocker* (1989) 213 Cal.App.3d 1262, 1267-1269); that evidence of income without evidence of assets and liabilities or "something more" than income alone is insufficient (*Lara v. Cadag* (1993) 13 Cal.App.4th 1061, 1064-1065 & fn. 3); and that evidence of profits gained from the misconduct without evidence of net worth or assets and liabilities ordinarily is insufficient (*Robert L. Cloud & Associates, Inc. v. Mikesell* (1999) 69 Cal.App.4th 1141, 1152; *Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 56-58; but see *Cummings Medical Corp. v. Occupational Medical Corp.* (1992) 10 Cal.App.4th 1291, 1298-1300 [held that profits gained through defrauding the plaintiff were an appropriate measure of punitive damages and there was no need to consider the defendant's net worth]). The court in *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 391, stated, "Net worth generally is considered the best measure of a defendant's 'wealth' for purposes of assessing punitive damages." (Accord, *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1100; *Little v. Stuyvesant Life Ins. Co.* (1977) 67 Cal.App.3d 451, 469 & fn. 5.) Some courts have cautioned that net worth is subject to manipulation and should not be the sole measure of a defendant's ability to pay. (*Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 582-583; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 625 [affirmed a punitive damages award in excess of the defendant's net worth, noting that the defendant had considerable future earning potential and that some of his assets were exempt from execution]; *Lara v. Cadag, supra*, at p. 1065, fn. 3).

Bullock presented expert testimony opining on (1) Philip Morris's "financial condition" based on a percentage of the total value of the outstanding shares of stock of its parent company (market capitalization); (2) its "financial condition" based on the value of its "market share" as determined by the price Philip Morris paid to acquire other cigarette company trademarks multiplied by a market share factor; and (3) its biannual sales revenue and annual operating income since 1967. Bullock presented no evidence of Philip Morris's profits. Bullock's expert did not testify that the market capitalization analysis revealed the company's net worth or ability to pay, and it is apparent that it did not because the aggregate value of outstanding shares of stock is not an asset of the company, as the expert acknowledged on cross-examination. (See *Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge) L.L.C.* (Tex.App. 2005) 171 S.W.3d 905, 914 [stating that market capitalization is not a measure of net worth].)

Bullock's expert offered the second method of analysis as a measure of the value to Philip Morris of its own market share. He did not testify that the value to Philip Morris of its own market share reflected the company's net worth or ability to pay, but only that it was a measure of the company's "financial condition." The calculation based on the price paid for other cigarette trademarks at best yields only a subjective asset value, does not reflect liabilities, and does not provide reliable evidence of the company's net worth or ability to pay.

Bullock's expert also presented evidence of Philip Morris's biannual sales revenue and annual operating income since 1967. The sales revenue figures reflected only income, while the operating income figures reflected, generally, sales revenue

minus costs of goods sold and marketing expenses, with no deduction for taxes and interest payments. This evidence does not permit a reviewing court to determine the financial impact of the punitive damages award on Philip Morris. That is, we cannot determine based on this evidence whether the award will serve the purposes of deterrence and punishment without financially destroying the company. We conclude that absent evidence of Philip Morris's total assets and total liabilities or other meaningful evidence of its ability to pay, evidence of its revenue and operating income is insufficient to support an award of punitive damages. (*Lara v. Cadag*, *supra*, 13 Cal.App.4th at pp. 1064-1065 & fn. 3.)

Bullock presented insufficient evidence of Philip Morris's financial condition to support an award of punitive damages under California law. Despite that evidentiary shortcoming, however, there is no reversible error because counsel for Philip Morris conceded in closing argument in the punitive damages phase of trial that Philip Morris could afford to pay $1 billion or $6.666 billion in punitive damages:

"Now, you have seen over the course of the last day and again this morning from Mr. Piuze, big numbers. There's no question about it. Philip Morris is a very large company. It has billions of dollars in sales. It has billions of dollars in profits; and there's no debate, no dispute, that Philip Morris could afford to pay a billion dollars or $6.666 billion in this case. There's no question about that." Counsel argued that such a large deterrent was not needed and that it would not be fair and just to award Bullock billions of dollars.

An oral statement by counsel in the same litigation constitutes a binding judicial admission if the statement was an unambiguous concession of a matter then at issue and was not made improvidently or unguardedly. (*People v. Jackson* (2005) 129 Cal.App.4th 129, 161; *Irwin v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 709, 714; *Scafidi v. Western Loan & Bldg. Co.* (1946) 72 Cal.App.2d 550, 562.) The statements by counsel for Philip Morris were clear and deliberate. Counsel admitted that Philip Morris could afford to pay several billion dollars in punitive damages and thereby affirmatively disavowed any claim that an award in that amount would be excessive in light of its financial condition. The concession apparently was either a tactical move or simply a matter of yielding to the truth. We conclude that Philip Morris is bound by its judicial admission and cannot impeach the verdict based on insufficiency of the evidence of its financial condition.

6. *Due Process Limitations on Punitive Damages*

The due process clause of the Fourteenth Amendment prohibits grossly excessive or arbitrary punishment of a tortfeasor and therefore limits the amount of punitive damages that a state court can award. (*State Farm*, *supra*, 538 U.S. at pp. 416-417.) An appellate court reviewing a punitive damages award under the due process clause must independently apply three constitutional guideposts: "(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 damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. [Citation.]" (*Id*. at p. 418.) Our review of the excessiveness of

punitive damages under the due process clause is de novo. (*Ibid*.; *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 436 [121 S.Ct. 1678]; *Simon, supra*, 35 Cal.4th at p. 1172 & fn. 2.)

The United States Supreme Court in *State Farm, supra*, 538 U.S. at page 419 stated, " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' *Gore*, 517 U.S., at 575. We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. *Id*., at 576-577. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. *Id*., at 575."

A state generally has no "legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." (*State Farm, supra*, 538 U.S. at p. 421.) "A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or

proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction. [Citation.]" (*Id*. at p. 422.) Moreover, "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct . . . ."[24] (*Id*. at pp. 423.) This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. (*Johnson v. Ford Motor Co*. (2005) 35 Cal.4th 1191, 1206-1208 & fn. 6 (*Johnson*).)

The reprehensibility of the defendant's conduct toward the plaintiff depends in part on the "scale and profitability" of the course of conduct of which the defendant's conduct toward the plaintiff is a part. (*Johnson*, *supra*, 35 Cal.4th at pp. 1207-1208.) "[T]he court in *State Farm* noted that conduct involving 'repeated actions' was worse than, and could be punished more severely than, conduct limited to 'an isolated incident.' (*State Farm*, *supra*, [538 U.S.] at p. 419.) [Fn. omitted.]" (*Johnson*, *supra*, at p. 1206.) The *State Farm* court stated that that even "[l[awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the

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[24] *State Farm* held that the Utah courts erred by awarding punitive damages based on the defendant's dissimilar acts that "had nothing to do with" the conduct that injured the plaintiffs. (*State Farm*, *supra*, 538 U.S. at pp. 422-423.)

defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff." (*State Farm*, *supra*, at p. 422.) The California Supreme Court in *Johnson* stated, "To consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, ' " 'a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one.' " ' (*Ewing v. California* (2003) 538 U.S. 11, 25-26 [155 L.Ed.2d 108, 123 S.Ct. 1179].) . . . By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature." (*Johnson*, *supra*, at pp. 1206-1207, fn. 6.) *Johnson* stated further, "The scale and profitability of a course of wrongful conduct by the defendant cannot justify an award that is grossly excessive in relation to the harm done or threatened, but scale and profitability nevertheless remain relevant to reprehensibility and hence to the size of award warranted, under the guideposts, to meet the state's interest in deterrence. . . . Nothing the high court has said about due process review requires that California juries and courts ignore evidence of corporate policies and practices and evaluate the defendant's harm to the plaintiff in isolation." (*Id*. at p. 1207.)

The second guidepost is that punitive damages must bear a " 'reasonable relationship' " to compensatory damages or to the actual or potential harm to the

plaintiff. (*Gore*, *supra*, 517 U.S. at pp. 575, 580; accord, *State Farm, supra*, 538 U.S. at pp. 424-426.) "[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." (*State Farm*, *supra*, at p. 426.) *State Farm* declined "to impose a bright-line ratio," but stated, "Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." (*State Farm*, *supra*, at p. 425.) The court stated that a higher ratio might be appropriate if " 'a particularly egregious act has resulted in only a small amount of economic damages' [citation]" or " 'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine' [citation]." (*Ibid*.) The court also stated that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages," may be the appropriate limit. (*Ibid*.) The court noted that compensatory damages for emotional distress caused by outrage or humiliation at the defendant's misconduct contain a "punitive element" and should be considered in evaluating the amount of punitive damages. (*Id*. at pp. 426, 429.) *State Farm* held that a $145 million punitive damages award for purely economic injuries was excessive, stated that the $1 million compensatory award for emotional distress "was complete compensation," and remanded the matter to the Utah state court to calculate the amount of punitive damages in the first instance. (*Ibid*.) "The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*Id*. at p. 425.)

The California Supreme Court in *Simon, supra,* 35 Cal.4th at page 1182 stated that *State Farm, supra,* 538 U.S. 408 established a presumption that a ratio significantly greater than single digits violates due process absent a special justification: "We understand the court's statement in *State Farm* that 'few awards' significantly exceeding a single-digit ratio will satisfy due process to establish a type of presumption: ratios between the punitive damages award and the plaintiff's actual or potential compensatory damages significantly greater than 9 or 10 to 1 are suspect and, absent special justification (by, for example, extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages), cannot survive appellate scrutiny under the due process clause. [Fn. omitted.]" *Simon* cited "extreme reprehensibility" as one example of a special circumstance that can justify a ratio significantly greater than single digits. (*Simon, supra,* 35 Cal.4th at p. 1182.) *Simon* rejected the notion that ratios greater than four to one are presumptively invalid and disapproved *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1057, which had held to that effect. (*Simon, supra,* 35 Cal.4th at pp. 1182-1183.) With regard to the third guidepost, civil penalties for comparable misconduct, *Simon* stated that the guidepost "is less useful in a case like this one, where plaintiff prevailed only on a cause of action involving 'common law tort duties that do not lend themselves to a comparison with statutory penalties.' [Citation.]" (*Id.* at pp. 1183-1184.)

The defendant's financial condition remains an essential consideration under California law, and a permissible consideration under the due process clause, in determining the amount of punitive damages necessary to further the state's legitimate

interests in punishment and deterrence. (*Simon*, *supra*, 35 Cal.4th at p. 1185.) Those interests are not served if the amount awarded is so small in relation to the defendant's wealth as to constitute only a nuisance or a routine cost of doing business. (*Ibid*.) On the other hand, under California law, the interests in punishment and deterrence cannot justify an award so large as to financially destroy the defendant. (*Ibid*.) An award violates due process in light of the defendant's financial condition only if the award is " ' "grossly excessive" in relation to these interests.' " (*Ibid*., quoting *Gore*, *supra*, 517 U.S. at p. 568.) The defendant's financial condition cannot supplant the three guideposts in an evaluation of the amount of punitive damages under the due process clause, but the defendant's financial condition can supplement the guideposts as an additional consideration. (*Id.* at pp. 1185-1186.) "The *BMW/State Farm* guideposts cannot be abandoned or ignored, but in determining whether a lesser award 'could have satisfied the State's legitimate objectives' (*State Farm*, *supra*, 538 U.S. at p. 420), a reviewing court may nonetheless give some consideration to the defendant's financial condition. [Fn. omitted.]" (*Id*. at p. 1186.) *Simon* stated that in some cases the defendant's financial condition considered together with the guideposts discussed above may justify a ratio significantly in excess of a single-digit ratio (*id.* at pp. 1182, 1186), while in other cases "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." (*Id.* at p. 1187.)

Another consideration in determining the amount of punitive damages necessary to further the state's legitimate interests in punishment and deterrence is any prior

punitive damages award against the defendant for the same conduct. California courts have stated that evidence of prior punitive damages awards and potential future punitive damages awards is relevant to the amount of punitive damages necessary to punish and deter. (*Boeken v. Philip Morris, Inc.*, *supra*, 127 Cal.App.4th at p. 1701; *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661; see Rest.2d Torts, § 908, com. e, p. 467; but see *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 812 [where the court stated that "the mere possibility of a future award in a different case" did not justify setting aside an award and that the defendant could raise the issue of multiple awards for the same conduct in a future case; *Owens-Corning Fiberglas Corp. v. Malone* (Tex. 1998) 972 S.W.2d 35, 42, 53 [held that a court can consider only punitive damages actually paid by the defendant].)[25] Although a prior punitive damages award for the same conduct affects the defendant's financial condition and ordinarily is reflected in evidence of the defendant's financial condition, such an award also is directly relevant to the amount necessary to punish and deter and therefore merits separate consideration. (*Stevens v. Owens-Corning Fiberglas Corp.*, *supra*, at pp. 1665-1666.) Evidence of a prior punitive damages award must be presented to the jury in the first instance. (*Id.* at pp. 1661-1662.) No evidence of a prior punitive damages award was presented in this case.

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[25] Philip Morris does not argue that we should consider potential future punitive damages awards, so we need not decide whether it would be appropriate to do so.

7. *The Refusal of Philip Morris's Proposed Instructions on Punitive Damages Was Proper*

a. *Due Process Limitations*

Philip Morris contends in light of the due process limitations on punitive damages, the refusal of three of its proposed instructions on punitive damages was error. Proposed instruction V-1 stated, "You are not to impose punishment for harms suffered by persons other than the plaintiff before you." Proposed instruction V-2 stated, "You are not to punish defendant for the impact of its conduct on individuals in other states or countries." Proposed instruction AA stated, "You must consider Philip Morris' financial condition and ability to pay a punitive damages award as part of the process of arriving at an appropriate punishment. But you may not punish a defendant simply because it is large." The first of these proposed instructions bears a handwritten "Denied," the second bears in the same handwriting "Denied" and the judge's initials, and the third bears no indication of any ruling. Bullock acknowledges that the court refused the instructions. We conclude that there was no error.

A party is entitled to an instruction on each theory of the case supported by the pleadings and substantial evidence for which the party requests a proper instruction, as stated *ante*. (*Soule*, *supra*, 8 Cal.4th at p. 572; *Munoz v. City of Union City*, *supra*, 120 Cal.App.4th at pp. 1107-1108.) We conclude that proposed instructions V-1 and V-2 were incomplete and misleading and that the court properly refused them. Although the jury may not award punitive damages to punish a defendant for its conduct toward others (*State Farm*, *supra*, 538 U.S. at p. 423), the defendant's similar wrongful

conduct toward others is a proper consideration in evaluating the reprehensibility of the defendant's conduct toward the plaintiff and therefore is a proper consideration in determining the amount of punitive damages to award. (*Id*. at p. 422; *Johnson*, *supra*, 35 Cal.4th at pp. 1206-1208 & fn. 6.) The defendant's "entire course of conduct" (*Johnson*, *supra*, at p. 1206, fn. 6) includes similar misconduct outside of California. (See *id*., at pp. 1204-1205, fn. 5 [citing with approval *Bocci v. Key Pharmaceuticals, Inc.* (2003) 189 Ore.App. 349 [76 P.3d 669, 674], mod. on other grounds and adhered to as mod., 190 Ore.App. 407 [79 P.3d 908] for the proposition that "the defendant's nationwide misconduct in disseminating false and misleading information, similar to its conduct that injured the plaintiff, was properly considered"].) "To consider the defendant's entire course of conduct in setting or reviewing a punitive damages award . . . is not to punish the defendant for its conduct toward others." (*Johnson*, *supra*, at p. 1206, fn. 6.) Absent this qualification, proposed instructions V-1 and V-2 were incomplete and misleading.

As for proposed instruction AA, the court properly instructed the jury to consider "The amount of the punitive damages which will have a deterrent effect on the defendant in the light of the defendant's financial condition." (*Simon*, *supra*, 35 Cal.4th at pp. 1184-1185.) The first sentence of proposed instruction AA ("You must consider Philip Morris' financial condition and ability to pay a punitive damages award as part of the process of arriving at an appropriate punishment.") was substantially similar to the instruction given, so the refusal to give that part of the proposed instruction was not error. In our view, the second sentence of the proposed instruction ("But you may not

punish a defendant simply because it is large.") also was encompassed in the same instruction given together with the instruction given that "punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff." Those instructions together adequately informed the jury that the amount of punitive damages cannot be based on the defendant's size alone, while properly stating that the defendant's financial condition is an appropriate consideration. The proposed instruction was properly rejected.

b. *Preemption*

Philip Morris proposed additional instructions on preemption in the punitive damages phase of trial. Proposed instruction II stated, "You may not impose punitive damages based on defendant's advertising and promotion of cigarettes after July 1, 1969 depicting cigarettes in a positive light, including depiction of smoking as enjoyable, where such advertising or promotion does not contain a specific affirmative misrepresentation of fact." Proposed instruction JJ stated, "You may not impose punitive damages based on any finding that defendant attempted to direct advertising or promotion of cigarettes to underage or youth smokers." The court refused both proposed instructions on the record. Philip Morris contends the refusal of the two instructions was error.

The court instructed the jury in the first phase of trial that Philip Morris's liability for fraudulent concealment and failure to warn of a design defect was limited to acts and omissions prior to July 1, 1969, and that Philip Morris could be held liable for misrepresentation or false promise only if it misrepresented a material fact or actionable

opinion or made a promise that it had no intention to perform, as stated *ante*. The court also instructed the jury in the second phase not to award punitive damages based on a failure to warn about the health risks of cigarettes. We conclude that those instructions adequately encompassed the rule of law stated in proposed instruction II, that liability for punitive damages could not be based on advertising or promotion after July 1, 1969, absent an affirmative misrepresentation of fact. We therefore conclude that the refusal of the proposed instruction was not error.

Proposed instruction JJ was based on *Reilly*, *supra*, 533 U.S. 525 and *Cipollone*, *supra*, 505 U.S. 504. *Reilly* held that the FCLAA preempted state law cigarette advertising regulations motivated by concerns about the health hazards of smoking, including regulations designed to restrict smoking by youths. (*Reilly*, *supra*, 533 U.S. at pp. 548-551.) *Reilly* involved positive enactments--regulations--rather than common law claims for damages and did not discuss preemption in the context of common law claims. *Cipollone* involved common law claims. A majority of the justices in *Cipollone* concluded that a common law claim is a "requirement or prohibition . . . imposed under State law" within the meaning of the preemption provision (15 U.S.C. § 1334(b)). (*Cipollone*, *supra*, 505 U.S. at pp. 521-523 (plur. opn. of Stevens, J.); *id*. at pp. 548-549 (conc. & dis. opn. of Scalia, J.).) A plurality of the justices in *Cipollone* held that section 1334(b) preempted state law claims based on failure to warn of the health hazards of smoking to the extent the claims required a showing that the defendants' advertising or promotions after 1969 "should have included additional, or more clearly stated, warnings." (*Cipollone*, *supra*, 505 U.S. at p. 524 (plur. opn. of

Stevens, J.).) The plurality also held that section 1334(b) preempted state law claims for fraudulent misrepresentation based on statements in advertising and promotional materials that minimized the health hazards of smoking and neutralized the required warnings. (*Cipollone, supra*, 505 U.S. at pp. 527-528 (plur. opn. of Stevens, J.).) The plurality concluded that both types of claims were "based on smoking and health" within the meaning of section 1334(b). (*Cipollone, supra*, 505 U.S. at pp. 524, 527-528 (plur. opn. of Stevens, J.).)

Proposed instruction JJ incorrectly stated the law because it precluded liability for punitive damages based on youth targeting activities that occurred *before or* after July 1, 1969, the effective date of the amended preemption provision (15 U.S.C. § 1334(b)). Section 1334(b) preempts claims based on advertising or promotional activities only to the extent that the claims are based on activities that occurred after July 1, 1969. (*Hearn v. R.J. Reynolds Tobacco Co.* (D.Ariz. 2003) 279 F.Supp.2d 1096, 1110-1111; *Cruz Vargas v. R.J. Reynolds Tobacco Co.* (D.P.R. 2002) 218 F.Supp.2d 109, 117, affd. (1st Cir. 2003) 348 F.3d 271; see *Cipollone, supra*, 505 U.S. at p. 524 (plur. opn. of Stevens, J.) [held that failure to warn claims were preempted only to the extent the claims arose from "post-1969 advertising or promotions"].) Thus, the trial court properly refused the instruction.

Moreover, it is clear that Bullock's misrepresentation and false promise claims against Philip Morris were not "based on smoking and health" within the meaning of the preemption provision. Those claims were not based on either a positive enactment or a common law "prohibition against statements in advertising and promotional materials

that tend to minimize the health hazards associated with smoking" (*Cipollone*, *supra*, 505 U.S. at pp. 527-528 (plur. opn. of Stevens, J.).) Instead, the claims were based on false statements. The court instructed the jury that Philip Morris could be held liable for misrepresentation or false promise only if it misrepresented a material fact or actionable opinion or made a promise that it had no intention to perform. With respect to the misrepresentation and false promise claims, there was no need to instruct the jury not to award punitive damages based on youth targeting in the advertising or promotion of cigarettes because those claims were not based on youth targeting and a duty "based on smoking and health," but on a duty not to deceive. Therefore, apart from the reason already stated, the refusal of proposed instruction JJ was proper with respect to the counts for misrepresentation and false promise.

Finally, the court instructed the jury that Philip Morris's liability for fraudulent concealment and failure to warn of a design defect was limited to acts and omissions prior to July 1, 1969, so there was no need to instruct that those claims could not be based on advertising or promotional activities after that date that targeted youths. Again, Philip Morris has not shown error.

8. *The Punitive Damages Award Bears a Reasonable Relationship to Compensatory Damages*

a. *Degree of Reprehensibility*

There was more than sufficient evidence to demonstrate that Philip Morris knew that the consensus among scientific and medical professionals was that cigarette smoking caused lung cancer and other serious diseases and that smokers suffered lung

cancer and other diseases at rates far greater than nonsmokers. Philip Morris knew that cigarettes contained many carcinogens. Despite that knowledge, Philip Morris and other cigarette manufacturers for many years conducted a public campaign designed to obscure and deny the truth. Philip Morris falsely asserted that there was no consensus in the scientific and medical community concerning the adverse health effects of smoking and that the relationship between smoking and health was unknown. Philip Morris assured its customers that if it learned that any cigarette ingredient caused cancer it would remove that ingredient, and falsely stated that it did not believe that smoking was hazardous. Philip Morris repeatedly asserted that more research was needed and that it was diligently pursuing that research, but avoided sponsoring any research that would reveal the hazards of smoking and went to great lengths to avoid disclosing its own toxicological data. Rather than remove nicotine from its cigarettes as it had the ability to do, Philip Morris added urea to its cigarettes to enhance the effect of nicotine so as to further exploit its customers' addiction and gain new customers. Its customers included individuals such as Bullock who first began to smoke as youths before July 1, 1969, attracted in part by an aggressive advertising campaign in television and in print and other media that was particularly appealing to youths.

The harm caused by Philip Morris's misconduct was physical rather than economic because the evidence tends to show that Bullock suffered a debilitating and terminal illness, lung cancer, as a result of Philip Morris's fraudulent scheme. The first reprehensibility factor listed by the court in *State Farm*, *supra*, 538 U.S. at page 419, "whether: the harm caused was physical as opposed to economic," therefore weighs in

favor of high reprehensibility. The second factor, "whether . . . the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others" (*ibid*.), also weighs in favor of high reprehensibility because the evidence tends to show that Philip Morris knew that many smokers would suffer death or serious injury as a result of smoking but, for pecuniary gain, sought to convince its customers and the public in general that the health concerns were unfounded.

The third reprehensibility factor, "whether . . . the target of the conduct had financial vulnerability" (*State Farm*, *supra*, 538 U.S. at p. 419), ordinarily is relevant only if financial vulnerability made the target more vulnerable to the defendant's misconduct or exacerbated the harm, such as where the harm caused by the defendant's conduct was economic. (See *Gore*, *supra*, 517 U.S. at p. 576 ["infliction of economic injury, especially when done intentionally through affirmative acts of misconduct [citation], or when the target is financially vulnerable, can warrant a substantial penalty"], cited in *State Farm*, *supra*, at p. 419.) The United States Supreme Court has reviewed the amount of punitive damages under the due process clause only in cases involving economic harm. (*State Farm*, *supra*, at p. 419 [insureds' bad faith action against an insurer]; *Gore*, *supra*, at p. 576 [purchaser's fraud action against a car dealer]; *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 462 [113 S.Ct. 2711] (plur. opn. of Stevens, J.) [slander of title action]; *Pacific Mutual Life Insurance Co. v. Haslip* (1991) 499 U.S. 1, 18-24 [111 S.Ct. 1032] [insureds' fraud action against an insurer]; see also *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, *supra*, 532 U.S. at p. 441 [unfair competition].) We have no trouble concluding,

however, that in a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability. (Cf. *Gore*, *supra*, 517 U.S. at p. 576.) Because the evidence shows that nicotine is an addictive drug that makes smokers highly vulnerable to rationalization of their injurious behavior, and that Philip Morris for many years and through extensive efforts deliberately exploited that vulnerability through a deceptive, broad-based publicity campaign, manipulation of the narcotic effect of nicotine in cigarettes, and other means, we conclude that this factor weighs in favor of high reprehensibility.

The fourth factor is "whether . . . the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." (*State Farm*, *supra*, 538 U.S. at p. 419) The evidence supports the conclusion that Philip Morris's efforts to cast doubt on information concerning the adverse health effects of smoking involved repeated intentional and deliberate actions through various means and for several decades, and that Philip Morris intended to deceive smokers and the public in general. This factor therefore also weighs in favor of high reprehensibility.

Finally, Bullock was only one of many smokers affected by Philip Morris's nationwide efforts to disseminate misleading information and create a false controversy concerning the adverse health effects of smoking. The evidence shows that Philip Morris earned over $5.2 billion in operating income from domestic sales of tobacco

products in 2001 alone, and earned approximately $100 billion cumulatively, in 2001 dollars, in operating income from 1967 to 2001. Philip Morris acknowledged that it earned "billions of dollars in profits." Those large figures presumably resulted in no small part from Philip Morris's misconduct. We therefore conclude that the vast "scale and profitability" of the course of misconduct (*Johnson*, *supra*, 35 Cal.4th at p. 1206) weighs in favor of high reprehensibility.

Because each of the four factors weighs in favor of high reprehensibility *and* in light of the vast "scale and profitability" of its actions, we conclude that Philip Morris's misconduct was extremely reprehensible.[26]

b. *Ratio of Punitive Damages to Actual Harm Suffered by Bullock*

The ratio of punitive damages to compensatory damages here is approximately 33 to 1. The $850,000 compensatory damages award includes $100,000 for pain and suffering, but the latter figure probably does not contain a substantial punitive element.[27] Although this ratio significantly exceeds single digits, we conclude that the

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[26] Another court considering essentially the same course of misconduct is in accord. (*Boeken v. Philip Morris, Inc.*, *supra*, 127 Cal.App.4th at pp. 1694, 1700 [stated that Philip Morris's conduct was " 'extremely reprehensible' " and " 'exceptionally extreme' "].)

[27] *State Farm*, *supra*, 538 U.S. at page 426 noted that the plaintiffs suffered purely economic injuries, stated that much of their emotional distress was caused by "outrage and humiliation" at their mistreatment and that "it is a major role of punitive damages to condemn such conduct," and concluded that the damages awarded for emotional distress were duplicated in the punitive damages award. Here, in contrast, Bullock suffered physical injuries that resulted in emotional distress apart from any outrage or humiliation reflected in the punitive damages award.

extreme reprehensibility of Philip Morris's misconduct, including the scale and profitability of the course of misconduct, justifies the greater ratio. (See *State Farm, supra*, 438 U.S. at p. 419 [stating that the degree of reprehensibility of the defendant's conduct is "the most important indicium of the reasonableness of a punitive damages award"]; *Simon, supra*, 35 Cal.4th at p. 1182 [stating that extreme reprehensibility can justify a ratio significantly greater than single digits].) We do not mean to suggest that 33 to 1 would be an appropriate ratio in another case involving extreme reprehensibility or to establish any kind of presumption, but merely conclude, based on the facts in this case, that the ratio of punitive damages awarded by the trial court to compensatory damages is not excessive. " '[T]he judicial function is to police a range, not a point.' "[28] (*Simon, supra*, 35 Cal.4th at p. 1183, quoting *Mathias v. Accor Economy Lodging, Inc.* (7th Cir. 2003) 347 F.3d 672, 678.)

Boeken v. Philip Morris, Inc., supra, 127 Cal.App.4th 1640 involved the same defendant, same causes of action, same counsel, and much of the same conduct as this case. As in this case, the plaintiff in *Boeken* began smoking in the 1950's, was diagnosed with lung cancer over 40 years later, and died after the conclusion of trial. (*Id*. at p. 1649 & fn. 1.) The jury awarded Boeken $5,539,127 in compensatory

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[28] Contrary to our dissenting colleague, we do not find the compensatory damages award so "substantial" (*State Farm, supra*, 438 U.S. at p. 425) as to render any punitive damages award greater than a single-digit multiplier excessive, particularly in light of Philip Morris's wealth (see *Simon, supra*, 35 Cal.4th at p. 1189 [considered the substantiality of the compensatory damages award "accounting for San Paolo Holding's wealth"]).

damages and $3 billion in punitive damages. (*Id*. at p. 1650.) The trial court conditionally granted Philip Morris's new trial motion unless Boeken agreed to reduce the punitive damages award to $100 million. Boeken consented to the reduction. (*Ibid*.) On appeal, Division Four of the Second District Court of Appeal held that the $100 million punitive damages award was excessive. The court concluded that in light of the prohibitions in the MSA, and a $9 million punitive damages award in another case, no more than a single-digit multiplier was justified, and reduced the award to $50 million, a ratio of 9 to 1. (*Id*. at p. 1703.)

Boeken stated that *State Farm*, *supra*, 538 U.S. 408 shed new light on the principles governing review of a punitive damages award under the due process clause, and stated that *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, *supra*, 109 Cal.App.4th 1020 was a California case "applying *State Farm*'s principles." (*Boeken v. Philip Morris, Inc*., *supra*, 127 Cal.App.4th at pp. 1700-1701.) *Boeken* cited the holding in *Diamond Woodworks*, *supra*, at page 1057 that in an unexceptional fraud case where the conduct was not exceptionally extreme, the constitutional limit was a ratio of 4 to 1. (*Boeken*, *supra*, at p. 1701.) *Boeken* also cited the holding in *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 26, limiting the ratio to 9 to 1 in a case where the damages suffered by the plaintiff were small compared to the seriousness of the defendant's conduct but the plaintiff suffered no physical injury or death. (*Boeken*, *supra*, at p. 1701.) Although *Boeken* noted that some of the circumstances in those two cases were distinguishable from the circumstances in *Boeken*, the court expressed no disagreement with either opinion and appeared to cite both opinions with approval. (*Ibid*.) The *Boeken* court did

not have the benefit of *Simon, supra*, 35 Cal.4th at pages 1182-1183, decided later, in which the California Supreme Court disapproved the rule from *Diamond Woodworks* and clearly stated that "extreme reprehensibility" is a special justification that can overcome the presumption against an award exceeding a single-digit ratio. Because we conclude that the extreme reprehensibility of Philip Morris's conduct is more than sufficient to overcome that presumption and because we disagree with *Boeken* as to the significance of the MSA, as discussed *post*, we decline to apply the limitations apparently recognized in *Boeken*.

c. *Civil Penalties in Comparable Cases*

We are aware of no statutory penalty for misconduct that is comparable in a meaningful way to the misconduct at issue here. (*Boeken v. Philip Morris*, *supra*, 127 Cal.App.4th at p. 1700.) The third guidepost therefore plays no significant role in our analysis. (See *Simon*, *supra*, 35 Cal.4th at pp. 1183-1184.)

d. *Philip Morris's Financial Condition*

California's interests in punishment and deterrence are very strong in light of the extreme reprehensibility of Philip Morris's misconduct. Moreover, Philip Morris's persistent efforts to mislead the public about the health hazards of smoking despite its understanding that smoking was hazardous show that "strong medicine is required to cure the defendant's disrespect for the law." (*Gore*, *supra*, 517 U.S. at pp. 576-577.) Although there was some evidence of Philip Morris's revenues and operating income, discussed *ante*, the best indication of its financial condition and ability to pay is the admission by its counsel that Philip Morris "has billions of dollars in profits; and there's

no debate, no dispute, that Philip Morris could afford to pay a billion dollars or $6.666 billion in this case. There's no question about that." Philip Morris's considerable wealth and ability to pay many times the amount awarded supports our conclusion that a $28 million award is not excessive.

e. *Philip Morris's Obligations Under the MSA*

Philip Morris contends its obligations under the MSA reduce the need for punishment and deterrence. Philip Morris contends its substantial and continuing payment obligations under the agreement and the MSA's prohibition of some of the same types of conduct on which its liability in this case is based are deterrent measures, and argues that "there is little, if anything, left to deter." We disagree.

Bullock and Philip Morris stipulated that the MSA "provides payments to the states for reimbursement of funds spent on health care costs of individuals, among other things" and that the MSA "does not provide any payments to individuals and does not provide any payments for punitive damages." The substantial payments under the MSA reflect the substantial damages to the states allegedly caused by the cigarette manufacturers, and are by no means a measure of punishment. Punitive damages serve different purposes than compensatory damages (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1046; *Merlo v. Standard Life & Acc. Ins. Co.* (1976) 59 Cal.App.3d 5, 20) and are imposed in addition to compensatory damages. (Civ. Code, § 3294, subd. (a) ["the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant".]) Moreover, we conclude that a defendant's payment of compensatory damages, or

payment in settlement of claims for compensatory damages, does not serve the deterrent function of punitive damages. Punitive damages are intended to punish the defendant and to deter the defendant and others from similar misconduct. (*Ferguson*, *supra*, at p. 1046.) Punitive damages serve that purpose by increasing the potential cost of misconduct to the defendant and others. Where potential liability for compensatory damages, discounted by the likelihood of being sued and held liable, may be an insufficient deterrent for profitable misconduct, potential liability for compensatory and punitive damages provides a greater deterrent. (See Owen, *A Punitive Damages Overview: Functions, Problems and Reform* (1994) Vill. L.Rev. 363, 377-378.) Compensatory damages, or a settlement of claims for compensatory damages, do not provide the same measure of deterrence as punitive damages. As for Philip Morris's agreement not to engage in certain conduct, such an agreement is neither punishment nor an effective deterrent to others who would engage in similar misconduct.

For these reasons, we conclude that the MSA does not constitute punishment, does not provide the measure of deterrence that punitive damages provide, and does not reduce the need for punishment and deterrence in this case. We decline to follow *Boeken v. Philip Morris, Inc*., *supra*, 127 Cal.App.4th 1640 on this point. *Boeken* concluded that a $9 million punitive damages award against Philip Morris in another action based on similar facts and the fact that the MSA prohibits Philip Morris from misrepresenting the health risks of smoking and targeting underage smokers reduced the need for punishment and deterrence. (*Id*. at pp. 1701-1703.) *Boeken* stated that Philip Morris failed to show that the MSA was punitive rather than compensatory, and stated

that because Philip Morris could simply raise cigarette prices to absorb the cost of payments required under the MSA, "there may be no punitive or deterrent effect as a result of the payments." (*Id*. at p. 1703.) *Boeken* nevertheless concluded that the MSA's prohibition of certain conduct provided an "incentive" not to engage in that conduct. (*Ibid*.) *Boeken* held that in light of the other punitive damages award and the "incentives" provided by the MSA, the punitive damages award must be limited to a single-digit multiplier. (*Ibid*.)

Philip Morris in this case, however, presented no evidence to the jury of any other punitive damages award and does not argue on appeal that the award should be reduced in light of another award, thus *Boeken v. Philip Morris, Inc*., *supra*, 127 Cal.App.4th 1640 is distinguishable to the extent the *Boeken* court relied on another punitive damages award. With respect to the MSA, we conclude that Philip Morris's agreement not to engage in certain conduct is neither punishment nor an effective deterrent and does not reduce the need for punishment and deterrence, as we have stated.

f. *Conclusion*

In summary, we conclude that Philip Morris's conduct was extremely reprehensible, that the approximately 33-to-1 ratio of punitive damages to compensatory damages is not constitutionally excessive in light of the extreme reprehensibility of the misconduct, including the vast "scale and profitability" of the course of misconduct, and that those considerations together with Philip Morris's financial condition justify the

$28 million punitive damages award for purposes of the due process clause. We therefore reject Philip Morris's contention that the award is constitutionally excessive.

9. *Bullock Has Shown No Error in the Remittitur*

Bullock contends the punitive damages award by the jury followed a fair trial, was presumptively correct, and there was no compelling reason to reduce the award by remittitur. Code of Civil Procedure section 662.5 authorized the court upon finding that the punitive damages award was excessive to independently determine the amount of punitive damages for purposes of remittitur.[29] (*Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal.3d at p. 933.) In light of that authority, there is no heightened scrutiny of the court's order and no presumption in favor of the jury verdict. Rather, the presumption in favor of the verdict that otherwise would apply is replaced by a presumption in favor of the remittitur order. (*Id*. at p. 932.) We therefore reject the contention that the reasons for the remittitur were not sufficiently compelling.

We must affirm the punitive damages award against Bullock's appeal if the court stated adequate reasons for the decision and substantial evidence supports the decision. (*Lane v. Hughes Aircraft Co.*, *supra*, 22 Cal.4th at p. 412; *Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal.3d at pp. 931-933 & fn. 18.) Bullock does not challenge the court's statement of reasons, does not contend there is no substantial evidence to support the ruling, and has not shown error.

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[29] Bullock does not contend there is no substantial evidence to support the trial court's finding that the $28 billion punitive damages award by the jury was excessive.

10. *The Attorney Fee Award Was Error*

The court awarded Philip Morris $45,809.48 in attorney fees against Piuze as a sanction under Code of Civil Procedure, section 128.6. Philip Morris concedes that section 128.6 was not effective at the time of the order awarding fees and never became effective, that the court had no authority to award fees, and that the order awarding fees should be reversed.[30] We agree and reverse the order.

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[30] A court has no inherent authority to award attorney fees as a sanction. (*Bauguess v. Paine* (1978) 22 Cal.3d 626, 638-639.)

DISPOSITION

The judgment is affirmed, and the sanctions order is reversed. Bullock and Piuze are entitled to recover their costs on appeal.

CERTIFIED FOR PUBLICATION

CROSKEY, J.

I CONCUR:

KLEIN, P. J.

KITCHING, J., Concurring and Dissenting.

The United States Supreme Court in *State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408 (*State Farm*), declined to impose a bright-line ratio between compensatory and punitive damages. However, *State Farm* instructs that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." (*Id*. at p. 425.) The majority in this case has affirmed a ratio of 33 to 1. I dissent from that portion of the majority opinion.

I agree that the conduct of Phillip Morris was reprehensible and supports an award of punitive damages. However, under *State Farm* and *Simon v. San Paolo U.S. Holding Co., Inc*. (2005) 35 Cal.4th 1159 (*Simon*), I find that the punitive damages award in this case constitutes a grossly excessive punishment. It therefore violates the Due Process Clause of Fourteenth Amendment of the United States Constitution.
I otherwise concur with the majority opinion affirming the award of compensatory damages in favor of Bullock. I also concur with the majority opinion reversing the award of sanctions against counsel for Bullock.

Under the de novo standard of review which we must use, I find that because Bullock received substantial compensatory damages, the ratio of punitive damages to compensatory damages may be no more than 9 to 1. In addition, I agree with the holding and analysis of *Boeken v. Philip Morris, Inc*. (2005) 127 Cal.App.4th 1640 (review denied Aug. 10, 2005), *certiorari denied*, (2006) __ U.S. __ [126 S.Ct. 1567]

(*Boeken*), which limited punitive damages to a single digit ratio of approximately 9 to 1. The *Boeken* case involved the same defendant, Philip Morris, and the same reprehensible conduct presented in this case.

In *State Farm*, the Supreme Court applied three guideposts set forth in *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 (*BMW*), for determining whether an award of punitive damages violates the constitutional right to due process: "(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 damages 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*, *supra*, 538 U.S. at p. 418.)

As to the first guidepost, I agree with the majority opinion that the conduct of Philip Morris was sufficiently reprehensible to support an award of punitive damages. As to the third guidepost, I agree with the majority opinion that "[w]e are aware of no statutory penalty for misconduct that is comparable in a meaningful way to the misconduct at issue here." The third guidepost, therefore, plays no role in my conclusion that the punitive damage award of $28 million in this case violates due process.

The second *State Farm* guidepost is the ratio of punitive damages to compensatory damages. As to this guidepost, the court explained that "courts *must* ensure that the measure of punishment is *both reasonable and proportionate to the*

amount of harm to the plaintiff and to the general damages recovered." (*State Farm, supra*, 538 U.S. at p. 426; italics added.)

The *State Farm* court further explained that the amount of compensatory damages awarded to the plaintiff is an important factor to consider. The court stated that "because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' [Citation.]" (*State Farm, supra*, 538 U.S. at p. 425.)

The *State Farm* court cautioned that "[t]he converse is also true, however. When compensatory damages are *substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee*. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm, supra*, 538 U.S. at p. 425; italics added.)

Likewise, in *Simon*, *supra*, 35 Cal.4th 1159, in its discussion of the ratio guidepost, the California Supreme Court explained: "Multipliers *less* than nine or 10 are not, however, presumptively *valid* under *State Farm*. *Especially when the compensatory damages are substantial or already contain a punitive element, lesser*

ratios 'can reach the outermost limit of the due process guarantee.' " (*Id*. at p. 1182, original italics & italics added.)[1]

In this case, the jury awarded Bullock $850,000 in compensatory damages, including $100,000 in non-economic damages for pain and suffering. This was a substantial compensatory award. Both *State Farm* and *Simon* indicate that in cases of substantial compensatory awards, a punitive damage award in excess of a 9 to 1 ratio of punitive damages to compensatory damages may not comport with the Due Process Clause of the Fourteenth Amendment.

Because Bullock received substantial compensation, pursuant to *State Farm* and *Simon*, the 33 to 1 ratio of punitive to compensatory damages violated the due process rights of Philip Morris. In the words of the *State Farm* court, this measure of punishment ($28 million) was not "*both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered*." (*State Farm*, 538 U.S. at p. 426, italics added.)

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[1] In its discussion of the role of a defendant's wealth in the calculation of punitive damages, the *Simon* court further explained: "In some cases, the defendant's financial condition may combine with high reprehensibility and *a low compensatory award* to justify an extraordinary ratio between compensatory and punitive damages. [Citation.] In other cases, especially those involving *substantial compensatory awards*, the level of deterrence may be limited, after *State Farm*, to that provided 'as a natural result of imposing damages over and above traditional compensatory damages, not from the imposition of sanctions in an individual case that are actually disabling to the defendant' [citation]; 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*, *supra*, 35 Cal.4th at pp. 1186-1187; italics added.)

The Court of Appeal in *Boeken*, interpreted *State Farm* to reach the same conclusion on almost identical facts. *Boeken* found that the plaintiff was entitled to no more than a single digit ratio of punitive damages in comparison to compensatory damages. (*Boeken, supra,* 127 Cal.App.4th at p. 1703.) As the majority opinion in this case explains, the *Boeken* case involved the same defendant, the same causes of action, the same counsel, and much of the same conduct.

In *Boeken*, the jury awarded the plaintiff approximately $5.5 million in compensatory damages and $3 billion in punitive damages. (*Boeken, supra,* 127 Cal.App.4th at p. 1650.) The trial court reduced the punitive damages award to $100 million. The Court of Appeal further reduced the punitive damage award to $50 million, which constituted a ratio of a little over 9 to 1 in relation to the award of compensatory damages. (*Ibid*.)

Like the present case, the Court of Appeal in *Boeken*, applying the first guideline set forth in *State Farm*, concluded that the conduct of Philip Morris was extremely reprehensible. (*Boeken, supra,* 127 Cal.App.4th at p. 1694.)

As to the second *State Farm* guideline, the *Boeken* court recognized that in *State Farm*, the United States Supreme Court suggested that in some cases a punitive damages award could exceed the 9 to 1 ratio when compared to compensatory damages, for instance, " 'where "a particularly egregious act has resulted in only a small amount of economic damages." ' " (*Boeken, supra*, 127 Cal.App.4th at p. 1696, quoting, *State Farm, supra*, 538 U.S. at p. 425.) The *Boeken* court also recognized that the *State Farm* court cautioned that when compensatory damages are substantial, due process may limit

a punitive damage award to a lesser ratio, which may not, in some cases, exceed an amount equal to the compensatory damages. (*Boeken, supra,* 127 Cal.App.4th at p. 1696.)

Balancing the foregoing due process parameters, the *Boeken* court rejected the plaintiff's assertion that *State Farm* authorized an award in excess of the 9 to 1 ratio because the conduct of Philip Morris had been extremely reprehensible. The *Boeken* court also rejected the assertion by Philip Morris that *State Farm* required an award of punitive damages no greater than the amount of compensatory damages. (*Boeken, supra,* 127 Cal.App.4th at pp. 1696-1697.)

Instead, the *Boeken* court balanced a number of competing concerns to discern the maximum amount of punitive damages which could be awarded without violating the due process rights of Philip Morris, and which would promote the state's interests in punishment and deterrence. (*Boeken, supra,* 127 Cal.App.4th at p. 1700 ["The ultimate question is how much is necessary to deter and punish the activity."].) The court reiterated that the conduct of Philip Morris was extremely reprehensible. (*Ibid*. ["We have found Philip Morris's 40 years of fraud and its continuing conscious disregard for the safety and lives of its consumers of its so-called low-tar Marlboros to be 'exceptionally extreme.' " (Italics omitted.)].) The *Boeken* court also considered the wealth of Philip Morris, which the trial court in that case found to be $30 to $35 billion in net worth. (*Id*. at p. 1698.)

In addition, the *Boeken* court also explained that prior punitive damage awards may be a relevant consideration: "We agree that punitive damages previously imposed

against it for the same conduct in other cases, as well as possible future awards, are relevant in determining the amount of punitive damages required to sufficiently punish and deter, so long as they are shown to have identical issues." (*Boeken, supra,* 127 Cal.App.4th at p. 1701.) The *Boeken* court noted that in *Henley v. Philip Morris, Inc*., No. A086991 (previously published at 114 Cal.App.4th 1429, review granted Apr. 28, 2004, review dismissed Sept. 15, 2004, S123023), the Court of Appeal awarded the plaintiff $9 million in punitive damages. (*Boeken, supra*, 127 Cal.App.4th at p. 1702.)[2]

After examining whether the 1998 Master Settlement Agreement (MSA) sufficiently punished and deterred Philip Morris, the *Boeken* court rejected the argument that the purpose of the MSA was punitive. (*Boeken, supra,* 127 Cal.App.4th at pp. 1702-1703.) The court explained that the purpose of the MSA was for states to recover the costs of providing health care to persons with smoking-related illnesses, and to fund measures aimed at reducing underage smoking. (*Id*. at p. 1702.)

As to the state's interests in deterrence, the *Boeken* court explained on one hand that the MSA gave Philip Morris "an incentive not to misrepresent the health risks of its products, and not to target underage smokers with its misrepresentations." (*Boeken, supra,* 127 Cal.App.4th at p. 1703.) The *Boeken* court also noted on the other hand that the MSA did "not deter Philip Morris from adding flavorings and chemicals that make

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[2] We note that after the *Boeken* case was filed, the Oregon Supreme Court affirmed a punitive damages award of $79.5 million in *Williams v. Philip Morris, Inc.* (2006) 340 Or. 35 [127 P.3d 1165; 2006 WL 242456].

its product more addictive and easier to take into the lungs. [The MSA] does nothing to deter Philip Morris from marketing defective 'light' cigarettes, knowing that they are more dangerous than the ordinary consumer expects." (*Ibid*.)

The *Boeken* court concluded: "Given these other incentives and the final punitive damage award in *Henley*, we conclude that more than a single digit multiplier is not justified. But the extreme reprehensibility of increasing addictiveness by manipulating additives, gaining smokers by fraud, and marketing a product that is more dangerous than ordinary consumers expect, knowing that serious physical injury and death will result in many smokers, does justify a ratio of at least 9 to 1." (*Boeken*, *supra*, 127 Cal.App.4th at p. 1703.)

The majority opinion in this case distinguishes *Boeken*, concluding that the *Boeken* court did not have the benefit of the *Simon* case where the California Supreme Court explained that extremely reprehensible conduct may constitute a special justification for awarding punitive damages in excess of the 9 to 1 ratio. (*Simon*, *supra*, 35 Cal.4th at p. 1182.)[3]

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[3] In *Simon*, *supra*, 35 Cal.4th at page 1182, the court stated: "We understand the court's statement in *State Farm* that 'few awards' significantly exceeding a single-digit ratio will satisfy due process to establish a type of presumption: ratios between the punitive damages award and the plaintiff's actual or potential compensatory damages significantly greater than 9 or 10 to 1 are suspect and, *absent special justification (by, for example, extreme reprehensibility* or unusually small, hard-to-detect or hard-to-measure compensatory damages), cannot survive appellate scrutiny under the due process clause." (Italics added.)

I conclude that the *Simon* case did not alter the due process parameters set forth in *State Farm* for purposes of determining whether an award of punitive damages comports with due process.

Like the United States Supreme Court in *State Farm*, the California Supreme Court in *Simon* explained that reprehensibility is " 'the most important indicium of the reasonableness of a punitive damages award' " (*Simon*, *supra*, 35 Cal.4th at p. 1180), but also acknowledged that other factors, like the amount of compensatory damages, play a critical role in the analysis of whether an award of punitive damages comports with due process. (*Id*. at pp. 1180-1183.) For example, in its discussion of the ratio guidepost, immediately after stating that extreme reprehensibility may justify an award of punitive damages in excess of the 9 to 1 ratio, the *Simon* court cautioned: "Multipliers *less* than nine or 10 to one are not, however, presumptively *valid* under *State Farm*. Especially when the *compensatory damages are substantial or already contain a punitive element, lesser ratios 'can reach the outermost limit of the due process guarantee*.' " (*Simon*, *supra*, 35 Cal.4th at p. 1182; original italics & italics added.)[4] Thus, like *State Farm*, the *Simon* case instructs that a critical factor in determining whether an award of punitive damages violates due process is the amount of the compensatory award.

Pursuant to *State Farm*, *Simon*, and *Boeken*, Bullock was entitled to no more than a single-digit ratio of punitive damages to compensatory damages. However, because

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[4] See also footnote 1, above.

of the reprehensible conduct of Philip Morris coupled with its great wealth, I conclude, like the *Boeken* court, that Bullock was entitled to an award of punitive damages at the highest end of the single-digit ratio, 9 to 1. (*Boeken*, *supra*, 127 Cal.App.4th at p. 1703.)

The $28 million punitive damages award exceeded, to a significant degree, the single-digit ratio in comparison to the compensatory damages, and is in violation of due process. I therefore respectfully dissent. I would reverse the trial court order and judgment to the extent that it approved a punitive damage award in excess of the 9 to 1 ratio when compared to compensatory damages. On remand, I would instruct the trial court to enter a new and different judgment permitting Bullock to recover punitive damages in an amount no greater than a 9 to 1 ratio when compared to compensatory damages.

KITCHING, J.