

No. B222596

IN THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION THREE

Philip Morris USA, Inc.,
Defendant and Appellant,

vs.

Jodie Bullock,
Plaintiff and Respondent.

Appeal from the Superior Court of Los Angeles County
Case No. BC249171
The Honorable Susan Bryant-Deason

APPELLANT'S BRIEF

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CERTIFICATE OF INTERESTED PERSONS

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INTRODUCTION

This is an individual smoker’s personal injury case in which the jury awarded \$13.8 million in punitive damages. The jury’s award—more than 16 times the compensatory damages—should not be permitted to stand. The California Supreme Court has stated that a “presumption” of unconstitutionality attaches to any award that is more than “nine or ten” times the compensatory damages. *Simon v. San Paolo U.S. Holding Co.* (2005) 35 Cal. 4th 1159, 1182. That presumption cannot be overcome here. The conduct alleged to have harmed the plaintiff occurred decades ago, pursuant to policies designed by employees who are no longer associated with PM USA. There is virtually no chance that the conduct will recur: it is explicitly barred by recent pathbreaking federal legislation—which PM USA supported—giving the Food and Drug Administration extensive regulatory authority over the tobacco industry; by the California Attorney General’s 1998 settlement agreement with PM USA and the other major tobacco companies; and by PM USA’s own corporate policies. Under these circumstances, due process requires that the punitive damages award be substantially reduced.

Plaintiff's claim for punitive damages, moreover, is barred in its entirety by the 1998 Master Settlement Agreement. A punitive damages claim is a public claim, not a private one. Its purpose is to protect the public by punishing and deterring the defendant's conduct, not to compensate the plaintiff. The Master Settlement Agreement resolved a lawsuit brought by the California Attorney General (along with the Attorneys General of 45 other States) that asserted virtually all of the same factual allegations that form the basis of the punitive damages claim in this case. The Attorney General sought punitive damages to punish and deter that conduct, and it resolved that claim—on behalf of all citizens of California—when it settled the suit. Claim preclusion bars plaintiff from recovering a duplicative award of punitive damages in this action.

STATEMENT OF THE CASE

Betty Bullock sued Philip Morris USA Inc. ("PM USA") in 2001 after she was diagnosed with lung cancer. *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal. App. 4th 655, 672. She sought compensatory damages on four theories of deceit (false promise, intentional misrepresentation, negligent misrepresentation, and intentional concealment) and four theories of product liability

(design defect, failure to warn, negligent design, and negligent failure to warn). *Id.*; *see also* 2002 RT-3901.¹ She also sought punitive damages. *Id.*

1. The First Trial

The first trial took place in 2002, and proceeded in two stages. First, there was a five-week trial on liability. The scope of the evidence presented at that trial was exceptionally broad: plaintiff introduced evidence of many different kinds of misconduct that allegedly took place over the second half of the 20th century, without regard to whether that misconduct had any connection to Ms. Bullock. *Bullock*, 159 Cal. App. 4th at 667-72.²

¹ Cites to “2002 RT-___” refer to the Reporter’s Transcript of the 2002 trial, which is incorporated by reference in the Reporter’s Transcript for this appeal. *See* AA-175.

² In support of her fraudulent misrepresentation claim, for example, plaintiff offered evidence of 15 allegedly false statements by PM USA, but did not identify which statements, if any, Ms. Bullock may have heard or seen and been affected by, or even which were publicized or broadcast in media to which Ms. Bullock was exposed. Indeed, several of the statements were published solely in cities or countries thousands of miles from Ms. Bullock’s home, and several others were published as early as the 1950s, during a time when Ms. Bullock testified she did not remember hearing any statements from the tobacco industry. These statements are summarized in PM USA’s Memorandum In Support of Defendant’s Motion in Limine No. 4 to Exclude Evidence of Tobacco Industry Public Statements Not Seen or Heard by Betty Bullock, filed on May 1, 2009. AA-056-63.

At the conclusion of the first phase, the jury returned a verdict in plaintiff's favor on each of her eight causes of action and awarded \$850,000 in compensatory damages (\$100,000 of which was non-economic damages for pain and suffering). *Bullock*, 159 Cal. App. 4th at 672. The jury also found that the defendant's conduct was sufficiently malicious, fraudulent, or oppressive to support punitive liability. *Id.* The jury did not specify what actions—out of the five decades' worth of conduct that was presented at trial—formed the basis of its findings on compensatory or punitive liability. 2002 RT-3895-3911.

The case then proceeded to a two-day punitive damages phase before the same jury. After plaintiff's counsel compared PM USA to Osama Bin Laden and the Devil, and urged the jury to punish the company for all tobacco-related illnesses in California (2002 RT-4119-21, 4148, 4191-92), the jury awarded plaintiff \$28 *billion* in punitive damages. *Bullock*, 159 Cal. App. 4th at 694-95. The trial court remitted the punitive award to \$28 million but denied PM USA's other motions for judgment and a new trial. *Id.* at 672. Final judgment was entered on January 6, 2003. AA-047-55. Ms. Bullock died soon thereafter and her daughter, Jodie Bullock, was substituted as plaintiff pursuant to

Code of Civil Procedure Section 377.31. *Bullock*, 159 Cal. App. 4th at 667, 672.

2. The First Appeal

PM USA appealed. In 2006, this Court initially upheld the trial court's judgment as to both liability and damages. *Bullock v. Philip Morris USA, Inc.* (2006) 42 Cal. Rptr. 3d 140. In addressing punitive damages, the Court held that the trial court had properly refused PM USA's proposed jury instruction on punishment for harms to non-parties, which would have told the jury that it was not to "impose punishment for harms suffered by persons other than the plaintiff before you." *Id.* at 171-72. In addition, the majority found that the remitted award was not unconstitutionally excessive. *Id.* at 179. Justice Kitching dissented. She concluded that the \$28 million award "constitute[d] a grossly excessive punishment" that violated the Due Process Clause. *Id.* at 180 (Kitching, J., concurring and dissenting). PM USA petitioned the California Supreme Court for review.

The California Supreme Court granted review but stayed PM USA's appeal pending the decision of the U.S. Supreme Court in *Philip Morris USA v. Williams* (2007) 549 U.S. 346. *See Bullock*

v. Philip Morris USA, Inc. (2006) 48 Cal. Rptr. 3d 365 (granting review and deferring action pending *Williams*). In February of 2007, the U.S. Supreme Court decided *Williams*, which held that the “Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent.” 549 U.S. at 353. Shortly thereafter, the California Supreme Court transferred the case back to this Court with instructions “to vacate its decision and to reconsider the cause” in light of *Williams*. *Bullock v. Philip Morris USA, Inc.* (2007) 59 Cal. Rptr. 3d 441.

On remand, this Court vacated its 2006 opinion in light of the intervening decision in *Williams*, holding that

Williams made it clear that imposing punishment for harm caused to others, which is prohibited, is separate and distinct from determining the degree of reprehensibility by considering evidence of harm caused to others, which is permitted.

Bullock, 159 Cal. App. 4th at 694. After reciting the extensive evidence of harm to non-parties that plaintiff had presented at the first trial, the Court concluded that the refusal of PM USA’s proposed instruction was reversible error. *Id.* at 694-95.

On that basis, the Court vacated the \$28 million punitive award and ordered a new trial “limited to determining the amount of punitive damages.” *Bullock*, 159 Cal. App. 4th at 700. The Court instructed the trial court, “in the exercise of its discretion, [to] admit evidence relevant to determine the amount of punitive damages” necessary to punish and deter the “conduct that harmed Bullock.” *Id.* at 701.

Having vacated the punitive damages judgment, the Court did not have occasion to address the size of the punitive award. Instead, the Court held that “the remaining contentions by Philip Morris and Bullock concerning the amount of punitive damages are moot.” *Bullock*, 159 Cal. App. 4th at 701. The Court also made clear that if “the amount awarded by the jury in the new trial is excessive, an adequate remedy is available by way of a new trial motion and an appeal in which the appellate court must consider *de novo* the constitutional guideposts” governing the size of punitive damages awards. *Id.*

3. The Punitive-Amount Retrial

The punitive-amount retrial began on July 6, 2009. RT-6315.³ Plaintiff presented a mix of video-deposition and live-witness testimony. As in the first trial, much of plaintiff's evidence related to conduct that occurred decades ago. Moreover—despite this Court's instructions to the contrary—the trial court repeatedly denied PM USA's motions to exclude evidence that was irrelevant to the question of the amount of punitive damages necessary to punish and deter “the conduct that harmed Bullock.” 159 Cal. App. 4th at 701.⁴ For example, plaintiff put on testimony from three expert witnesses (Dr. David Burns, Dr. Michael Cummings and Dr. Marvin Goldberg) about so-called “youth marketing,” even though Ms. Bullock did not

³ The retrial, like the first trial, was riddled with serious evidentiary and instructional errors. This Court need not consider whether those errors warrant a new trial, because we do not seek a new trial on that basis; PM USA expressly waives any right to a new trial on punitive damages under California Code of Civil Procedure Section 657. We briefly discuss some of the evidence that the trial court improperly admitted, however, because in conducting its *de novo* review of the jury's punitive damages award this Court may not consider evidence that is irrelevant to that award under either California law or federal due process. *See* p. 29 *infra*.

⁴ The trial court expressly held that any evidence introduced at the first trial would be automatically admissible at the retrial. RT-659-60; *see also* RT-335.

become a regular smoker until she was an adult. RT-7512-13, 8402-28, 9349-53, 9376-84. Another witness testified extensively about the allegedly misleading marketing of “light” cigarettes, which Ms. Bullock never smoked. RT-6961-72. Other witnesses for the plaintiff testified at length about the “Frank Statement,” which ran in various newspapers in 1954, and various cigarette advertisements from the 1950s and 1960s, even though there was no evidence that Ms. Bullock ever saw any of those materials. RT-7564, 8553-64, 8574, 8577, 8618, 9388-95. Plaintiff also presented evidence about PM USA’s alleged interference with the marketing of Nicorette gum—even though Ms. Bullock actually *used* Nicorette and thus could not have been affected by the alleged misconduct. RT-8424-66.

4. PM USA’s Motion for Directed Verdict Based Upon The Attorney General’s Settlement

At the close of plaintiff’s case, PM USA moved for a directed verdict, arguing that plaintiff’s claim for punitive damages was precluded by the California Attorney General’s prior settlement of its claim for punitive damages on behalf of all State residents. AA-064-71. On June 12, 1997, the Attorney General had filed a sweeping complaint on behalf of California and its citizens,

alleging that several tobacco companies, including PM USA, had engaged in various types of misconduct since the mid-1950s in connection with the manufacture, sale, and marketing of cigarettes. *See* First Am. Cmplt., *People of the State of California v. Philip Morris* (Super. Ct. Sacramento County, No. 97AS03031) (AA-072-101). Among other remedies, the Attorney General sought punitive damages, and it specified that the purpose of that remedy would be “to punish the Tobacco Companies and to deter such conduct in the future.” AA-087-88; *see also* AA-094.

On December 9, 1998, the State settled that suit, including the claim for punitive damages, as part of a nationwide settlement that was documented in the Master Settlement Agreement (MSA). AA-102-16. The Superior Court for San Diego County then entered a Consent Decree and Final Judgment on all claims. *Id.* In its motion in this case, PM USA argued that the settlement of the Attorney General’s claim for punitive damages precluded suits by individual Californians, such as the plaintiff here, seeking the same relief for the same conduct. The trial court denied that motion. RT-13656.

5. PM USA's Defense

PM USA then presented a defense at the retrial that went well beyond the defense it had presented at the original trial regarding punitive damages. PM USA put on expert testimony from a historian and a survey expert about the considerable extent to which information about the health risks of smoking and the difficulties of quitting were available at the time when Ms. Bullock had started smoking and continued to smoke. RT-10940-69, 11125-54, 11251-99, 11317-58, 11401-15, 11882-11908.

More significantly, PM USA also presented fact testimony from two company witnesses (Richard Jupe, director of cigarette product development, and Dr. Jane Lewis, vice president of analytical sciences and technical operations) about the efforts that PM USA has made to reduce the dangers associated with smoking, including changes to the design of cigarettes and reductions in the levels of certain harmful chemicals in cigarette smoke. RT-12123-12368, 12601-12825. Neither of these witnesses had testified at the first trial.

Dr. Lewis explained that PM USA, alone among the major American tobacco companies, had supported the enactment in 2009 of the Family Smoking Prevention and Tobacco Control Act

("FSPTCA"), which for the first time gave the FDA the authority to regulate the design, packaging, and advertising of tobacco products. RT-12651-54. Under the new law, which had not been enacted at the time of the first trial in this case, Congress has ordered larger and more prominent warning labels (RT-12656-59); restricted in-store advertising (RT-12657-58); and banned the use of descriptors such as "lights" and "ultra lights" and the use of tar and nicotine yield information in advertising. *Id.* The regulations also cover cigarette testing: the FDA now has the authority to regulate various aspects of cigarette design, including nicotine yields, smoke constituents, carbon monoxide, and other chemicals. It also has the power to inspect PM USA's labs and manufacturing facilities. Additionally, tobacco manufacturers now must seek FDA approval before asserting any health claims relating to their products. RT-12660, 12794-95. The costs associated with all of these measures are paid by the tobacco industry. RT-12655-56.

Dr. Lewis also testified about the restrictions imposed by the MSA and the policy changes that PM USA implemented in response to that agreement. RT-12609, 12617-25. The MSA requires PM USA to disclose documents and research to the

public. RT-12619. All PM USA employees are now trained in compliance with the MSA. RT-12620. Since the MSA took effect, PM USA has disclosed the ingredients in its cigarettes to the Centers for Disease Control. RT-12791-94. The MSA significantly restricts the places and manner in which PM USA can advertise its products: it bans promotional gear, free samples, billboards, advertisements at sports arenas, and product placements in movies (RT-12617-19), and it sharply curtails sponsorships of sports teams and signage at retail stores. RT-12618.

The MSA also requires PM USA to make significant payments to the states. In 2007, PM USA paid \$774 million to the State of California, and it must make similar annual payments for 25 years. RT-13521.

Perhaps most significantly, Dr. Lewis further testified that, along with entering into the MSA, PM USA had changed its public positions on causation and addiction, and that the company now officially states on its website (and elsewhere) that cigarette smoking “is addictive” and that “[t]here is an overwhelming medical and scientific consensus that cigarette smoking causes cancer, heart disease, emphysema and other

serious diseases in smokers.” RT-12625-26; *see also* RT-12623-31. As Dr. Lewis explained, the company realized in 1999 that “it’s time to change. We are out of step with society. . . . We need to change that.” RT-12624-25.

6. The Jury Instructions, Verdict, and Judgment

At the close of the retrial, although the trial court instructed the jury that it could not use punitive damages to punish PM USA for the impact of its alleged misconduct on anyone other than the plaintiff, it declined to give other instructions proposed by PM USA. In particular, the court refused to tell the jury that plaintiff had been made whole by the \$850,000 compensatory damages award (RT-12974-75), or that remote misconduct is less blameworthy than recent misconduct (RT-12953-54, 13514).

After nearly six days of deliberation, on August 29, 2009, the jury reached a verdict by a 9-3 vote and awarded plaintiff \$13,800,000 in punitive damages. The trial court denied PM USA’s motion for JNOV based on the unconstitutional excessiveness of the punitive award. AA-168. Final judgment was entered on December 1, 2009. AA-120-26. The court subsequently ruled that interest on the compensatory damage award would run from September 26, 2002 (the date of the

original jury verdict) and that interest on the punitive award would run from the date of the jury's August 24, 2009 punitive-damages verdict, rather than from the date of the final judgment. AA-169.

ARGUMENT

I. THE PUNITIVE DAMAGES AWARD IS UNCONSTITUTIONALLY EXCESSIVE.

The jury's \$13.8 million award is grossly and unconstitutionally excessive. These punitive damages were awarded to a single smoker for conduct that occurred long ago and will not be repeated. The Phase I jury valued Ms. Bullock's compensable losses at \$850,000, including \$100,000 for pain and suffering. The Phase II jury nevertheless awarded punitive damages in an amount more than 16 times the already substantial compensatory award. Under established law, that award cannot stand.

A. The Due Process Clause Imposes Meaningful Limits On The Size of Punitive Damages Awards.

The U.S. Supreme Court's decisions in *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, and *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, as well as subsequent California appellate rulings, "have

announced due process standards that every [punitive] award must pass.” *Exxon Shipping Co. v. Baker* (2008) 128 S. Ct. 2605, 2626. These cases instruct courts reviewing punitive awards to consider three primary 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.

State Farm, 538 U.S. at 418; see also *BMW*, 517 U.S. at 574-85; *Simon v. San Paulo U.S. Holding Co.* (2005) 35 Cal. 4th 1159, 1179-84. Additionally, “[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business” (*State Farm*, 538 U.S. at 423), and a State may not “use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.” *Williams*, 549 U.S. at 355. Finally, and most fundamentally, an award of punitive damages may never “exceed[] the level necessary to properly punish and deter,” *Neal v. Farmers Ins. Exchange* (1978) 21 Cal. 3d 910, 928 n.13, even if the defendant’s conduct was highly reprehensible. *State Farm*, 538 U.S. at 419-20.

This Court must review the jury's punitive damages award *de novo* against these established due process standards. The "United States Supreme Court has determined that the due process clause of the Fourteenth Amendment to the United States Constitution places limits on state courts' awards of punitive damages, limits appellate courts are required to enforce in their review of jury awards." *Simon*, 35 Cal. 4th at 1171. "Exacting appellate review" is essential to ensure "that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." *State Farm*, 538 U.S. at 418 (internal quotation marks omitted); *see also Simon*, 35 Cal. 4th at 1172 (same).

B. The 16-to-1 Ratio Of Punitive To Compensatory Damages Is Presumptively Unconstitutional.

Under *Simon* and *State Farm*, the jury's \$13.8 million award, which yields a ratio of punitive to compensatory damages of more than 16 to 1, is presumptively unconstitutional and must be reduced.⁵

⁵ In its 2006 ruling in this case, this Court (over Justice Kitching's dissent) approved a punitive award that was approximately 33 times the size of the compensatory award. *Bullock*, 42 Cal. Rptr. 3d at 180. The 2006 opinion has since been vacated by the California Supreme Court, and this Court's 2008

The Supreme Court has described the ratio of punitive to compensatory damages as “a central feature in our due process analysis.” *Exxon*, 128 S. Ct. at 2629. The *Exxon* Court reviewed empirical research showing that “the median ratio of punitive to compensatory awards has remained less than 1:1” and concluded that “in many instances a high ratio . . . is substantially greater than necessary to punish or deter.” *Id.* at 2624-25. As the Court explained in *State Farm* and reiterated in *Exxon*, “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” *State Farm*, 538 U.S. at 425; *Exxon*, 128 S. Ct. at 2626. The compensatory award that the Supreme Court described as “substantial” in *State Farm* was \$1 million—only slightly larger than the \$850,000 compensatory award here. *State Farm*, 538 U.S. at 426.

opinion in this case expressly reserved decision on PM USA’s constitutional challenge, making clear that the excessiveness issue would be subject to *de novo* review in a subsequent appeal. *See Bullock*, 159 Cal. App. 4th at 701 (“If the amount awarded by the jury in the new trial is excessive, an adequate remedy is available by way of a new trial motion and an appeal in which the appellate court must consider *de novo* the constitutional guideposts.”).

In the years since *State Farm*, numerous courts have held that six-figure damage awards are more than “substantial” enough to trigger this 1:1 upper limit. *See, e.g., Williams v. ConAgra Poultry Co.* (8th Cir. 2004) 378 F.3d 790 (1:1 ratio was constitutional maximum where plaintiff was awarded \$600,000 in compensatory damages; “six hundred thousand dollars is a lot of money,” and is “substantial” within the meaning of *State Farm*); *Bach v. First Union Nat’l Bank* (6th Cir. 2007) 486 F.3d 150 (reducing 5.6:1 ratio to 1:1 where compensatory damages were \$400,000).⁶ Indeed, in a case involving economic injuries,

⁶ In a footnote on its vacated 2006 *Bullock* opinion, this Court noted that “we do not find the compensatory damages award so ‘substantial’ as to render any punitive damages award greater than a single-digit multiplier excessive, particularly in light of Philip Morris’s wealth.” 42 Cal. Rptr. 3d at 176 n.28 (citation omitted). PM USA respectfully submits that its wealth is not relevant to the substantiality of the compensatory award. *State Farm* does not support that proposition—to the contrary, all the Court said about wealth in *State Farm* is that it “cannot justify an otherwise unconstitutional punitive damages award.” 538 U.S. at 428. And *Simon*, on which this Court relied in footnote 28, said that the \$50,000 *punitive* award was not “so minor, even accounting for San Paolo Holding’s wealth, that it can be completely ignored.” 35 Cal. 4th at 1189. The California Supreme Court was not commenting on the substantiality of the *compensatory* award, which was only \$5,000; nor was it measuring the compensatory award against the defendant’s wealth. *Id.* at 1166. As noted in text, courts have found even mid-six-figure awards against large corporations to be “substantial.”

the California Supreme Court recently held that a 1:1 ratio was the constitutional maximum where the compensatory damages were substantial and awarded in part for physical and emotional distress. *See Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 719.

An especially apposite decision from the Eighth Circuit also drew the line at 1:1. In *Boerner v. Brown & Williamson Tobacco Co.* (8th Cir. 2005) 394 F.3d 594, a smoking-and-health case brought against a major domestic cigarette manufacturer, the court first described the defendant's conduct, finding it to be particularly reprehensible:

[T]he sale of this defective product occurred repeatedly over the course of many years despite [the defendant's] knowledge that the product was dangerous to the user's health; and [the defendant] actively misled consumers about the health risks associated with smoking. Moreover, the reprehensible conduct was shown to relate directly to the harm suffered by [the plaintiff]: a most painful, lingering death following extensive surgery.

Id. at 602-03. Despite that critical assessment, the court held that an award yielding no more than "a ratio of approximately 1:1 would comport with the requirements of due process." *Id.* at 603.

The Court of Appeal for the Fourth District followed a similar approach in *Buell-Wilson v. Ford Motor Co.* (2008) 73 Cal. Rptr. 3d 277—another case in which the plaintiff challenged a

course of conduct that allegedly caused personal injury to a great number of people. The Court of Appeal concluded in that case that “the reprehensibility of Ford’s conduct was high” (*id.* at 319), pointing to factors such as the “the catastrophic nature of Mrs. Wilson’s injuries, Ford’s reckless disregard for the safety of others, the repeated nature of Ford’s conduct, and the fact that Ford’s acts were intentional.” *Id.* Even so, the Court of Appeal determined that an “award exceeding a two-to-one ratio would exceed the constitutional maximum that could be awarded under the facts of this case.” *Id.* at 322 (emphasis added). *See also, e.g., Romo v. Ford Motor Co.* (2003) 113 Cal. App. 4th 738, 755 (finding 3:1 ratio to be constitutional maximum in view of the “extreme reprehensibility of defendant’s actions,” among other factors); *Clark v. Chrysler Corp.* (6th Cir. 2006) 436 F.3d 594, 608 (reducing \$3 million punitive award for death caused by defective truck design to “approximately 2:1 ratio”).

Whatever the precise maximum may be, it is plain that the 16:1 ratio yielded by the jury’s award substantially surpasses the constitutional limit. The California Supreme Court has established a “presumption” that double-digit ratios are “suspect” and generally “cannot survive appellate scrutiny under the due

process clause.” *Simon*, 35 Cal. App. 4th at 1182; *see also Romo*, 113 Cal. App. 4th at 751 (“the need to limit most punitive damages awards to a single-digit multiplier was obvious to the Supreme Court” in *State Farm*).

State Farm specifically indicates that a higher multiple “may comport with due process” in only three circumstances: (i) “a particularly egregious act has resulted in only a small amount of economic damages”⁷; (ii) “the injury is hard to detect”; or (iii) “the monetary value of non-economic harm might have been difficult to determine.” 538 U.S. at 425; *see also Simon*, 35 Cal. 4th at 1183; *Exxon*, 128 S. Ct. at 2633 (noting “the modest economic harm or odds of detection that have opened the door to higher awards” than the median of 0.65:1).

None of those exceptions is present here. Plaintiff cannot suggest that \$850,000 in compensatory damages is “small,” warranting a double-digit ratio. In fact, as noted above, it is firmly established that the \$850,000 compensatory damages award here is at the other end of the spectrum—“substantial”—

⁷ As noted above, *Simon* correctly read this exception as conjunctive, requiring *both* “a particularly egregious act” *and* “a small amount of economic damages.” 35 Cal. 4th at 1183 (quoting *State Farm*, 538 U.S. at 425).

requiring a ratio around 1:1. 538 U.S. at 425. *Accord ConAgra*, 378 F.3d at 799.⁸

Nor is this a case where a high ratio is appropriate because the injury is difficult to detect or to quantify, such that a higher ratio is needed to stop the wrongdoer from “getting away with it” or to provide an incentive to sue. *Exxon*, 128 S. Ct. at 2622. To the contrary, just as in other smoking-and-health cases, the “[f]actors that justify a higher ratio, such as the presence of an ‘injury that is hard to detect’ or a ‘particularly egregious act [that] has resulted in only a small amount of economic damages,’ are absent here.” *Boerner*, 394 F.3d at 603 (quoting *BMW*, 517 U.S. at 582).

A finding that the defendant’s conduct was highly reprehensible was not among the exceptions to the single-digit

⁸ Although the precise meaning of “small” is an open question, there can be *no* doubt that \$850,000 is not “small.” It is most likely that by “small” the Court meant awards below \$10,000. *See BMW*, 517 U.S. at 582-83 (discussing exception for cases in which “a particularly egregious act has resulted in only a small amount of economic damages,” while giving no indication that \$4,000 compensatory award in case before it qualified for that exception); *Bains LLC v. Arco Prods. Co.* (9th Cir. 2005) 405 F.3d 764, 776 (“[t]his is not a ‘small amount’ case because the economic damages were substantial—\$50,000”); *Roth v. Farner-Bocken Co.* (S.D. 2003) 667 N.W.2d 651, 669-70 (\$25,000 award was not “small”). *Cf. Simon*, 35 Cal. 4th at 1179-83 (invoking *State Farm* exception where compensatory award was \$5,000).

limitation identified by the Court in *State Farm*. And with good reason: punitive damages cannot be awarded at all unless the defendant's conduct was highly reprehensible. *State Farm* instructs the reviewing court to consider both the reprehensibility of the conduct and the size of the compensatory award, among other factors, in deciding where along the single-digit spectrum the constitutional limit falls in a particular case. 538 U.S. at 425. High reprehensibility is a factor that supports a higher award, but it does not remove a case from the single-digit range altogether.

For example, in *Planned Parenthood of Columbia/Willamette Inc. v. Am. Coalition of Life Activists* (9th Cir. 2005) 422 F.3d 949, the Ninth Circuit addressed an intentional, orchestrated campaign to threaten violence against doctors who performed abortion procedures. The court found that

[w]hile the reprehensibility of [defendant's] conduct was a notch removed from a direct threat of violence, the effect on physicians was not much different. The effect was not accidental. In these circumstances, ACLA's conduct is significantly blameworthy. It hovers high in the hierarchy.

422 F.3d at 958. Nonetheless, the court found that the double-digit ratio imposed by the jury was unconstitutionally excessive. *Id.* at 962.

This Court’s vacated 2006 *Bullock* opinion concluded that extreme reprehensibility could, in isolation, warrant a double-digit ratio. 42 Cal. Rptr. 3d at 177. That conclusion rested largely on *Simon*. *Id.* at 169-70. But the compensatory award in *Simon* not only was not “substantial,” as it is here; it was only \$5,000—“small” by any measure, and all for economic harm. 35 Cal. 4th at 1166. The *Simon* Court went on to clarify that even “[m]ultipliers less than nine or 10 to one are not . . . presumptively *valid* under *State Farm*[,] [*e*]specially where the compensatory damages are substantial or already contain a punitive element.” *Id.* at 1182 (final emphasis added). And the Court stressed the importance of both reprehensibility *and* the size of the compensatory award (*id.* at 1186). *Simon*’s insistence on a meaningful quantitative element has since been confirmed by the U.S. Supreme Court, which rejected exclusive reliance on “verbal formulations” of the excessiveness standard and expressed “doubt[] that anything but a quantified approach will work.” *Exxon*, 128 S. Ct. at 2628.

Indeed, the Court of Appeal has repeatedly struck down double-digit ratios in smoking-related personal injury cases similar to this one. Both *Boeken v. Philip Morris USA, Inc.* (2005) 127 Cal. App. 4th 1640, and *Henley v. Philip Morris Inc.* (2004) 9 Cal. Rptr. 3d 29, *review dismissed* 18 Cal. Rptr. 3d 873 (Sept. 15, 2004), involved claims for fraud and product liability brought by individual smokers suffering from lung cancer. In both cases, the Court of Appeal held that a double-digit ratio violated due process.

In *Boeken*, the Court of Appeal found that due process required it to cut the punitive award in half (from \$100 million to \$50 million) and held that any “more than a single digit multiplier is not justified.” *Boeken*, 127 Cal. App. 4th at 1703. The Court held that even “exceptionally extreme” conduct could not support a double-digit ratio where the compensatory damages were “significant.” 127 Cal. App. 4th at 1700. In fact, the *Boeken* Court distinguished *Mathias v. Accor Economy Lodging, Inc.* (7th Cir. 2003) 347 F.3d 672, on the ground that “[a] higher ratio was justified in that case, however, *not solely because of reprehensibility*, but also because the great wealth of the defendant, compared to *the small compensatory award*, might

otherwise permit the wealthy defendant to make it economically infeasible to bring the action.” 127 Cal. App. 4th at 1696 (emphasis added).⁹

In sum, a 16:1 ratio would be unconstitutionally excessive in virtually any case involving a \$850,000 compensatory award. It is particularly so here: the evidence that PM USA adduced at the retrial confirms that the jury’s \$13.8 million award is far more than is necessary to serve California’s interest in punishment and deterrence. Taking into account the substantial compensatory award, the enormous payouts that PM USA has made under the MSA and in private litigation, and—most importantly—the fact that the relevant conduct occurred decades ago and cannot possibly recur, the Court should reduce the award to a low single-digit ratio.

⁹ In *Henley*, on which *Boeken* relied, the compensatory damages were \$1.5 million and the punitive award approved by the trial court was \$25 million. *Henley*, 9 Cal. Rptr. 3d at 38. Applying *State Farm*, the Court of Appeal rejected that 17:1 ratio on due process grounds and held that \$9 million (a 6:1 ratio) was the constitutional maximum. *Id.* at 75. The court reached that conclusion despite finding that the conduct at issue was “extraordinarily reprehensible,” that the plaintiff’s injuries were physical, and that “nothing done by defendant mitigated or ameliorated them in any way.” *Id.*

C. The Evidence Adduced At The Retrial Confirms That The Jury’s \$13.8 Million Award Substantially Exceeds The Amount Needed To Punish And Deter The Conduct That Harmed Betty Bullock.

The “overarching consideration” in the due process analysis is that “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.” *Amerigraphics, Inc. v. Mercury Cas. Co.* (2010) 182 Cal. App. 4th 1538, 1561 (quoting *State Farm*, 538 U.S. at 419). Accordingly, even where the defendant’s conduct was highly reprehensible, the punitive award may not “exceed[] the level necessary to properly punish and deter.” *Neal*, 21 Cal. 3d 910, 928 n.13; *see also State Farm*, 538 U.S. at 419-20 (reversing punitive damages award because “a more modest punishment for this *reprehensible conduct* could have satisfied the State’s legitimate objectives, and the Utah courts should have gone no further”) (emphasis added).

In assessing reprehensibility and gauging whether the award is greater than necessary to serve the State’s interest in punishment and deterrence, the Court must carefully narrow its focus to the particular unlawful conduct that harmed Ms.

Bullock: misrepresentations and omissions heard or read by Ms. Bullock regarding the link between the cigarettes that she smoked and her health. *State Farm*, 538 U.S. at 422-23.

At a minimum, the Court can—and must—exclude from its consideration conduct that neither harmed Ms. Bullock nor bears a close nexus to conduct that did. *See State Farm*, 538 U.S. at 423-24; *Johnson v. Ford Motor Co.* (2005) 35 Cal. 4th 1191, 1203-04 (“evidence of wide-ranging business practices could not, consistent with due process, be used to show reprehensibility”); *Holdgrafer v. Unocal Corp.* (2008) 160 Cal. App. 4th 907, 927-22; *ConAgra*, 378 F.3d at 797-98. In this case, such irrelevant conduct includes: PM USA’s alleged efforts to market cigarettes to youth (Ms. Bullock became a regular smoker as an adult); public statements and marketing efforts that are not alleged to have reached, much less influenced, her; and PM USA’s alleged interference with the marketing of Nicorette gum (which Ms. Bullock had no difficulty obtaining or using).

This Court stated in its 2006 vacated opinion that “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.” 42 Cal. Rptr. 3d at 177 (quoting *BMW*, 517 U.S. at 576-77). The evidence introduced by PM USA at the retrial, however—most of which was not before the jury at the first trial or before this Court in 2006—demonstrates that even if “strong medicine” in the form of a 33:1 punitive damages ratio was necessary in the past, it is neither necessary nor permissible today. To the contrary: the nearly \$14 million punitive award imposed in this case goes far beyond anything needed today to serve California’s interests in punishing and deterring the conduct that harmed Ms. Bullock. Because a materially lesser amount of punitive damages would adequately punish and deter PM USA for the concededly wrongful conduct at issue, due process requires that the grossly disproportionate award be reduced.

1. The Conduct That Harmed Ms. Bullock Was Undertaken Decades Ago, By People No Longer Associated With PM USA.

This Court has recognized that the justification for imposing punitive damages is mitigated when the conduct at issue occurred in the distant past, and that a lower award of punitive damages is often warranted in such circumstances. *See Notrica v. State Comp. Ins. Fund* (1999) 70 Cal. App. 4th 911, 953

(reducing a punitive award by 75 percent where the “harm done resulted from operating policies determined more than 10 years ago by” defendant’s employees); *see also Baione v. Owens-Illinois, Inc.* (Fla. App. 1992) 599 So. 2d 1377, 1380 (Altenbernd, J., concurring) (“Punitive damages serve a valid purpose when they punish persons for their recent, inappropriate decisions. As the period becomes longer, it becomes increasingly difficult to justify this element of damage. I am convinced that the harm to our present economy and, thus, to our society from imposing punitive damages for corporate acts committed long ago by retired or deceased employees outweighs any arguable future deterrent effect that such awards might create.”) (citation omitted).

That principle has important implications here, where plaintiff’s punitive damages claim is substantially grounded in conduct that took place more than a half-century ago. The PM USA employees whose conduct and policies gave rise to the claim are long since retired or deceased, so that punishing the company can have no possible effect on them. RT-12608. Moreover, as we next discuss, the actions that those employees are alleged to have committed— withholding information about the health effects of cigarettes and launching deceptive advertising campaigns to

entice the public to start or continue smoking—ceased long ago. A massive punitive award in this case thus would not punish those actually responsible for the wrongful conduct that affected Ms. Bullock; rather, it would punish PM USA’s current employees and shareholders, who had nothing to do with that conduct and who have worked hard to ensure that it is not repeated.

2. It Is Virtually Impossible For Similar Misconduct To Recur Today.

California’s interest in imposing punitive damages to deter similar conduct in the future is minimal for the additional reason that it is exceedingly unlikely that the conduct underlying plaintiff’s claims will ever be repeated. *See Ross v. Louise Wise Servs., Inc.* (N.Y. App. Div. 2006) 28 A.D.3d 272, 304 (“Since there does not appear to be any need to deter a repetition of the long-ago conduct for which [the defendant] is being sued, an award of punitive damages in this case would serve little or no public purpose”).

As a matter not just of personnel, but also of policy, PM USA is effectively a different company from the one whose conduct was at issue in this case. PM USA today operates under very

different internal policies and external restraints, and it has changed its public positions on the very issues that formed the basis for the punitive damages claim in this case. The company now openly acknowledges (and states on its website and elsewhere) that it agrees with the “overwhelming medical and scientific consensus that cigarette smoking causes lung cancer, heart disease, and other serious diseases in smokers.” RT-12625, 12628-29, 12630-31. PM also now publicly acknowledges that “cigarette smoking is addictive.” RT-12631, 12626-27. A \$13.8 million punitive award is not required to ensure that PM USA “gets the message” about these issues or to deter it from deceiving smokers about the dangers of cigarettes.

That is especially so given the significant legal constraints under which PM USA is now operating. As described above, PM USA’s conduct is constrained by the newly enacted federal tobacco legislation. This landmark legislation, which PM USA (alone among the major domestic cigarette companies) supported (RT-12651-54), gives the FDA broad new authority to regulate the tobacco industry’s communications with customers, as well as virtually all aspects of cigarette design, manufacturing, and testing. As noted, PM USA introduced extensive testimony about

the FDA legislation at the retrial. RT-12652-61 (discussing Pub. L. No. 111-31, codified in various sections of Title 21 of the U.S. Code). The legislation requires larger and clearer warning labels on all cigarette packs, prohibits the use of descriptors such as “lights,” abolishes the use of tar and nicotine measures in advertisements, limits in-store promotion, and requires FDA pre-approval of all claims that a particular product poses reduced risks. RT-12651-58, 12660-61. The FDA also has the power to regulate virtually all aspects of cigarette design and ingredients, and PM USA is required to—and does—fully disclose information about ingredients and additives. RT-12659-61.

In addition, PM USA has since 1998 been bound by the MSA that it entered into with 46 States, including California. Under that agreement, PM USA is prohibited from advertising its cigarettes on billboards, buses, or at sporting events; it no longer is permitted to pay for product placements in movies; and it no longer can give out free cigarette samples. RT-12619. The MSA also requires PM USA to make public documents and research regarding the health effects of smoking. *Id. Cf. Boeken*, 127 Cal. App. 4th at 1703 (holding that the “MSA does provide Philip Morris with an incentive not to misrepresent the health risks of

its products, and not to target underage smokers with its misrepresentations, since it prohibits it from doing so” and relying in part on the MSA in concluding that a double-digit punitive damages ratio was unconstitutional).¹⁰

Against this backdrop, it is evident that PM USA has neither the inclination nor the capacity to repeat the misconduct that gave rise to this case. As its Dr. Lewis acknowledged in the retrial, by 1999 the company knew that it was “out of step with society” and committed to change. RT-12624-25. That circumstance bears directly on this Court’s *de novo* evaluation of the punitive damages award. Given the sea change in PM USA’s personnel and policies in the years since the conduct at issue occurred—and the significant array of new regulations and restrictions on what PM USA can and cannot do when it comes to marketing and communicating about its cigarettes—it simply

¹⁰ In its vacated 2006 opinion, this Court found that “Philip Morris’s agreement not to engage in certain conduct . . . is neither punishment nor an effective deterrent to others who would engage in similar misconduct.” 42 Cal. Rptr. 3d at 178. In this section, however, PM USA argues only that the fact that its wrongful conduct has ceased and that there is virtually no chance that it will be repeated mitigates the necessity of punitive damages to prevent a recurrence of the conduct in the future. In addition, PM USA notes that the Court’s 2006 *Bullock* opinion was issued before the new FDA legislation.

cannot be said that a punitive award more than 16 times the size of than plaintiff's compensatory award is "necessary to vindicate the state's legitimate interests in deterring conduct harmful to state residents." *Simon*, 35 Cal. 4th at 1185. Deterrence of the type of conduct that harmed Ms. Bullock has already been achieved through means other than the punitive damages imposed in this case.

3. The Enormous Compensatory Payments That PM USA Has Made Have A Significant Deterrent Effect.

A defendant's obligation to pay a large compensatory award is highly relevant in determining whether an even larger punitive award is necessary to satisfy the State's interests: "the overall size of compensatory damages alone may constitute a significant deterrent." *Mirkin v. Wasserman* (1993) 5 Cal. 4th 1082, 1106. *See also Memphis Cmty. Sch. Dist. v. Stachura* (1986) 477 U.S. 299, 306-07 ("Punitive damages aside, . . . [d]eterrence . . . operates through the mechanism of damages that are *compensatory*." (emphasis in original)).

The Court should consider not only the significant compensatory award that PM USA must pay to the plaintiff in this case, but also the Company's compensatory liability to other

plaintiffs, both in the past and in the future. Furthermore, the Court should take into account the massive compensatory payments that PM USA has made to the State of California (and to other States) under the MSA: PM USA paid \$774 million to California *in 2007 alone* to compensate this State for its expenditures for smoking-related illnesses. RT-13519-21. Even a single payment of that size would have a significant deterrent effect. *See Mirkin, supra*. But under the MSA, PM USA is obligated to make similar payments to California *annually* for 25 years. RT-13519-21. While this Court held in *Boeken* (127 Cal. App. 4th 1703) that these MSA payments are intended to be compensatory, whatever their purpose, the hundreds of millions of dollars of annual payments for the conduct at issue here undoubtedly have the effect of deterring PM USA from repeating that conduct. California does not have a legitimate interest in imposing yet another eight-figure award to punish and deter this same decades-old conduct.

II. CLAIM PRECLUSION BARS ANY RECOVERY OF PUNITIVE DAMAGES IN THIS CASE.

A punitive damages claim is a public cause of action: it seeks to protect the public by punishing the defendant's misconduct

toward the plaintiff and deterring the repetition of such misconduct in the future. *Adams v. Murakami* (1991) 54 Cal. 3d 105, 110. That is why California courts refer to plaintiffs who seek punitive damages as “private attorneys general.” *Dyna-Med, Inc. v. Fair Employment & Housing Comm’n* (1987) 43 Cal. 3d 1379, 1403. In this case, however, the purported private attorney general’s claim for punitive damages has already been brought, and settled, by the *real* Attorney General. For that reason, courts in several jurisdictions have concluded that claim preclusion bars a citizen of a State that sought punitive damages in the MSA litigation from seeking punitive damages for the same conduct that was alleged in the State’s complaint. See *Fabiano v. Philip Morris Inc.* (N.Y. App. Div. 2008) 54 A.D.3d 146; *Brown & Williamson Tobacco Corp. v. Gault* (Ga. 2006) 627 S.E.2d 549; *Shea v. Am. Tobacco Co.* (N.Y. App. Div. 2010) 901 N.Y.S.2d 303, 305; *Grill v. Philip Morris USA, Inc.* (S.D.N.Y. 2009) 653 F. Supp. 2d 481, 498; *Clinton v. Brown & Williamson Holdings, Inc.* (S.D.N.Y. 2007) 498 F. Supp. 2d 639, 653.

Claim preclusion bars a new claim when there is (1) a final judgment on the merits in a prior action, (2) involving the same parties, or their privies, and (3) involving the same claims. See,

e.g., *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal. 4th 888, 896. Because Plaintiff's claim for punitive damages meets all three elements, the trial court erred by denying PM USA's motion for a judgment of nonsuit. *See, e.g.*, *Watkins v. Watkins* (1953) 117 Cal. App. 2d 610, 611.¹¹

A. The Consent Decree Serves As Final Judgment in the California Attorney General's Case.

The decree settling the Attorney General's suit is a "final judgment" for claim preclusion purposes. It is well established that a consent decree is entitled to the same preclusive effect as a judgment obtained by trial. *See, e.g.*, *Citizens for Open Access to Sand & Tide* (1998) 60 Cal. App. 4th 1053, 1072 (applying claim preclusion where "the prior litigation ended in a settlement rather than a successful judgment after trial"); *Johnson v. Am.*

¹¹ In *Boeken*, this Court addressed Philip Morris Inc.'s argument for a reduction in the punitive award on the ground that significant further punishment and deterrence were unnecessary, in part because of its obligations under the MSA to make payments. This Court concluded that the defendant had failed to show that the terms of the MSA fully satisfied the "state's interest in deterring future wrongs" (*id.* at 1702), because (1) the defendant had not provided sufficient proof of the total sum that it would pay to California under the MSA (*id.*), and (2) it had not demonstrated that the MSA's "purpose is punitive." *Id.* at 1703. This Court did not, however, address the independent argument asserted in this section, which rests on the preclusive effect of the judgment in favor of the State.

Airlines, Inc. (1984) 157 Cal. App. 3d 427, 431 (“a court-approved settlement pursuant to a final consent decree in a class action will operate to bar subsequent suits by class members”); *Arizona v. California* (2000) 530 U.S. 392, 414.

B. Plaintiff Is in Privity With the Attorney General For Purposes Of Her Punitive Damages Claim.

To be bound by a final judgment, a person must either have been a party in the prior action or in “privity” with such a party. A finding of “privity” is a legal conclusion that the relationship between a party and a non-party is sufficiently close that preclusion principles will bar the non-party from asserting the same claims that were brought, or that could have been brought, by the party in a prior suit in which judgment was entered. *See, e.g., Consumer Advocacy Group, Inc. v. ExxonMobil Corp.* (2008) 168 Cal. App. 4th 675, 689-90.

A claim for punitive damages is a public right. As the California Supreme Court has explained,

Th[e] purpose [of punitive damages] is a purely public one. The public’s goal is to punish wrongdoing and thereby to protect itself from future misconduct, either by the same defendant or other potential wrongdoers. The essential question therefore in every case must be whether the amount of damages awarded substantially serves the societal interest.

Adams, 54 Cal. 3d at 110 (citation and footnote omitted); *see also Weeks v. Baker & McKenzie* (1998) 63 Cal. App. 4th 1128, 1155 (“The purpose for awarding punitive damages is to punish wrongdoing and thereby protect the public from future misconduct, either by the same defendant or other potential wrongdoers.”).

Because a punitive damages claim is a public right, and not a private one, Betty Bullock (and therefore plaintiff, her successor-in-interest) was in privity with the Attorney General for purposes of this particular claim. Privity exists between the State and its citizens when the State litigates common public rights. *See Consumer Advocacy Group*, 168 Cal. App. 4th at 692-93 (consumer group suing under “statutory scheme intended to create a mechanism for vindicating public rights” was bound, under claim preclusion principles, by judgment in an earlier suit on behalf of “the general public of California”); *Citizens for Open Access*, 60 Cal. App. 4th at 1073 (“The members of [plaintiff group] were also members, although unnamed, of the class of public citizens adequately represented by the state agencies in the Kelly and federal court actions. . . . The result is no different because the *government* represented the interests of the public as

a class in the prior actions. Where, as here, authority to pursue public rights or interests in litigation has been given to a public entity by statute, a judgment rendered is res judicata as to all members of the class represented.”).¹²

C. Because Plaintiff’s Claim for Punitive Damages Seeks To Punish And Deter The Same Misconduct Addressed By The State of California’s Lawsuit, It Is the Same Claim for Claim Preclusion Purposes.

Finally, Ms. Bullock’s claim for punitive damages is the “same claim” as the Attorney General’s prior claim for punitive damages. As we explain below, the Attorney General action included an explicit request for punitive damages. All of the factual allegations that form the basis for Ms. Bullock’s claims were also alleged in the Attorney General’s suit, and—as discussed above—the punitive damages claims served precisely the same public purpose in both actions.

This Court has explained that “[i]f the matter was within the scope of the action, related to the subject-matter and relevant to

¹² See also, e.g., *Satsky v. Paramount Comm’ns, Inc.* (10th Cir. 1993) 7 F.3d 1464, 1470 (“When a state litigates common public rights, the citizens of that state are represented in such litigation by the state and are bound by the judgment.”); *Alaska Sport Fishing Ass’n v. Exxon Corp.* (9th Cir. 1994) 34 F.3d 769, 773 (claim preclusion applicable where state and federal governments sued on behalf of their citizens and therefore “members of the public[] were ‘parties’ to the . . . suit”).

the issues, so that it could have been raised, the judgment is conclusive on it” *Murphy v. Murphy* (2008) 164 Cal. App. 4th 376, 401. The fact that the enumerated causes of action in the Attorney General’s action were different from the common-law claims asserted here is of no moment: “the cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced.” *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal. 4th 788, 798.¹³

There can be no question that Plaintiff’s claim for punitive damages is “within the scope of” the Attorney General’s lawsuit. Both suits arise out of PM USA’s sale of, among other brands, Marlboro and Benson & Hedges cigarettes. Both allege a conspiracy among cigarette manufacturers going back to the 1950s. See First Am. Cmplt. ¶¶ 3, 31, *People of the State of California v. Philip Morris* (Super. Ct. Sacramento County, No.

¹³ See also *Johnson v. Am. Airlines*, 157 Cal. App. 3d at 432 (applicability of claim preclusion “depends not on the legal theory or label used, but on the ‘primary right’ sought to be protected in the two actions. The invasion of one primary right gives rise to a single cause of action.”) (citation omitted); *Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal. App. 4th 1234, 1250 (difference in legal theory does not render claims different for claim preclusion purposes).

97AS03031) (“AG Cmplt.” (AA-073, 079-80)); Bullock First Am. Cmplt. ¶¶ 11-13 (AA-005).

Among many other similarities, both complaints allege that:

- Nicotine is addictive (*see* AG Cmplt. ¶ 62 (AA-087); Bullock Cmplt. ¶ 20 (AA-007));
- PM USA “manipulated the amount of nicotine in cigarettes and other tobacco products, in order to maintain and increase their market for tobacco products” (*see* AG Cmplt. ¶ 47 (AA-083); Bullock Cmplt. ¶¶ 22, 44-45 (AA-008, 012-13));
- PM USA “claimed nicotine is not addictive, when [it] knew that it was” (AG Cmplt. ¶ 45 (AA-083); *see also* Bullock Cmplt. ¶ 22 (AA-008));
- PM USA “misrepresented scientific knowledge about the health effects of smoking and the addictive nature of nicotine, the suppression of research by tobacco industry scientists relating to the dangers of smoking and the addictive qualities of nicotine, and wrongful claims of privilege in order to keep documents and information from the public” (AG Cmplt. ¶ 40 (AA-081); *see also* Bullock Cmplt. ¶ 23 (AA-008));
- PM USA promoted the use of cigarettes by minors (*see* AG Cmplt. ¶ 82(H) (AA-092); Bullock Cmplt. ¶ 49 (AA-014));

PM USA sold cigarettes that were defectively designed (*see* AG Cmplt. ¶ 65 (AA-087); Bullock Cmplt. ¶ 75 (AA-021-22)); and

- Cigarette use causes illnesses, including lung cancer, *throat* cancer, emphysema, heart disease, birth defects, and death (*see* AG Cmplt. ¶ 62 (AA-087); Bullock Cmplt. ¶ 59 (AA-015-16)).

And, importantly, *both complaints demanded punitive damages*. AG Cmplt. ¶ 69 & First Cause of Action ¶ 2 (AA-087-88, 094); Bullock Cmplt., Prayer ¶ 5 (AA-041). The purpose of the Attorney General’s punitive damages claims was to punish and deter precisely the same conduct at issue in this case. Indeed, the Attorney General’s complaint stated explicitly that the purpose of its claim for punitive damages was “to punish the Tobacco Companies and to deter such conduct”—including the conduct that forms the basis for Ms. Bullock’s punitive damages claim—“in the future.” AG FAC ¶ 69 (AA-087-88); *see also id.* at First Cause of Action ¶ 2 (AA-094). *Cf. Harshbarger v. Philip Morris, Inc.*, 2003 WL 23342396, at *8-*9 (N.D. Cal. Apr. 1, 2003) (“Disgorgement of all profits received from all cigarette sales throughout California is not private or individual relief within the meaning of the MSA. . . . The claims are thus barred by the MSA as representative claims, seeking relief ‘generally applicable to the general public.’”).

For all of these reasons, courts in New York and Georgia have barred private plaintiffs from seeking punitive damages for the same conduct that formed the basis for the MSA. In *Fabiano*, for example, New York’s Appellate Division explained that an

individual plaintiff's claim for punitive damages is among the claims that were settled in the MSA, because both causes of action seek to punish and deter the same conduct. The court rejected the plaintiffs' argument that their punitive damages claim had not accrued before the MSA was executed and therefore could not have been extinguished by it:

[T]he claim plaintiffs would now assert for punitive damages, based upon defendants' course of conduct in connection with the marketing of tobacco products over a period of decades encompassing the decedent's use of such products (which ceased in 1992), most certainly had accrued. Indeed, that claim, ultimately premised upon public, not personal, injury, had not only accrued but had also been interposed and prosecuted by the Attorney General on behalf of all New York residents, including plaintiffs and the decedent, in the litigation concluded in the Master Settlement Agreement and ensuing judgment. . . .

[A] claim by a private attorney general to vindicate what is an essentially public interest in imposing a punitive sanction cannot lie where, as here, that interest has been previously and appropriately addressed by the State Attorney General in an action addressed, on behalf of all of the people of the State, including plaintiffs and the decedent, to the identical misconduct. Relitigation of the claim is, under these circumstances, barred under the doctrine of res judicata.

54 A.D.3d at 151-52.

Similarly, in *Gault*, the Georgia Supreme Court addressed the preclusive effect of the MSA and concluded that (1) "[b]ecause

punitive damages serve a public interest and are intended to benefit the general public . . . the State and plaintiffs were privies”; (2) “[i]nsofar as the punitive damage claims are concerned, the matters put in issue in the State’s action and in plaintiffs’ proceeding are the same”; and (3) “a consent decree is an enforceable judgment and can be afforded preclusive effect.” 627 S.E.2d at 552-53. The court concluded that “[t]he State’s release of its punitive damages claim as *parens patriae* precludes plaintiffs from pursuing the same claim for punitive damages in this action.” *Id.* at 553-54.¹⁴

This Court should likewise recognize that the California judgment in the MSA litigation precludes California plaintiffs from raising claims for punitive damages based on the same conduct that was addressed in the Attorney General’s suit.

III. THE TRIAL COURT ERRED IN AWARDING INTEREST RUNNING FROM THE DATE OF THE PUNITIVE DAMAGES VERDICT.

The trial court ruled that plaintiff was entitled to interest on the punitive damages judgment running from the date of the

¹⁴ *But see Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1262 (Fla. 2006). *But cf. United States v. Philip Morris USA, Inc.* (D.D.C. 2001) 327 F. Supp. 2d 1, 6-7 (finding that MSA did not moot U.S. Government’s RICO claims).

verdict (August 24, 2009), rejecting PM USA's argument that interest on that award should start on the date on which judgment was entered (December 1, 2009). AA-169.

It is plain that *post*-judgment interest cannot be awarded for the period between the verdict and the judgment. In *Pellegrini v. Weiss* (2008) 165 Cal. App. 4th 515, the Court of Appeal squarely held that post-judgment interest runs only from the date of the judgment, based on the plain language of the statute (Civ. Code section 685.020) that authorizes such interest.

The trial court may have accepted plaintiff's argument that *pre*-judgment interest could be awarded on the punitive damages award. Plaintiff argued that interest could accrue prior to the judgment in reliance on *Holdgrafer v. Unocal Corp.* (2008) 160 Cal. App. 4th 907, which held that Civil Code section 3287 allows "for the payment of prejudgment interest from the date [the damages] are certain or capable of being made certain, *e.g.*, *the date the jury's verdict is entered.*" *Id.* at 935 (emphasis added). But *Holdgrafer* (and Section 3287) are inapposite here. *Holdgrafer* involved interest on an award of *compensatory* damages, not punitive damages. This case, in contrast, is governed by Section 3288, which gives the jury alone the

discretion to award pre-judgment interest “in every case” involving punitive damages. *Cf. Lakin v. Watkins Associated Indus.* (1993) 6 Cal. 4th 644, 664 (awarding pre-judgment interest on punitive damages would not serve the purpose of Section 3287, because “[p]unitive damages are awarded ‘for the sake of example and by way of punishing the defendant.’ By definition they are not intended to make the plaintiff whole by compensating for a loss suffered.”) (citation omitted). If plaintiff here wanted pre-judgment interest on the punitive damages award, she could and should have invoked Section 3288 and asked the jury to make such an allocation. But she did elect not to do so, and may not avoid the consequence of that choice by relying on Section 3287.

In any event, PM USA respectfully submits that *Holdgrafer’s* interpretation of Section 3287 was incorrect. Entry of a jury verdict alone should not be enough to satisfy Section 3287’s certainty requirement in cases where the amount of the verdict was not certain or capable of being made certain *before the jury rendered its findings*.¹⁵ Among other problems, that construction

¹⁵ *See Wisper Corp. v. California Commerce Bank* (1996) 49 Cal. App. 4th 948, 958, 960 (“Damages are deemed certain or

of the statute countermands the Legislature's decision in 1985 to repeal former Section 1033, which had specifically authorized post-verdict interest.

For these reasons, the trial court erred in awarding plaintiff interest on the punitive award for the period between the verdict and the entry of final judgment.

IV. PM USA IS ENTITLED TO A RETRIAL ON ALL ISSUES.

In 2008, PM USA argued in this Court that the proper remedy for the constitutional instructional error in the first trial was a retrial on all issues. This Court did not accept the argument, instead reasoning that a "new trial . . . limited to determining the amount of punitive damages" would not be prejudicial and "will result in some time savings." *Bullock*, 159 Cal. App. 4th at 700-01. That ruling is law of the case. To preserve the issue for any future appeal, however, we respectfully

capable of being made certain within the provisions of subdivision (a) of [Civil Code] section 3287 where there is essentially no dispute between the parties concerning the basis of computation of damages [W]here the amount of damages cannot be resolved *except by verdict or judgment*, prejudgment interest is not appropriate.") (emphasis added); accord *Canavin v. Pac. Sw. Airlines* (1983) 148 Cal. App. 3d 512, 524; *Marine Terminals Corp. v. Paceco, Inc.* (1983) 145 Cal. App. 3d 991, 995; *Block v. Lab. Procedures, Inc.* (1970) 8 Cal. App. 3d 1042, 1046-47.

submit that the Court erred, and that as a matter of California law and federal due process, PM USA was entitled to a new trial on all issues. A jury may punish only for conduct that has been proved to have harmed the plaintiff and to have been sufficiently reprehensible to warrant punishment. *State Farm*, 538 U.S. at 423; *Williams*, 549 U.S. at 357. In this case, of course, the retrial jury could not identify that conduct.

Moreover, California and federal law prohibit separate juries from making independent findings about fundamentally inseparable issues. *See Liodas v. Sahadi* (1977) 19 Cal. 3d 278, 286; *Medo v. Superior Ct.* (1988) 205 Cal. App. 3d 64, 69; *Gasoline Prods. Co. v. Champlin Ref. Co.* (1931) 283 U.S. 494, 500. As the California Supreme Court held in *Liodas*, therefore, a retrial limited to punitive damages is impermissible where “it is not possible to determine on what basis liability was predicated.” 19 Cal. 3d at 286.

CONCLUSION

For the reasons given above, the punitive damages award is barred by claim preclusion and (if not barred) is unconstitutionally excessive. Exercising its independent review, this Court should reduce that award to the constitutional maximum.

Respectfully submitted,

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Dated: October 12, 2010

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I certify that this Appellant's Brief is proportionally spaced, has a typeface of 13 points, and contains 10,802 words as calculated by the word processing software used to prepare it, exclusive of the materials excluded under Rule 8.204(c)(3).

Dated: October 12, 2010

By: _____
Lauren R. Goldman

ATTACHMENT PURSUANT TO RULE 8.1115(c)