IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LIONEL SIMON d.b.a LIBERTY PAPER COMPANY, Plaintiff/Respondent, v. SAN PAOLO U.S. HOLDING COMPANY, INC., Defendant/Petitioner.	)	No. S121933

APPLICATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF DEFENDANT/PETITIONER SAN PAOLO U.S. HOLDING COMPANY, INC.

After a Decision by the Court of Appeal for the Second Appellate District
No. B121917

Of Counsel:
Evan M. Tager
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3240

Robin S. Conrad
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Donald M. Falk (Bar # 150256)
MAYER, BROWN, ROWE & MAW LLP
Two Palo Alto Square
3000 El Camino Real
Suite 2-300
Palo Alto, CA 94306
(650) 331-2030

Attorneys for *Amicus Curiae* The Chamber of Commerce of the United States

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LIONEL SIMON d.b.a LIBERTY PAPER COMPANY, Plaintiff/Respondent,	
v.	No. S121933
SAN PAOLO U.S. HOLDING COMPANY, INC., Defendant/Petitioner.	

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF DEFENDANT/PETITIONER SAN PAOLO U.S. HOLDING COMPANY, INC.

The Chamber of Commerce of the United States ("the Chamber") respectfully requests permission to file the attached brief as *amicus curiae* in support of defendant/petitioner San Paolo U.S. Holding Company, Inc., in this matter. The Chamber is the nation's largest federation of business companies and associations, with an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing amicus curiae briefs in cases involving issues of national concern to American business.

Because few issues are of more concern to American business than those pertaining to the fair administration of punitive damages, the Chamber regularly files amicus briefs in significant punitive damages cases, including each of the cases in which the U.S. Supreme Court has addressed such issues during the past 15 years. The Chamber also has been granted leave to appear as amicus in several recent punitive damages cases in this and other California courts.[1]

This Court has not had addressed issues pertaining to the amount of punitive damages since its decision in *Adams v. Murakami* (1991) 54 Cal.3d 105. In the intervening 13 years, the U.S. Supreme Court has held that there is a due process limit on the amount of punitive damages that may be exacted (*BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559); it has held that the amount of punitive damages awarded by the jury must be subjected to "[e]xacting appellate review" (*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 418; *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424); and it has articulated and refined three guideposts for evaluating whether a punitive award is unconstitutionally excessive (*State Farm*, 538 U.S. at 419-29; *BMW*, 517 U.S. at 575-85). The lower courts of this State have struggled to apply those guidelines, with often conflicting results. *Compare Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1057 (4:1 ratio of punitive to compensatory damages should be the norm when damages are "neither exceptionally high nor low" and conduct was "neither exceptionally extreme nor trivial") *with Bardis v. Oates* (2004) 119 Cal.App.4th 1, 26 (approving 9:1 ratio on ground that 4:1 ratio "would be tantamount to a slap on the wrist"), *rev. den.* (Sept. 15, 2004).

---

[1] *E.g.*, *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405; *Dyna-Med, Inc. v. Fair Employment & Housing Comm'n* (1987) 43 Cal.3d 1379; *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738; *Anderson v. General Motors Corp.* (Ct. App.), No. B135147 (settled during appeal).

Because this Court has not yet had the opportunity to interpret the U.S. Supreme Court's guidance, and the lower courts of California are in conflict, the present case and its companion — *Johnson v. Ford Motor Co.*, No. S121723 — will be of extraordinary importance to the administration of punitive damages in this State. They no doubt will be the pole stars for the lower courts of California to follow in this area for years to come. Accordingly, the Chamber has a strong interest in sharing with the Court its views on the various issues presented in these cases. Moreover, because the Chamber has participated in virtually the entire spectrum of cases in which punitive damages have been imposed against American businesses (from product liability to consumer fraud to business torts to employment discrimination), we respectfully submit that its perspective can be of substantial assistance to the Court in resolving those extraordinarily important issues.

For the foregoing reasons, the Chamber respectfully requests permission to file the attached brief.

Respectfully submitted,

____
Donald M. Falk (Bar # 150256)
MAYER, BROWN, ROWE
& MAW LLP
Two Palo Alto Square
3000 El Camino Real
Suite 2-300
Palo Alto, CA 94306
(650) 331-2030

Of Counsel:
Evan M. Tager
MAYER, BROWN, ROWE
& MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3240

Robin S. Conrad
NATIONAL CHAMBER LITIGATION
CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Attorneys for *Amicus Curiae* The Chamber of Commerce
of the United States

Dated: October 13, 2004

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LIONEL SIMON d.b.a LIBERTY PAPER COMPANY, Plaintiff/Respondent, v. SAN PAOLO U.S. HOLDING COMPANY, INC., Defendant/Petitioner.	No. S121933

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF DEFENDANT/PETITIONER SAN PAOLO U.S. HOLDING COMPANY, INC.

After a Decision by the Court of Appeal for the Second Appellate District
No. B121917

Of Counsel:
Evan M. Tager
MAYER, BROWN, ROWE
& MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3240

Robin S. Conrad
NATIONAL CHAMBER LITIGATION
CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Donald M. Falk (Bar # 150256)
MAYER, BROWN, ROWE
& MAW LLP
Two Palo Alto Square
3000 El Camino Real
Suite 2-300
Palo Alto, CA 94306
(650) 331-2030

Attorneys for *Amicus Curiae* The Chamber of Commerce
of the United States

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest federation of business companies and associations, with an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing amicus curiae briefs in cases involving issues of national concern to American business.

This Court has not had addressed issues pertaining to the amount of punitive damages since its decision in *Adams v. Murakami* (1991) 54 Cal.3d 105. In the intervening 13 years, the U.S. Supreme Court has held that there is a due process limit on the amount of punitive damages that may be exacted (*BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559); it has held that the amount of punitive damages awarded by the jury must be subjected to "[e]xacting appellate review" (*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 418; *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424); and it has articulated and refined three guideposts for evaluating whether a punitive award is unconstitutionally excessive (*State Farm*, 538 U.S. at 419-29; *BMW*, 517 U.S. at 575-85). The lower courts of this State have struggled to apply those guidelines, with often conflicting results. *Compare Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1057 (4:1 ratio of punitive to compensatory damages should be the norm when damages are "neither exceptionally high nor low" and conduct was "neither exceptionally extreme nor trivial") *with Bardis v. Oates* (2004) 119 Cal.App.4th 1, 26 (approving 9:1 ratio on ground that 4:1 ratio "would be tantamount to a slap on the wrist"), *rev. den.* (Sept. 15, 2004).

Because this Court has not yet had the opportunity to interpret the U.S. Supreme Court's guidance, and the lower courts of California are in conflict, the present case and its companion — *Johnson v. Ford Motor Co.*, No.

S121723 — will be of extraordinary importance to the administration of punitive damages in this State. They no doubt will be the pole stars for the lower courts of California to follow in this area for years to come. Accordingly, the Chamber has a strong interest in sharing with the Court its views on the various issues presented in these cases. Moreover, because the Chamber has participated in virtually the entire spectrum of cases in which punitive damages have been imposed against American businesses (from product liability to consumer fraud to business torts to employment discrimination), we respectfully submit that its perspective can be of substantial assistance to the Court in resolving those extraordinarily important issues.

ARGUMENT

To avoid needless repetition of the points San Paolo has articulated in its briefs, this amicus brief will not address every one of the issues implicated by the decision below. Instead, we focus predominantly on (i) the proper standard for reviewing a punitive award for excessiveness and (ii) the role of corporate financial condition in setting and reviewing awards of punitive damages. In addition, we offer a few brief observations on some additional errors made by the Court of Appeal and Simon in applying the three *BMW* guideposts.

Our position on the standard of review is that, because it is impossible to tell merely from the size of a punitive award how a jury resolved disputed factual issues bearing on the ***degree*** of reprehensibility of the defendant's conduct and other factors relevant to the setting of punishment, reviewing courts may defer only to "specific" factual findings made by juries. *Cooper Indus.,* 532 U.S. at 439 fn.12. Accordingly, when, as here, there are no special interrogatories, the constitutionally mandated "[e]xacting appellate review" (*State Farm,* 538 U.S. at 418) necessitates that at least one level of reviewing court conduct a *de novo* review of the record and independently resolve any disputed factual issues bearing on the degree of reprehensibility of the defendant's conduct and any other factors pertinent to the excessiveness inquiry.

Our position with respect to corporate financial condition is that, under *State Farm*, it is not a valid basis for upholding a large punitive award. Moreover, the U.S. Supreme Court's punitive damages cases (buttressed by the scholarly commentary) indicate that evidence of corporate financial condition is relevant only in limited circumstances — specifically, when a defendant asserts that a large award would be disproportionate to its ability to pay or when the case involves a non-economic tort perpetrated by an individual rather than an organization. When, as here, the case involves an economic tort committed by a business organization that is not arguing that a large punitive award will be disproportionate to its ability to pay, evidence of financial condition has no proper role to play and should not be admitted.

I. THE COURT OF APPEAL'S DEFERENCE TO FACTUAL FINDINGS THAT THE JURY NEVER MADE IS IMPOSSIBLE TO SQUARE WITH THE "EXACTING APPELLATE REVIEW" REQUIRED BY THE U.S. SUPREME COURT

One of the most important unresolved issues pertaining to judicial review of punitive damages awards involves the standard to be used by reviewing courts when resolving factual disputes relevant to their application of the three *BMW* guideposts. This is a threshold question that arises whenever a reviewing court is tasked with evaluating an excessiveness challenge to a punitive award. And the answer to the question is very often determinative of the outcome of the reviewing court's excessiveness review. Accordingly, it is critical that this Court resolve the issue decisively once and for all.

1. In *Cooper Industries*, the U.S. Supreme Court held that appellate courts must conduct a *de novo* review of trial courts' application of the three *BMW* excessiveness guideposts (532 U.S. at 436), a mandate it recently reiterated in *State Farm* (538 U.S. at 418). In so holding, the Court observed that "[e]xacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." *Id.* (internal quotation marks omitted). In neither *Cooper Industries* nor *State Farm*, however, did the Court instruct lower courts as to the meaning of "exacting" review in the context of determining whether the punishment is commensurate with the degree of reprehensibility of the conduct, the ratio of punitive damages to actual or potential harm, and other mixed issues of law and fact.

Lacking concrete guidance from either the U.S. Supreme Court or this Court, the appellate courts of this State generally have applied the standard of review used to test the sufficiency of evidence for a liability finding — taking the evidence in the light most favorable to the plaintiff, assuming the existence of any fact asserted by the plaintiff so long as the record contains "substantial evidence" to support it, and giving the plaintiff the benefit of all conceivable inferences supporting a finding of high reprehensibility. The decision below is emblematic of this deferential approach. The Court of Appeal expressly held that "we apply the *Leatherman* standard to the express ***and implied*** factual findings of the jury, and reject them only if they are clearly erroneous." 113 Cal.App.4th at 1150 (emphasis added). It accordingly "summarize[d] the trial evidence in the light most favorable to [Simon], giving him the benefit of every reasonable inference, and resolving conflicts in support of the verdict." *Id*. at 1149. That exercise resulted in the court "presum[ing] that [the jury] found all the facts necessary to support its determination," including, significantly, the inference that "the effect of San Paolo's conduct upon Simon was an actual loss of at least the $400,000 difference between the appraised value and the price at which King falsely promised to sell the building." *Id*. at 1163-64; *see also id*. at 1150-52, 1157-58.

2. This kind of deference to "implied" findings confuses the jury's liability determination with its judgment of an appropriate amount of punishment. A finding of liability necessarily constitutes a factual finding that each indispensable element of the cause of action has been established. In contrast, the jury's function in setting the amount of punitive damages does ***not*** typically involve determining whether any particular fact has been proven. Once the punishment-setting stage is reached, the jury generally is ***not*** instructed that it must find particular facts and rarely is asked to return a special verdict answering specific factual questions that would bear on the degree of reprehensibility of the defendant's conduct and other issues relevant to determining the amount of punitive damages. In short, the jury essentially is asked to make an impressionistic judgment about the amount of punishment to exact. The resulting verdict is the legal equivalent of an ink blot, subject to any number of possible interpretations.

It follows that the standard for reviewing the amount of punitive damages should be substantially different from the standard that applies to sufficiency challenges to liability determinations. Because it is not possible to tell what facts (if any) the jury found in setting an amount of punitive damages or what relative weight it gave to any facts that may have been found, application of a sufficiency-of-the-evidence standard (as the Court of Appeal did here) would result in deference being given to what in reality are phantom factual determinations. This approach perforce results in "false positive" determinations of high reprehensibility.

This concern is more than hypothetical. In most cases in which punitive damages are sought against a wealthy company, the plaintiff's counsel argues to the jury that the punitive damages must be significant in relation to the defendant's net worth (or some similar measure of wealth) in order to accomplish the deterrent function. This case is no exception. During closing arguments, Simon's counsel unabashedly and repeatedly urged the jury to peg its punishment to San Paolo's net worth. For example, toward the end of his principal summation, he stated:

> And at the end of the case, I am going to ask you to award an amount of punitive damages equal to 5 to 10 percent of their real net assets, their real financial condition, and that's $2.5 million dollars to $5 million dollars.
>
> * * * And I know that those are sizeable amounts. But in this case, it is required. You will not get the attention of New York. You will not get the attention of Italy in a company that moves around $40 million dollars like they're a chip in Las Vegas.

R.T. 1927.[1] During his rebuttal, counsel returned to this theme with relish, stating:

> The bank has at least $50 million. They say they don't care that you know now that you do know.
>
> I want you to compare and consider an individual person who had a worth of $100,000 and put yourself in mind of that

---

[1] Although the issue is not presented by San Paolo, the Chamber notes that these kinds of inflammatory references to corporate defendants' out-of-state locations are common in punitive damages cases precisely because they are calculated to incite juries to return excessive and arbitrary awards by appealing to jurors' parochialism. We urge this Court to take the opportunity to admonish counsel not to engage in arguments of this sort and to encourage trial courts to act decisively to ameliorate the prejudice from such arguments when they are made. *See, e.g., Whitehead v. Food Max of Miss., Inc.* (5th Cir. 1998) 163 F.3d 265, 275-78 (granting new trial because, *inter alia*, counsel's closing argument improperly emphasized defendant's status as a national corporation with out-of-state headquarters); *Pappas v. Middle Earth Condo. Ass'n* (2d Cir. 1992) 963 F.2d 534, 539-41 ("No verdict may stand when it is found in any degree to have been reached as a result of appeals to regional bias or other prejudice.").

> person committing fraud having to be punished at a point where they have done something that's vile and reprehensible and how much it would take to punish that party.
>
> If you awarded 5 percent, that would be a $5,000 fine. It would hurt. Nobody wants to pay $5,000, but it wouldn't break them.
>
> At 10 percent they would pay $10,000. Again, that would be a pretty stiff fine for somebody. But if they committed a reprehensible act that caused a lot of harm, it's not out of line for somebody with $100,000.
>
> * * *
>
> Well, this party has $50 million dollars. And 5 percent is $2.5 million dollars. And 10 percent is $5 million dollars. And that's the same level of punishment that this person with $100,000 would get for committing these same acts.

R.T. 1967-69.

In view of this repeated exhortation to award between $2.5 million and $5 million, pegged directly to Sao Paolo's finances, there is no basis for assuming that, in imposing a punitive award of $1.7 million, the jury regarded San Paolo's conduct to be especially reprehensible, much less that it found San Paolo to have committed each of the acts of alleged misconduct relied upon by the Court of Appeal in concluding that "the conduct of San Paolo's officer was reprehensible and that substantial punitive damages were warranted in this case" (113 Cal.App.4th at 1159). There similarly is no basis for assuming that the jury valued Simon's lost opportunity at $400,000. To the contrary, the only reasonable inference is that, having been given a skewed frame of reference by Simon's counsel, the jury believed a $1.7 million award to constitute modest punishment for conduct of modest reprehensibility that caused modest injury. *See generally* Cass R. Sunstein *et al.* (2002) *Punitive Damages: How Juries Decide* 62 (explaining that empirical research demonstrates that "[t]he dollar amounts that are requested by plaintiffs in their closing arguments to a jury have a dramatic effect on the size of the punitive damages award: the higher the request, the higher the awards").

3. Each of the U.S. Supreme Court's last three punitive damages decisions either implicitly or explicitly recognizes the distinction between liability determinations and the impressionistic task of setting an amount of punitive damages, and each therefore undercuts the notion that courts conducting the constitutionally required excessiveness review should defer to "implicit" findings that there is no basis for concluding the jury actually made.

In *BMW*, for example, the plaintiff's theory was that "BMW was palming off damaged, inferior-quality goods as new and undamaged, so that BMW could pocket 10 percent more than the true value of each car." Brief of Respondent at 17, *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559 (No. 94-896), 1995 WL 330613, at *17. Had a sufficiency-of-the-evidence standard been applicable, the Supreme Court surely would have accepted this inference as being one that the jury reasonably could have reached. Instead, the Court reviewed the record for itself and, in the course of concluding that the case implicated "none of the aggravating factors associated with particularly reprehensible conduct," expressly found that "[t]here is no evidence that BMW acted in bad faith when it sought to establish the appropriate line between presumptively minor damage and damage requiring disclosure to purchasers." 517 U.S. at 576, 579. The Court emphasized that the jury's finding of the conduct necessary for punitive liability was entirely irrelevant to the excessiveness analysis, stating:

> We accept, of course, the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate to prospective purchasers of repainted cars in that State. * * * That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages[, however,] does not establish the high degree of culpability that warrants a substantial punitive damages award.

Id. at 579-80. *See also id*. at 585 ("[W]e of course accept the Alabama courts' view that the state interests in protecting its citizens from deceptive trade practices justifies a sanction in addition to the recovery of compensatory damages. We cannot, however, accept the conclusion of the Alabama Supreme Court that BMW's conduct was sufficiently egregious to justify a punitive sanction that is tantamount to a severe criminal penalty.").

In *Cooper Industries*, the Supreme Court observed that "the level of punitive damages is not really a 'fact' 'tried' by the jury," but instead "is an expression of [the jury's] moral condemnation." 532 U.S. at 432, 437 (internal quotation marks omitted). It accordingly held that appellate review of a trial court's application of the *BMW* guideposts is *de novo*. In the course of so holding, it indicated that reviewing courts must accept "***specific*** findings of fact" by the jury (*id*. at 439 fn.12 (emphasis added)), thereby implying that, in the absence of such findings, reviewing courts must resolve for themselves factual issues bearing on the application of the three guideposts. Indeed, the Court did just that in *Cooper Industries*, expressly rejecting the plaintiff's assertion that, for purposes of the second guidepost, the potential harm was $3 million. *Id*. at 441-42.

Then, in *State Farm*, after reiterating the importance of "[e]xacting appellate review" (538 U.S. at 418), the Court made clear from its own actions that this critical constitutional requirement cannot be satisfied by application of the extremely deferential sufficiency-of-the-evidence standard. Thus, although one of the dissenting Justices applied such a standard, arguing that "[e]vidence the jury could credit demonstrated that the PP & R program regularly and adversely affected Utah residents" (538 U.S. at 432 (Ginsburg, J., dissenting)), the six-Justice majority gave no deference to findings that the jury did not necessarily make, instead concluding from its own review of the record that there was "scant evidence of repeated misconduct of the sort that injured [the plaintiffs]." *Id*. at 423.

4. The upshot, we submit, is that when, as here, the jury has not been asked to respond to special interrogatories bearing on the degree of reprehensibility of the defendant's conduct and other considerations relevant to setting the amount of punitive damages, reviewing courts may not simply assume that every relevant fact was resolved against the defendant and indulge every inference urged by the plaintiff. Instead, at least one level of reviewing court must independently resolve the disputed factual issues bearing on the amount of punitive damages before applying the three *BMW* guideposts. If the trial court has made specific fact findings that bear upon the excessiveness calculus, those would of course be entitled to deferential review. *Cooper Indus.*, 532 U.S. at 440 fn.14. On the other hand, if, as here, the trial court has made no such findings, it falls to the appellate court to do so. Of course, whichever court undertakes the necessary factual inquiry, the appellate court remains obliged to apply the *BMW* guideposts *de novo*. *Id*. at 440.

In sum, there is no warrant for this Court to accept the Court of Appeal's recitation of the facts, which undeniably was the product of deferring to phantom findings that the jury never made. Rather, like the U.S. Supreme Court in *BMW*, *Cooper Industries*, and *State Farm*, this Court should independently review the record for purposes of resolving any disputed issues of fact that bear on the degree of reprehensibility of San Paolo's conduct and any other considerations that are pertinent to the excessiveness inquiry.[2] After making the necessary factual determinations, the Court should proceed to

---

[2] Little point would be served by remanding this case to the trial court to perform the factual inquiry in the first instance because the judge that presided over the trial is no longer on the superior court bench. Thus, any institutional advantage that the trial judge might enjoy over this Court in resolving disputed factual questions is absent here.

apply the three guideposts *de novo*. In this way it can provide the lower courts of this State with needed guidance about the proper and consistent application of the *BMW/Cooper Industries/State Farm* framework.

II. EVIDENCE OF AN ORGANIZATIONAL DEFENDANT'S FINANCIAL CONDITION IS NOT A VALID BASIS FOR JUSTIFYING A HIGH PUNITIVE AWARD AND IS RELEVANT (AND HENCE ADMISSIBLE) ONLY IF THE DEFENDANT CONTENDS THAT A LARGE PUNITIVE AWARD WOULD BE DISPROPORTIONATE TO ITS ABILITY TO PAY

In *Adams v. Murakami* (1991) 54 Cal.3d 105, a case involving ***an individual defendant***, this Court held not only that evidence of a defendant's financial condition is relevant to determining whether an award of punitive damages is excessive, but also that no punitive award may be sustained in the absence of such evidence. The Chamber submits that, although *Adams* remains good law in some circumstances not applicable here, it has been superseded, at least as applied to organizational defendants, by *State Farm*'s holding that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." 538 U.S. at 427. The upshot is that San Paolo's net worth (however measured) never should have been placed before the jury and certainly may not now be considered as a basis for sustaining the jury's punitive award.

A. The U.S. Supreme Court Has Now Decisively Rejected The Core Assumption Underlying The Use Of Wealth To Justify Large Punitive Damages.

The central assumption underlying this Court's decision in *Adams* was that "[t]he absence of * * * evidence [of the defendant's financial condition] thwarts effective appellate review of a claim that punitive damages are excessive." *Adams*, 54 Cal.3d at 109. *See also id.* at 118 ("Absent such evidence, a reviewing court cannot make an informed decision whether the amount of punitive damages is excessive as a matter of law."). In particular, the Court was concerned that "'the absence of evidence of net worth precludes an appellate court from deciding whether an award might, for example, bankrupt the defendant.'" *Id*. at 114 (quoting *Dumas v. Stocker* (1989) 213 Cal.App.3d 1262, 1269)). *See also id.* at 111 ("Even if an award is entirely reasonable in light of the * * * nature of the misconduct and amount of compensatory damages[], the award can be so disproportionate to the defendant's ability to pay that the award is excessive *for that reason alone*") (emphasis in original); *id.* at 112 (considering excessiveness challenge without evidence of financial condition "is contrary to the well-established rule that a punitive damages award is excessive if it is disproportionate to the defendant's ability to pay"); *id.* at 113 ("Absent evidence of a defendant's financial condition, a punitive damages award can financially annihilate the defendant.").

Insofar as the Court's ruling in *Adams* was intended to help implement the do-not-bankrupt principle, its observations were sound, but its remedy went much further than that rationale could justify. It should be up to the ***defendant*** to decide whether to seek lenience on the basis of limited resources, and when the defendant objects to consideration of that subject, its objection should be respected. But, in practice, the use of wealth has not been limited to the do-not-bankrupt concern; rather, wealth has far more often been proffered by plaintiffs as a ground for ***enhancing*** punitive damages, especially when the defendant is a large corporation. That was certainly the case here (*see* pages 6-7, *supra*). It is the error of that use of financial condition that we address in this brief.

The *Adams* holding was made in the context of an individual defendant's appeal of a punitive damages award in a professional negligence case. (We explain below why that situation is materially different from a case such as the present one.) The untoward consequences of the holding were addressed in Justice Mosk's dissent, which admonished that, while holding that a punitive award may not be sustained without evidence of the defendant's financial condition would benefit the defendant in the case before the Court, in the long run that holding "will inevitably inure to the detriment of countless future defendants." *Id*. at 131 (Mosk, J., dissenting). In particular, "to require the plaintiff to introduce evidence of the defendant's financial condition would increase the danger that the jury will focus on this information rather than on the issue of the defendant's liability for oppression, fraud or malice. A wealthy defendant would likely be prejudiced as a result." *Id.* at 130.

Justice Mosk was right. Both before and after *Adams*, evidence of corporate financial condition in particular has been the centerpiece of many a punitive damages trial and the fuel that has ignited many an explosive verdict, so much so that the U.S. Supreme Court has been prompted to express concern about the prejudicial impact of such evidence on repeated occasions since *Adams* was decided. *See State Farm,* 538 U.S. at 417 ("'the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences'") (quoting *Honda Motor Co. v. Oberg* (1994) 512 U.S. 415, 432); *TXO Prod. Corp. v. Alliance Res. Corp.* (1993) 509 U.S. 443, 464 (plurality op.) (agreeing with defendant that "the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident").[3] As a result of this oft-repeated

---

[3] This concern is well supported in the academic literature. Empirical studies consistently show that allowing plaintiffs' counsel to suggest a specific amount of punitive damages significantly skews jurors' ultimate awards. *See* W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics* (2001) 30 J. Legal Stud. 313, 329 (describing mock juror study showing that allowing plaintiff's attorney to suggest a punitive damages range produced awards highly concentrated within the suggested range because jurors "base[d] their judgments largely on the anchoring influence [of counsel's suggested

concern, the Supreme Court has consistently ***refrained*** from including financial condition as a factor to be considered in reviewing a punitive award for excessiveness and, in its most recent decision in *State Farm*, decisively rejected the proposition that a defendant's financial condition is a valid basis for upholding a large punitive award.

The evolution of that holding began in *BMW*. The U.S. Supreme Court there identified three guideposts for evaluating the permissible size of a punitive damages award: the degree of reprehensibility of the defendant's conduct; the relationship between the punitive damages and the actual and/or potential harm to the plaintiff; and the disparity between the punitive damages and the legislatively established fine for comparable misconduct. Significantly, the Court did not include corporate financial condition as a factor — even though the respondent had argued that the $2 million punishment in that case should be sustained on the ground that it was small in relation to BMW's substantial finances. *See* Brief of Respondent at 39, *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559 (94-896), 1995 WL 330613, at *37-*39. To the contrary, the Court observed that "[t]he fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business." 517 U.S. at 585.

In *Cooper Industries*, the Court reiterated the three *BMW* guideposts (532 U.S. at 435, 440, 441-43) but again omitted corporate financial condition

---

amounts]"); *see also* Reid Hastie *et al.*, *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards* (1999) 23 Law & Hum. Behav. 445 (demonstrating "anchor-and-adjust" phenomenon whereby jurors use award suggested by plaintiff's counsel as starting point and set punitive awards at a compromise figure based on the suggested amount). Of course, as this case well illustrates (*see* pages 6-7, *supra*), the defendant's net worth is invariably the jumping off point for the plaintiff's suggestion of a skewed range.

as a relevant consideration — even though the lower courts had relied on the defendant's finances as the primary basis for upholding the $4.5 million punitive verdict. *See Leatherman Tool Group, Inc. v. Cooper Indus., Inc.* (9th Cir. Dec. 17, 1999) 1999 WL 1216844, at *1 ("The district court specifically found that the punitive damage award was proportional and fair, given the nature of the conduct, the evidence of intentional passing off, and the size of an award necessary to create deterrence ***to an entity of Cooper's size and assets***. Those findings were supported by the evidence, such that the award did not violate Cooper's due process rights.") (emphasis added), *vacated by Cooper Indus., Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424.

Finally, in *State Farm* the Court not only declined to add financial condition to the guideposts but went substantially further, holding that the lower courts' reliance on "State Farm's enormous wealth" constituted "a departure from well-established constraints on punitive damages." 538 U.S. at 426-27. Accordingly, it stated unequivocally that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Id*. at 427.[4]

---

[4] Some courts have reasoned that *State Farm* does not in fact preclude the admission of evidence of corporate financial condition because the opinion contains a "see also" cite to the following passage from Justice Breyer's concurrence in *BMW*: "[Wealth] provides an open-ended basis for inflating awards when the defendant is wealthy . . . . That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct." 538 U.S. at 427-28 (internal quotation marks omitted; alterations in original). We submit that it is misguided to treat the citation of this passage as nullifying the Court's other comments about corporate financial condition. To begin with, the passage follows a cite to the majority opinion in *BMW* that unequivocally treats the defendant's financial condition as an impermissible justification for a high punishment. *Id*. at 427 ("'The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business'")

That the U.S. Supreme Court has repeatedly rejected exhortations to include financial condition as a guidepost is not surprising, because the use of financial condition to justify a high punitive award is affirmatively inconsistent with the three guideposts it has embraced. With regard to the first guidepost, varying punishment with the defendant's wealth conflicts with the well-established, constitutionally-based principle that punishment should fit the offense. *BMW*, 559 U.S. at 575; *Solem v. Helm* (1983) 463 U.S. 277, 284 ("The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence."); *Weems v. United States* (1910) 217 U.S. 349, 366-67 (it is "a precept of the fundamental law" as well as "a precept of justice that punishment for crime should be graduated and proportioned to offense"); *see also Massachusetts Bonding & Ins. Co. v. United States* (1956) 352 U.S. 128, 133 ("[b]y definition, punitive damages are based upon the degree of the defendant's culpability"). Put simply, "the size of a corporate defendant is not an additional evil that in itself warrants an enhanced penalty." *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 427 (Brown, J., concurring); *accord Zazu*

(quoting *BMW*, 517 U.S. at 585). And both are cited for the proposition that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Id*. It thus appears likely that the passage from the Breyer concurrence was cited because of its first sentence, not its second. Finally, even viewed in isolation, the second sentence of the passage is not the kind of blanket endorsement of the admission of evidence of corporate financial condition that some courts have deemed it to be. Specifically, it does not indicate what relevance Justice Breyer regards wealth evidence to have, or in what respects its use might be "[]lawful" or "[]appropriate." That is important because, as we discuss below, we readily accept that there are certain legitimate uses of wealth evidence — to "monetarize" the value of ***non-economic*** misconduct to an ***individual*** defendant and to avoid an economically debilitating award. There is no reason to suppose that the quoted comment was intended to convey anything more than that such uses are not foreclosed.

Designs v. L'Oreal, S.A. (7th Cir. 1992) 979 F.2d 499, 508 (Easterbrook, J.) ("having a large net worth" is not "the wrong to be deterred").

As to the second guidepost, the Supreme Court has expressly observed that the defendant's financial condition "bear[s] no relation to the award's reasonableness or proportionality to the harm." *State Farm*, 538 U.S. at 427. Finally, consideration of net worth is even more inconsistent with the comparative fines guidepost because neither the fines considered in *State Farm* and *BMW* nor most other criminal or administrative fines vary with the wealth of the defendant. *See Kemezy v. Peters* (7th Cir. 1996) 79 F.3d 33, 36 (Posner, C.J.) ("[t]he usual practice with respect to fines is not to proportion the fine to the defendant's wealth").

In short, after *State Farm* it should be clear that corporate financial condition is not a fourth guidepost and may not be used as a basis for upholding a large punitive award. To the extent that *Adams* suggests otherwise, it is no longer good law.

B. The Use Of Corporate Finances As A Punishment Enhancer Does Not Reasonably Advance The Deterrent and Retributive Purposes That Justify Imposition Of Punitive Damages.

Just as statements made by the U.S. Supreme Court in *Pacific Mutual Life Insurance Co. v. Haslip* (1991) 499 U.S. 1 prompted this Court to conclude in *Adams* (incorrectly, in our view) that evidence of financial condition is indispensable to appellate review of punitive damages awards (*see* 54 Cal.3d at 116-18), so too should statements made by the High Court in *State Farm* prompt a re-evaluation of the same issue. In *State Farm*, the Supreme Court expressed "concerns over the imprecise manner in which punitive damages systems are administered" — concerns that are "heightened when the decisionmaker is presented * * * with evidence that has little bearing as to the amount of punitive damages that should be awarded." 538 U.S. at

417, 418. In so doing, it reiterated its belief that "'the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.'" *Id.* at 417 (quoting *Honda,* 512 U.S. at 432).

When combined with the Court's observations that evidence of the defendant's financial condition "bear[s] no relation to the award's reasonableness or proportionality to the harm" and that reliance upon such evidence is "a departure from well-established constraints on punitive damages" (*id.* at 427), the concerns expressed by the Court in *State Farm* are a strong signal to lower courts to limit the admissibility of evidence of financial condition. The Kentucky Supreme Court, for one, received that signal, pointedly reminding a trial court on remand that the Court in *State Farm* "frowned upon the presentation of evidence of a defendant's net worth." *Sand Hill Energy, Inc. v. Smith* (Ky. 2004) 142 S.W.3d 153, 167 (internal quotation marks and alterations omitted).

That is not to say that evidence of financial condition should be excluded in all circumstances. In particular, if a defendant intends to argue that a large punitive award would be disproportionate to its ability to pay and hence excessive as a matter of California law, evidence of its financial condition remains both relevant and essential. As already noted, however, we submit, in line with the dissent in *Adams* and the U.S. Court of Appeals for the Seventh Circuit, that the burden of introducing such evidence should be on the party seeking wealth-based leniency — *i.e.,* the defendant. *See* 54 Cal.3d at 131 (Mosk, J., dissenting); *Kemezy,* 79 F.3d at 36.

Although the issue was not presented in *State Farm* and is not presented here either, there is another circumstance in which evidence of financial condition may be admissible. Economists generally agree that, when an ***individual*** commits a ***non-economically motivated*** tort, such as an assault, defamation, or hate crime, it takes a higher penalty to deter a wealthy defendant than it does to deter a defendant of modest means. In such instances, it is necessary to "monetarize" the subjective value of the misconduct to the wrongdoer, and that value will depend to a material degree on his or her wealth. *See, e.g.,* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis* (1998) 111 Harv. L. Rev. 869, 912-14.

Importantly, however, this rationale loses its validity when applied to institutional defendants accused of economically motivated torts. As Judge Posner has explained for the Seventh Circuit:

> What in economics is called the principle of diminishing marginal utility teaches, what is anyway obvious, that losing $1 is likely to cause less unhappiness (disutility) to a rich person than to a poor one. (***This point * * * does not apply to institutions as distinct from natural persons.***)

Kemezy, 79 F.3d at 35 (emphasis added; citation omitted). Scholars who have considered the subject generally agree with the Seventh Circuit. As one pair of commentators explains it:

> [A] potentially liable defendant will compare the benefits it will derive from an action that risks tort liability against the discounted present expected value of the liability that will be imposed if the risk occurs. Whether a defendant is wealthy or poor, this cost-benefit calculation is the same. * * * The defendant's wealth or lack of it is thus irrelevant to the deterrence of socially undesirable conduct * * *.

Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of the Defendant's Wealth* (1989) 18 J. Legal Stud. 415, 417; *accord* 2 American Law Institute, Reporters' Study, Enterprise Responsibility for Personal Injury (1991) at pp. 254-55; Bruce Chapman & Michael Trebilcock, *Punitive Damages: Deterrence in Search of a Rationale* (1989) 40 Ala. L. Rev. 741, 824-26; Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?* (1989) 40 Ala. L. Rev. 1143, 1176-77; Polinsky &

Shavell, *supra,* at 910-12; Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation* (1989) 40 Ala. L. Rev. 919, 950-52; *Symposium Discussion, Punitive Damages* (1982) 56 S. Cal. L. Rev. 155, 190-91 (comments of Malcolm Wheeler & Jack Carr).[5]

Because large companies no less than small ones wish to avoid losses, the overall size of a business has little bearing on the way its employees behave. As Judge Easterbrook has explained:

> General Motors is much larger than Chrysler, and so makes more defective cars, but the goals of compensation and deterrence are achieved for both firms by awarding as damages the injury produced per defective car. Corporate size is a reason to magnify damages only when the wrongs of larger firms are less likely to be punished; yet judges rarely have any reason to suppose this * * *.

Zazu, 979 F.2d at 509.

Moreover, pegging punitive damages to corporate financial condition is in actuality inconsistent with one of the principal reasons asserted for doing it. Those who advocate the use of financial condition in setting punitive damages argue that large companies must suffer proportionately larger punishments in order to feel the same sting as smaller companies. While we dispute the validity of that assumption under any circumstances (*see* pages 18-20, *supra*), it is mathematically disprovable when, as is often the case, the defendant's conduct affects multiple individuals. Consider, for example, the product liability context. Suppose that two manufacturers make precisely the same dangerously defective product (with precisely the same degree of

---

[5] To illustrate this point, in purchasing legal services no corporation would pay a lawyer a fee of $5,000 per hour simply because the amount is small in relation to its financial condition. The client, large or small, will pay only on the basis of the value of the lawyer's services and the magnitude of the stakes in the particular matter in which the lawyer is being retained.

disregard for safety), but one manufacturer is ten times the size of the other and, consequently, makes ten times as many units of the product. If each is punished 0.5% of its net worth each time it is held liable for punitive damages (the low end of the range that plaintiffs' lawyers typically suggest), the larger company not only will have to pay ten times as much each time, but also will have to pay that ten times as often. In other words, its total liability would be 100 times more than that of the smaller company even though their conduct is posited to be identical. If, in fact, the objective is to make the two companies feel the same sting, making them pay equal amounts in each case in which they are punished is sufficient to accomplish that because the larger company, having produced 10 times as many units of the product, is apt to be subject to 10 times as many punishments.

In sum, the U.S. Supreme Court's statements in *State Farm* about the minimal relevance and severe prejudicial impact of evidence of corporate financial condition, combined with the substantial body of scholarship concluding that such evidence is not relevant to deterrence, dictate that the admissibility of financial evidence be limited to two circumstances: (i) when the defendant is arguing that a large punitive award would be disproportionate to its ability to pay; and (ii) when the defendant is an individual accused of a non-economically motivated tort. Because the present case involves neither of those circumstances, *State Farm* compels the conclusion that evidence of San Paolo's financial condition should not have been admitted and that such evidence may not be used as a basis for upholding the punishment.

III. THE COURT OF APPEAL AND SIMON HAVE MADE VARIOUS ADDITIONAL ERRORS IN APPLYING THE THREE *BMW* GUIDEPOSTS

The Court of Appeal in upholding the punitive award, and Simon in defending it here, have made a number of additional errors in applying the three *BMW* guideposts. Because at least some of these errors will be addressed in greater detail by other *amici*, we will limit ourselves to making some brief observations that we hope will be of assistance to the Court in providing additional guidance to the lower courts on the proper application of the *BMW* guideposts.

A. The Reprehensibility Guidepost

Although it is our understanding that another amicus will be addressing the reprehensibility guidepost in detail, a few points seem particularly salient to us.

First, in gauging the overall degree of reprehensibility of San Paolo's conduct, we think that it is important to appreciate that, if there actually had been a contract between Simon and San Paolo for the sale of the Figueroa Street property, San Paolo would have been free to breach the contract without exposure to punitive damages. Under the well-established "efficient breach" doctrine, its damages would have been limited to Simon's lost benefit of the bargain (a figure as to which the parties disagree and which the jury, having found no contract, was never asked to determine).[6] It therefore strikes us as

---

[6] *See, e.g.*, *Huynh v. Vu* (2003) 111 Cal.App.4th 1183, 1198-99 (under "efficient breach theory," a party generally has a right to breach a contract and pay "expectation damages"); *id*. at 1199 ("where it is worth more to the promisor to breach rather than to perform a contract, it is more efficient for the law to allow the promisor to breach the contract and to pay the promisee damages based on the benefit the promisee expected to gain by the completed contract") (citation omitted); *Arrowhead Sch. Dist. No. 75, Park County v. Klyap* (Mont. 2003) 79 P.3d 250, 256 ("By only awarding expectancy damages rather than additional damages intended to punish the breaching party for failure to perform the contract, court enforcement of private contracts supports the theory of efficient breach."); *Morabito v. Harris* (Del. Ch. Ct. Mar. 26, 2002) 2002 WL 550117, at *3 ("Our jurisprudence * * * is best reflected in Oliver Wendell Holmes' famous line: 'The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass.' Holmes' approach to contractual remedies would later evolve into the 'efficient breach' theory of contract law, which urges expectation damages as a remedy in order to encourage a

incongruous that when, as here, the parties never reached the stage of a ratified contract, the failure to go through with the deal (whether characterized as bad faith or "fraud") can be treated as sufficiently egregious to justify a punitive award that exceeds (possibly by a substantial multiple) the damages to which Simon would otherwise have been limited. Put another way, if the $1.7 million punitive award in this case is sustained, the lesson to companies engaged in the sale of real estate will simply be that, if during the course of negotiations they conclude that they don't want to contract with the party with whom they have been bargaining, they should go ahead and sign a contract and then immediately breach it, rather than cut off negotiations before a contract is completed. Punitive damages should not be used to promote such illogical results.

Second, the Court of Appeal believed that the fourth of *State Farm*'s reprehensibility factors — whether "the conduct involved repeated actions or was an isolated incident" (538 U.S. at 419) — supported a determination of heightened reprehensibility because "King's deceit was continuous and intricate," "continued into his trial testimony," and victimized not only Simon, but also Atha (113 Cal.App.4th at 1157).[7] This reasoning is wholly inconsistent with *State Farm*. Although the tortious conduct there took place over several years and involved multiple acts on the part of various State Farm employees and agents (*see* 538 U.S. at 412-14, 419), the Supreme Court nonetheless treated the conduct as a ***unitary***, isolated incident of third-party bad faith, observing that "[t]he Campbells have identified scant evidence of

---

promisor's breach where resulting profits to the promisor exceed the loss to the promisee.") (citation omitted).

[7] The court's belief that Atha was victimized is hard to square with the fact that his testimony at trial was far more favorable to San Paolo than it was to Simon.

repeated misconduct of the sort that injured them." *Id*. at 423. The same is true here. All of the evidence related to a single real estate transaction. Atomizing the conduct doesn't change that. Accordingly, the Court of Appeal was clearly wrong in concluding that the fourth reprehensibility factor dictates a finding of heightened reprehensibility.

B. The Ratio Guidepost

San Paolo and at least one other *amicus* are addressing the reasons why the Court of Appeal erred in including non-compensable harm in the denominator for purposes of the ratio guidepost. We will not burden the Court by repeating those points. Instead we offer some observations on Simon's eleventh-hour invocation of "potential harm" to support the verdict.

To begin with, as retired Justice Byron White explained shortly after a three-Justice plurality of the U.S. Supreme Court invoked the "potential harm" rationale in *TXO*, the potential harm inquiry is not an open invitation to consider remote and speculative injury. Rather, to be considered in the analysis, the potential harm must be "likely." *Pulla v. Amoco Oil Co.* (8th Cir. 1995) 72 F.3d 648, 659-60 (White, J., sitting by designation). The full Supreme Court endorsed that view in *Cooper Industries*, rejecting the plaintiff's proposed measure of potential harm as "unrealistic." 532 U.S. at 442. Here, Simon adduced no evidence that the harm he now claims might have befallen him was "likely" to occur. Indeed, the very fact that it didn't occur undermines any suggestion that it was likely to occur.

Equally important, there is little if any doctrinal basis for considering potential harm (whether likely to occur or not) in a case like this one. Historically, the concept of "potential harm" has been invoked principally, if not exclusively, in cases of failed attempts — *i.e.*, situations in which the defendant "intended" to do more harm than it "succeeded" in doing. For example, *TXO* involved a large oil and gas company's "malicious and fraudulent" scheme to wrest away the royalty interests of a small landowner. The scheme was thwarted by the landowner's willingness to fight rather than relent, so the Supreme Court considered the amount of royalties that could have been lost in the event the tortious scheme had succeeded. *See* 509 U.S. at 460-62. The Supreme Court has never suggested that "potential harm" should be considered when the conduct does not involve a failed attempt. Indeed, in *State Farm* itself, the plaintiffs argued that the amount they would have been required to pay the underlying judgment holders had they not reached agreement with them was "potential harm" that should have been added to the denominator of the punitive damages/harm ratio. *See* Brief of Respondents at 17 & fn.5, *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408 (No. 01-1289), 2002 WL 31387421, at *17. The Supreme Court instead used only the $1 million in actual damages as the denominator of the ratio, thus indicating its unwillingness to expand the "potential harm" concept beyond the context of failed attempts.

Here, there is no basis for believing that San Paolo knew that Simon was at risk of having no place to operate his business, much less intended him to suffer that consequence. Accordingly, to accept uncritically Simon's assertion that San Paolo's conduct entailed substantial "potential harm" that was not encompassed within the compensatory damages would expand the concept of "potential harm" in a manner that is sure to cause mischief in future cases. Indeed, if "potential harm" is treated as a valid basis for increasing the denominator of the ratio in this case, it is predictable that it will be invoked for that purpose in virtually every other tort case as well. The Court should take this opportunity to nip that possibility in the bud.

C. Legislatively Established Fines For Comparable Conduct

The Court of Appeal rejected San Paolo's contention that the punitive award should be compared to the $2500 civil penalty for unfair competition set forth in Business and Professions Code § 17206 on the ground that "unfair competition is not necessarily fraudulent; it may be any business practice undertaken by any unlawful means" (113 Cal.App.4th at 1167). That logic is squarely inconsistent with *BMW*. There, as here, the jury found the defendant to have committed fraud and, in addition, found by clear and convincing evidence that the fraud was "'gross, oppressive or malicious.'" *BMW*, 517 U.S. at 563 & fn. 3, 565 (quoting Ala. Code § 6-11-20). Nevertheless, the Supreme Court deemed it appropriate to compare the punitive award to the legislatively established fine for violating the Alabama Deceptive Trade Practices Act (*id*. at 584) even though there, as here, the statute governed conduct that fell short of fraud. Accordingly, the Court of Appeal committed a clear error of law in disregarding this important "indicium of excessiveness" (*BMW*, 517 U.S. at 583).

CONCLUSION

The Court should undertake an independent review of the record for purposes of resolving factual disputes relevant to the application of the *BMW* guideposts and then proceed to apply those guideposts, giving no weight to San Paolo's financial condition. Under a correct application of the guideposts, the punitive award is unsustainable.

Respectfully submitted,

____

Donald M. Falk (Bar # 150256)
MAYER, BROWN, ROWE
& MAW LLP
Two Palo Alto Square
3000 El Camino Real
Suite 2-300
Palo Alto, CA 94306
(650) 331-2030

Of Counsel:
Evan M. Tager
MAYER, BROWN, ROWE
& MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3240

Robin S. Conrad
NATIONAL CHAMBER LITIGATION
CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Attorneys for *Amicus Curiae* The Chamber of Commerce
of the United States

Dated: October 13, 2004

CERTIFICATE OF COMPLIANCE WITH CALIFORNIA RULE OF COURT 29.1(f)

Pursuant to California Rule of Court 29.1(f), I certify that the attached Brief of Amicus Curiae is proportionately spaced, has a typeface of 13 points, and contains 8,555 words.

Dated: October 13, 2004

Mayer, Brown, Rowe & Maw LLP

____

Donald M. Falk

PROOF OF SERVICE

I, the undersigned, declare:

1. I am employed in the County of Santa Clara, State of California. I am over the age of eighteen years and am not a party to this action. My business address is Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California, 94306-2112.

2. On October 13, 2004, I served the documents named below by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, addressed as follows:

Documents Served:

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF DEFENDANT/PETITIONER SAN PAOLO U.S. HOLDING COMPANY, INC.

by causing true and correct copies of the above to be delivered by overnight courier from DHL in sealed envelopes with all fees prepaid, addressed as follows:

Steven N. Richman, Jr. Lawrence A. Abelson Epport, Richman & Robbins, LLP 1875 Century Park East, Suite 800 Los Angeles, CA 90067-2512	Mitchell B. Ludwig Kevin J. Stack Andre E. Jardini 500 North Brand Blvd. Twentieth Floor Glendale, CA 91203-1904
Clerk, Los Angeles County Superior Court 111 N. Hill Street Los Angeles, CA 90012	Clerk, Court of Appeal Second Appellate District Division Four 300 South Spring Street Second Floor Los Angeles, CA 90013

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed by me on October 13, 2004.

____

Jessica I. Fernandez