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July 1, 2005

Honorable Ronald M. George,
Chief Justice, and
The Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Dear Chief Justice George and Associate Justices:

On behalf of the Chamber of Commerce of the United States of America (the "Chamber"), and pursuant to California Rule of Court 28(g), we write in support of the petition of Philip Morris Inc. for review of the decision of the Court of Appeal in *Boeken* v. *Philip Morris Inc.*, (2005) 26 Cal. Rptr. 3d 638. The Chamber is the nation's largest federation of business companies and associations, with 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. The sound and equitable administration of punitive damages claims is a matter of profound concern to the Chamber's members. Accordingly, the Chamber has a strong interest in the proper interpretation of the United States Supreme Court's decision in *State Farm Mutual Automobile Insurance Company v. Campbell* (2003), 538 U.S. 408 [123 S.Ct. 1513, 155 L.Ed.2d 585] ("*State Farm*").

This Court recently decided *Johnson v. Ford Motor Co.*, No. S121723, and *Simon v. San Paolo U.S. Holdings Co.*, No. S121933. In so doing, the Court took a significant step toward addressing some of the major open questions pertaining to the impact of *State Farm* on California punitive damages law. For example, *Johnson* provides guidance as to the relevance of the defendant's conduct toward parties other than the plaintiff, and *Simon* addresses the post-*State Farm* application of the second constitutional "guidepost" for the evaluation of a punitive damages award – the ratio of punitive to compensatory damages. (*See State Farm*, 538 U.S. at 423-25; *BMW of N. Am., Inc. v. Gore* (1996), 517 U.S. 559, 582.)

However, *Simon* and *Johnson* leave unanswered several key questions about the administration of punitive damages cases – questions as to which there is much confusion and inconsistency in the lower courts. A grant of review in *Boeken* would further advance the interests of legal uniformity, consistency and completeness.

1. First, *Boeken* raises the question of the appropriate remedy for a punitive damages award that is both excessive in amount and tainted by constitutional trial error. In *Simon*, where the only the error in the jury's verdict was the excessive amount of the award, this Court held that it was appropriate to reduce the award to the maximum amount allowable under the Constitution, without ordering a new trial. Slip op. at 30-31. In *Boeken*, the Court of Appeal recognized that the amount of the jury's award of $3 billion in punitive damages to an individual plaintiff was unconstitutionally excessive, but the court also noted that plaintiff's counsel had expressly asked the jury to punish Philip Morris for harms incurred by millions of other smokers. Nevertheless, the court determined that reducing the award to $50 million would satisfy due process. Petitioner's position is that the Court of Appeals approach deprives the defendant of its right to a jury trial, because it is impossible for the reviewing court to determine the amount that an untainted jury might have awarded. In light of the fact that the Courts of Appeal in both *Henley v. Philip Morris Inc.*, (Cal. App. 2004), 9 Cal. Rpt. 3d 29, 72, and *Romo v. Ford Motor Co.* (Cal. App. 2003), 6 Cal. Rpt. 3d 793, 805-806, also held that constitutional trial errors can be cured by remittitur, this Court should grant review in *Boeken* in order to instruct the lower courts that "the use of remittiturs [is] uniformly confined to cases in which an excessive damages award was the only error in the jury's verdict." *Schelbauer v. Butler Manufacturing Co.* (1984), 35 Cal.3d 442, 454 (emphasis in original).

2. *Boeken* presents an additional remedy question that was addressed in neither *Simon* nor *Johnson*: whether a punitive damages award can be so excessive that a remittitur is inadequate to cure the passion and prejudice that inflamed the jury and motivated the verdict. That issue is squarely presented here: a ten-figure award to a single plaintiff is so far outside the bounds of constitutional propriety as to demonstrate, without more, that it is the product of passion and prejudice. This Court should grant review in order to determine whether, under such

circumstances, the verdict is so tainted that only a new trial can serve as an adequate remedy.[1]

3. *Boeken* also raises questions about the ratio guidepost that were not addressed in *Simon* or *Johnson*. The size of the compensatory damages award is one of the principal factors in determining the maximum constitutionally permissible ratio. *See State Farm*, 538 U.S. at 425. In *Simon*, the compensatory damages were $5,000; *Johnson* involved a compensatory award of $17,812. In *Boeken*, by contrast, the compensatory award is $5.5 million – yet the Court of Appeal held that a punitive damages award more than nine times that amount comported with due process. In neither *Simon* nor *Johnson* did the Court have occasion to construe the United States Supreme Court's suggestion that where the "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* (emphasis added). The lower courts would benefit from guidance as to the relative weight that should be placed on a large compensatory award.

Moreover, although the *Johnson* opinion recognized the risk of duplicative punishment in the context of rejecting the plaintiff's disgorgement argument (*see* slip op. at 19-22), the Court was not directly presented with the question whether a lower ratio is appropriate where the defendant has already paid millions of dollars in punitive damages for the same cause of conduct that injured the plaintiff. In *Henley*, *supra*, Philip Morris was required to pay a $10.5 million verdict, including $9 million in punitive damages, to a single smoker who was permitted to urge the jury to punish for alleged harm to non-parties – including, necessarily, the plaintiff here. Many similar lawsuits are pending. Accordingly, a grant of review in *Boeken* would allow the Court to clarify the circumstances under which the specter of multiple punishment limits the amount of punitive damages that can be imposed in an individual case.

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[1]Defendants may of course waive their right to a new trial and instead request reduction of the award by way of remittitur.

For all of the foregoing reasons, we urge the Court to grant review in *Boeken* or, at a minimum, to remand the case for further consideration by the Court of Appeal in light of *Simon* and *Johnson*.

Respectfully submitted,

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of the United States of America