No. S213873

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THOMAS NICKERSON,
Plaintiff and Appellant,

v.

STONEBRIDGE LIFE INSURANCE,
Defendant and Respondent.

After a Decision by the Court of Appeal,
Second Appellate District, Division Three, Case No. B234271

From the Superior Court, County of Los Angeles
Case No. BC405280, Assigned for All Purposes to
Judge Mary Ann Murphy, Department 25

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT

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APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT

To the Honorable Tani Cantil-Sakauye, Chief Justice:

The Chamber of Commerce of the United States of America (the "Chamber") respectfully moves for leave to file a brief as *amicus curiae* in this matter in support of the defendant and respondent.* The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

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 every case in which the United States Supreme Court has addressed such issues during the past several decades, as well as in two of this Court's seminal cases—*Simon v. San Paolo U.S. Holding Co.* (2005) 35 Cal.4th 1159, and *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191.

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* No party or counsel for a party in the pending appeal authored the proposed *amicus brief* in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of this brief, other than the *amicus curiae* and its members.

As courts across the country—including this Court—have begun to impose meaningful quantitative limits on punitive damages under the auspices of the United States Supreme Court's ratio guidepost, attorneys for plaintiffs have attempted to circumvent those limits by manipulating how the ratio is calculated in a number of ways. This appeal represents one such attempt, and it is thus of great interest to the Chamber and its members.

The Chamber fully endorses the arguments set forth in Defendant's brief, but desires to bring to the Court's attention additional arguments and considerations that the Chamber believes should bear on the Court's resolution of the question presented. Accordingly, the Chamber respectfully submits that the attached proposed *amicus* brief will be of assistance to the Court and requests leave to file it.

CONCLUSION

The Court should grant this application and permit the Chamber to file the attached proposed *amicus curiae* brief.

Dated: July 7, 2014

Respectfully submitted.

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Chamber agrees with Defendant and the courts below that *Brandt* fees should not be included in the denominator of the ratio guidepost when they are awarded by the court after trial. More broadly, it is inappropriate to include *Brandt* fees—whether awarded by judge or jury—in the denominator when the plaintiff has a contingency-fee agreement with his counsel. When punitive damages are awarded to such a plaintiff, it is guaranteed that he will never suffer an economic loss in the form of attorneys' fees, so it is improper to consider that "phantom loss" in the due-process analysis.

With respect to *Brandt* fees that are awarded by the court after trial, there is a further reason not to include them in the denominator, over and above those identified by Defendant. Specifically, California has adopted a rule that defendants may not rely on evidence in mitigation of punitive damages unless they first submit that evidence to the jury. Plaintiffs should be held to the same strategic choice of either submitting evidence to the jury or forgoing reliance on such evidence during post-verdict review of the amount of any punitive award.

Finally, if the Court were to conclude that *Brandt* fees can be included in the denominator of the ratio guidepost, it also should hold that doing so dictates reducing the constitutionally permissible ratio. Because *Brandt* fees, in addition to compensating the plaintiff, serve to punish and deter the defendant, a lower punitive-to-compensatory ratio generally will be sufficient to accomplish California's interest in punishment and deterrence whenever an award of damages includes *Brandt* fees.

ARGUMENT

I. *Brandt* Fees Should Not Be Included In The Denominator When Plaintiff's Only Obligation To Pay Such Fees Is Contingent On A Successful Outcome.

Plaintiff contends that *Brandt* fees should be included in the denominator of the ratio guidepost because those fees represent harm to the plaintiff caused by the defendant's tortious conduct. As Plaintiff puts it, "*Brandt* fees represent compensation for an economic loss to the policyholder, and therefore must be taken into account during due-process review of punitive-damage awards." Opening Br. on Merits 13.

That rationale falls apart when, as here, the plaintiff has no obligation to pay attorneys' fees unless he wins. In such situations, the plaintiff never experiences "an economic loss" because the attorneys' fees go directly from the defendant's pocket to that of the plaintiff's attorney.

It is no answer to say that a plaintiff who has entered into a contingency-fee agreement can experience "an economic loss" if he prevails on his claim for breach of contract but not on his claim for bad faith and therefore is not entitled to recover a *Brandt* fee. That argument misses the mark, because such a plaintiff also would not be entitled to an award of punitive damages, which are available only upon proof of a tort (plus proof of fraud, oppression, or malice). Thus, there is no circumstance under which a plaintiff with a contingency-fee agreement can experience an economic loss yet also be entitled to recover punitive damages. Conversely, whenever the plaintiff in a bad-faith case receives a sustainable punitive-damages award, he also will receive an award of *Brandt* fees. And if such a plaintiff has a contingency-fee arrangement with his attorney, he cannot be said to have suffered any economic loss in the form of attorneys' fees.

Because there are no circumstances in which a plaintiff who entered into a contingency-fee agreement and received punitive damages could both incur attorneys' fees and not be awarded them under *Brandt*, it would be improper to include this phantom loss in the denominator of the ratio guidepost. (*See, e.g.*, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 442 ["unrealistic" estimates of potential harm should not be considered].)

II. It Would Be Fundamentally Unfair To Consider Post-Verdict *Brandt* Fees As Part Of The Due-Process Analysis While Refusing To Consider Post-Verdict Evidence Offered By The Defendant In Mitigation.

Whether or not the Court agrees with us that *Brandt* fees should be excluded from the denominator when the plaintiff has entered into a contingent-fee agreement, there is an independent reason why *Brandt* fees awarded by a court in post-trial proceedings should not be included in the denominator: It would be inequitable to rely on such post-trial fees to

justify a higher punitive award (as Plaintiff advocates) when California courts refuse to consider post-trial evidence offered by the defendant in mitigation of punitive damages.

The Court of Appeal has held that evidence offered in mitigation of punitive damages, such as "evidence of punitive damages imposed in other cases," may not be considered by a reviewing court as part of the due process analysis unless the evidence was "presented to the jury in the first instance." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1660-61.) That rule places defendants on the horns of a dilemma. On the one hand, evidence that the defendant has paid punitive damages in other cases for the same course of conduct will become highly relevant for post-trial review if the jury imposes excessive punitive damages. (*See id.* at 1661 ["Punitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter."].) On the other hand, informing the jury of prior punitive awards carries enormous risks for the defendant. Far from motivating the jurors to return a lower punitive award, it may actually incite the jurors to impose a ***larger*** sanction. Jurors in subsequent trials might also use prior awards as a benchmark for their own punitive awards, making it less likely that the defendant will be able to persuade them to impose more modest punishment.

A plaintiff deciding whether to litigate his claim for *Brandt* fees in front of the jury currently faces a similar dilemma. On the one hand, the plaintiff wants to include those fees as part of the denominator of the ratio guidepost in order to justify a higher punitive award. On the other hand, informing the jury that the plaintiff will receive a substantial award for attorneys' fees may cause the jurors to return a lower punitive award either because they realize that punitive damages are not necessary to cover the

plaintiff's legal fees or because they understand the punitive effect of those fees and decide that a lesser punitive award is sufficient.

Plaintiff now asks to be taken off the horns of this dilemma. He wants to use the *Brandt* fees to justify a higher punitive award without incurring the risk that the jurors will return a lower punitive award because they know that he will receive an award for his attorneys' fees. Allowing plaintiffs to rely on post-verdict *Brandt* fees to justify a higher punitive award while barring defendants from relying on post-verdict evidence in mitigation unless they accept the risks of presenting that information to the jury violates the fundamental principle that all parties are equal before the law. What is sauce for the goose should be sauce for the gander.

III. Including *Brandt* Fees In The Denominator Would Dictate A Reduction In The Constitutionally Permissible Ratio.

Plaintiff's core premise is that inclusion of the *Brandt* fee in the denominator will result in a commensurate increase in the constitutionally permissible punishment. That premise is false, and we urge the Court to say so.

The fundamental question underlying constitutional review of punitive awards for excessiveness is "whether [the] particular award is greater than reasonably necessary to punish and deter." (*Pac. Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 22.) When "a more modest punishment for [the defendant's] reprehensible conduct could have satisfied the State's legitimate objectives," then a reviewing court should reduce the award to that amount and "go[] no further." (*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 419-20; see also *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 568, 584 ["[t]he sanction imposed ... cannot be justified ... without considering whether less drastic remedies could be expected to achieve [punishment and deterrence]"]; *cf. Exxon Shipping Co. v. Baker* (2008) 554 U.S. 471, 513 [recognizing "the need to protect against

the possibility ... of [punitive] awards that are unpredictable and unnecessary, either for deterrence or for measured retribution"].)

As the Supreme Court of Wisconsin recently put it in ordering the reduction of a substantial punitive award, "[a] punitive damages award is excessive, and therefore violates due process, if it is more than necessary to serve the purposes of punitive damages, or inflicts a penalty or burden on the defendant that is disproportionate to the wrongdoing." (*Kimble v. Land Concepts, Inc.* (Wis. 2014) 845 N.W.2d 395, 407 [internal quotation marks omitted].)

In order to aid courts in determining whether a punitive award exceeds the amount necessary to accomplish the State's interests in punishment and deterrence, the U.S. Supreme Court has identified three "guideposts": (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive to compensatory damages; and (3) the legislatively established fines for comparable conduct. (*BMW*, 517 U.S. at 574-75.)

In *State Farm*, the Supreme Court "addressed [the ratio] guidepost with markedly greater emphasis and more constraining language" than it had in previous cases, "tighten[ing] the noose" that it previously had thrown around the problem of excessive punitive awards. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1181.) Specifically, *State Farm* reiterated the Supreme Court's prior statement that a punitive award of four times compensatory damages is generally "close to the line of constitutional impropriety" and indicated that, though "not binding," the 700-year-long history of double, treble, and quadruple damages remedies (*i.e.*, ratios of 1:1 to 3:1) is "instructive." (538 U.S. at 425.) *State Farm* also "emphasizes and supplements" *BMW* "by holding that '[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.'" (*Bains LLC v. ARCO Prods. Co.* (9th Cir. 2005) 405 F.3d 764, 776 [quoting *State Farm*, 538 U.S. at 425].)

As the Second Circuit recently has explained, "[t]he ratio, ***without regard to the amounts***, tells us little of value ... to help answer the question whether [a] punitive award was excessive." (*Payne v. Jones* (2d Cir. 2013) 711 F.3d 85, 103 [emphasis added].) Instead, for any particular degree of reprehensibility, the permissible ratio varies inversely with the amount of compensatory damages awarded. If the compensatory award is $10,000, then a 10:1 ratio may be warranted; but if the compensatory damages are $300,000, even a 1:1 ratio might "appear ... to be very high (because of the relevant low degree of reprehensibility of [the defendant's] conduct)." (*Ibid.*)

This observation comports with the Supreme Court's broader recognition that compensatory damages have a deterrent effect in their own right. (*See, e.g., Memphis Cmty. Sch. Dist. v. Stachura* (1986) 477 U.S. 299, 307 ["[d]eterrence ... operates through the mechanism of damages that are ***compensatory***"].) When the compensatory damages go beyond removal of the defendant's alleged ill-gotten gains, they have the effect of deterring and punishing every bit as much as if they were labeled "punitive" damages. From the defendant's perspective, a dollar is a dollar.

The U.S. Supreme Court has expressly recognized this point in the context of damages for mental anguish, explaining that when it comes to such damages, "'there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.'" (*State Farm*, 538 U.S. at 426 [quoting Restatement (Second) of Torts § 908, cmt. c (1979)].) As former Justice Brown put it even before *State Farm*:

> [L]arge compensatory damage awards not based on a defendant's ill-gotten gains have a strong deterrent and

> punitive effect in themselves. The magnitude of such awards should be considered in deciding whether and to what extent punitive damages should be imposed. ... Only if the jury finds the compensatory damage award insufficient to punish or deter should an additional punitive award be imposed.

(*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 424-25 [Brown, J., joined by Chin, J., concurring].) Indeed, in some cases "the overall size of compensatory damages alone may constitute a significant deterrent." (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1106 [internal quotation marks omitted].)

Like non-economic damages, awards of attorneys' fees include "a punitive element." (*Walker v. Farmers Ins. Exch.* (2007) 153 Cal.App.4th 965, 974 [affirming reduction of punitive damages to 1:1 ratio based on the "punitive element to ... compensatory damages" that included emotional-distress damages and *Brandt* fees]. See also *Sierra Club v. U.S. Army Corps of Eng'rs* (2d Cir. 1985) 776 F.2d 383, 389 [although "an award of fees under the bad faith exception rests on different principles than does an award of punitive damages," it "has a punitive and deterrent flavor"]; *Parrish v. Sollecito* (S.D.N.Y. 2003) 280 F.Supp.2d 145, 164 [attorneys' fees "include[] a certain punitive element"].) It follows that a plaintiff who receives an award of attorneys' fees should receive "a lesser rather than greater award of punitive damages." (*Daka, Inc. v. McCrae* (D.C. 2003) 839 A.2d 682, 701 n.24. See also *Gay v. Ludwig* (Ohio Ct. App. 2004) 2004 WL 911324, at *5 [rejecting argument that punitive damages award of $100 was insufficient and explaining that "we agree with [the defendant] that the trial court fashioned an equitable award of total damages when it awarded a nominal amount of punitive damages but then awarded a substantial amount of attorney fees, which the court ordered to be paid directly to the [plaintiffs]"].)

In accordance with this commonsense principle, the Court of Appeal has affirmed a reduction of a punitive award to an amount equal to the compensatory damages in an insurance bad-faith case in which the plaintiffs were awarded both emotional-distress damages and *Brandt* fees, reasoning that "there [was] a punitive element to respondents' recovery of compensatory damages." (*Walker*, 153 Cal.App.4th at 974.)

The upshot is that, whatever this Court ultimately determines about the inclusion of *Brandt* fees in the denominator of the punitive-to-compensatory ratio, courts must consider the effect of those fees in determining whether and to what extent an additional award of punitive damages remains necessary to accomplish California's interests in deterrence and retribution. Generally, that will mean that if *Brandt* fees are included in the denominator, a ***lower*** ratio of punitive to compensatory damages will be permissible than if they are excluded from the denominator.

To illustrate using the facts of this case, Plaintiffs are mistaken in assuming that adding their *Brandt* fees to their compensatory damages and thereby increasing the denominator by 35.7% should result in a commensurate 35.7% increase in the permissible amount of punitive damages. Whether or not a 10:1 ratio is permissible when the denominator is $35,000—and we would maintain that it is not (see *State Farm*, 538 U.S. at 425)—such a ratio is neither necessary nor appropriate if the denominator is inflated to $47,500 by inclusion of *Brandt* fees. Indeed, there is no reason why the exact same amount of punitive damages—and hence a reduced ratio of 7.4:1—would not be sufficient (indeed, more than sufficient) to accomplish California's interest in deterrence and retribution, which is all that the Constitution allows.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Dated: July 7, 2014

Respectfully submitted.

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CERTIFICATE OF WORD COUNT
(California Rule of Court 8.520(c)(1))

According to the word count facility in Microsoft Word 2007, this brief, including footnotes but excluding those portions excludable pursuant to Rule 8.520(c)(3), contains 2,785 words, and therefore complies with the 14,000-word limit contained in Rule 8.520(c)(1).

Dated: July 7, 2014

Respectfully submitted.

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CERTIFICATE OF SERVICE

I, Kristine Neale, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action. My business address is Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California 94306-2112. On July 7, 2014, I served the foregoing document(s) described as:

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT

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

Executed on July 7, 2014, in Palo Alto, CA.

Kristine Neale

Kristine Neale