CALIFORNIA COURT OF APPEAL

FOR THE SECOND APPELLATE DISTRICT - DIVISION FOUR

No. B135147

PATRICIA ANDERSON, individually; MARY BELL SEWARD as Guardian ad Litem on behalf of KIONTRA BROADNAX, KIONNA BROADNAX, ALISHA PARKER, and TYSHON HANEY; and JO TIGNER, individually, Plaintiffs/Respondents, v. GENERAL MOTORS CORPORATION, Defendant/Appellant.	Superior Court No. BC 116926

Appeal from Superior Court of the State of California, County of Los Angeles
The Honorable Ernest Williams, Judge, Presiding

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE APPELLANT

Of Counsel:

Robin S. Conrad
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1516 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Stephen M. Shapiro
Evan M. Tager
Donald M. Falk (SB#150256)
MAYER, BROWN & PLATT
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

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

TABLE OF CONTENTS

Page

TABLE OF CONTENTS — Continued

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES — Continued

Page(s)

TABLE OF AUTHORITIES — Continued

Page(s)

TABLE OF AUTHORITIES — Continued

Page(s)

TABLE OF AUTHORITIES — Continued

Page(s)

TABLE OF AUTHORITIES — Continued

Page(s)

TABLE OF AUTHORITIES — Continued

Page(s)

TABLE OF AUTHORITIES — Continued

Page(s)

CONSTITUTIONS

STATUTES AND REGULATIONS

MISCELLANEOUS

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 ("the Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, sector, and region. The Chamber regularly advocates the interests of its members in court on issues of national concern to the business community.

The Chamber has a significant interest in the issues presented in this case. Businesses such as those represented by the Chamber are the primary target of large damages claims of all types and often suffer unpredictable and arbitrary awards. As a consequence, the Chamber and its members have a strong interest in ensuring that damage awards are imposed in a manner that is fair, rational, and consistent with the guarantees of due process provided in both state and federal constitutions.

INTRODUCTION AND SUMMARY OF ARGUMENT

The plaintiffs in this case asked the jury to send a message. That message — in the form of emotional distress awards exceeding $100 million and a punitive award of $4.8 ***billion*** — is deeply troubling. The message is that manufacturers should not engage in cost-benefit analyses when they design products — even though the concept of cost-benefit analysis is embodied in California products liability law. Instead, under threat of essentially open-ended liability, they must design their products to prevent injury in every imaginable circumstance, no matter how much the resulting products will cost the consumer and no matter what otherwise desirable features need to be sacrificed in the process. Such a regime would undermine the welfare of consumers and discourage responsible manufacturing practices.

Although it would not have cost General Motors anything to design its A-cars so that the gas tank would be above, rather than behind, the rear axle, had it placed the tank there, the company surely would have confronted lawsuits claiming that its decision exacerbated the likelihood of gasoline escaping into the passenger compartment after a severe rear-end collision. Indeed, that safety concern was a significant reason for the decision to locate the tank behind the axle. Under the true message of this verdict, of course, the placement of the gas tank is really beside the point: it is the failure to design

a tank that is 100% puncture-resistant (or alternatively to design a car whose rear end can withstand an impact at any speed) for which General Motors is being punished. Even if auto makers could develop such accident-proof designs, doing so would require building the equivalent of an armored personnel carrier, which would be prohibitively expensive and would undermine other desirable features of the vehicle, including, significantly, fuel efficiency.

California law does not require such deleterious results. We fully agree with General Motors that plaintiffs have failed to establish the basic elements of their design defect claim. But even if liability were sustained, there would be no basis in the law for finding General Motors' decision to place the gas tank in the same location as 98% of the other vehicles marketed at that time to be sufficiently reprehensible to justify the imposition of punitive damages. Moreover, the unprecedented amounts of compensatory and punitive damages awarded by the jury (even as reduced by the trial court) are reflective of a jury that was animated by passion and prejudice rather than reasoned judgment.

This *amicus* brief addresses the following points, which recur in modern products liability litigation and are of substantial concern to the business community:

1. The non-economic damages in this case are so exorbitant as to call into doubt the fundamental fairness of the proceedings. Plaintiffs undeniably were injured, some of them severely. If General Motors were liable, they would be entitled to reasonable compensation for any physical and emotional injury that was proved by competent evidence. But no amount of evidentiary support could justify the eight-figure awards made to each plaintiff here. Those awards should be substantially reduced or a new trial should be granted.

2. Plaintiffs did not meet their burden to prove by clear and convincing evidence that General Motors is liable for punitive damages. To the contrary, undisputed evidence showed that the fuel-tank design and testing challenged by plaintiffs met the applicable government safety regulations and industry safety standards. This evidence alone defeats any finding — much less a finding by clear and convincing evidence — that General Motors

engaged in "despicable conduct" or "willful and conscious disregard of the rights or safety of others" within the terms of Civil Code Section 3294(c)(1)-(2). Perhaps recognizing this fact, plaintiffs focused their plea for extravagant penalties on the notion that General Motors' use of cost-benefit analyses in making design and engineering decisions was "despicable" in itself. That view is insupportable as a matter of law. The cost-benefit analyses for which plaintiffs demanded punishment were the same risk-utility tests that the law obliged the jurors themselves to apply in evaluating liability for the fuel-tank design at issue in this case.

3. Even if the jury were legally entitled to impose some measure of punishment, the billion-dollar exaction here cannot be sustained. First, the award cannot be justified based on the number of other persons who someday might be injured in automobiles from this long-discontinued product line. At best, such a conclusion would unconstitutionally extend the power of one jury and one judge in Los Angeles to regulate the behavior of General Motors nationwide and around the world. Second, the punitive award is grossly and unconstitutionally disproportionate to the harm caused in this case, even if that harm is measured by the shockingly large compensatory damages. Third, any rational deterrence interest would be more than served by the compensatory damages alone, even if those damages are substantially remitted (as they should be as a matter of law). Under these circumstances, ***any*** punitive exaction would drastically overdeter product innovation. Finally, General Motors' significant financial resources cannot rescue this grossly excessive award.

4. The staggering amounts of the damages awards demonstrate decision-making infected by passion and prejudice. The record leaves no doubt that plaintiffs intended and achieved exactly that illegitimate result, and that consequently General Motors was deprived of its right to a fair trial. Plaintiffs' counsel peppered their closing arguments with naked appeals to regional and anti-corporate bias, not only impugning General Motors' effort to defend itself but repeatedly resorting to crude name-calling as well. General Motors is entitled to a new trial on this ground as well.

I. THE COMPENSATORY AWARDS ARE GROSSLY EXCESSIVE AND SHOULD BE SET ASIDE.

The astounding $102 million compensatory awards alone are far beyond any reasonable recompense for plaintiffs' injuries. Affirming them would have seriously deleterious consequences. As one federal court has recognized, "[o]ne excessive verdict, permitted to stand, becomes precedent for another still larger one. Unbridled, spiraling, excessive judgments predictably impose huge costs on society." *Consorti v. Armstrong World Indus., Inc.* (2d Cir. 1995) 72 F.3d 1003, 1010 (footnote omitted), *vacated and remanded on other grounds sub nom. Consorti v. Owens-Corning Fiberglas Corp.* (1996) 518 U.S. 1031. As a consequence, California courts have repeatedly acknowledged their affirmative "duty * * * to act" when a jury "award as a matter of law appears excessive, or where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice." *Cunningham v. Simpson* (1969) 1 Cal.3d 301, 308; *see also Bertero v. National Gen'l Corp.* (1974) 13 Cal.3d 43, 64; *Las Palmas Assocs. v. Las Palmas Ctr. Assocs.* (1991) 235 Cal.App.3d 1220, 1252; *Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 259.

We do not mean to belittle the pain caused by the burn injuries that plaintiffs sustained, or to suggest that — if General Motors were liable — only nominal damages could be appropriate. But if any case crosses the line from reasonable compensation to gross excessiveness, this one does. The jury awarded the six plaintiffs damages for emotional distress in amounts that ranged from $10 million to $25 million each. If invested in extremely conservative long-term treasury bonds, two plaintiffs in this case would find themselves with an inexhaustible income stream of $549,000 per year; two more would have a guaranteed annual income of $823,500; and two would receive $1,372,500 each and every year for life — without ever invading the $10-25 million "principal." *See* N.Y. TIMES, Mar. 30, 2001, at C7 (reporting 5.27% yield rate for 30-year Treasury Bond).

These awards are not just staggering in their own right; they also shatter precedent. We have found no published California decision that affirmed an award of more than $6 million in non-economic damages (*see Fortman*, 211

Cal.App.3d 241); the largest compensatory award in a case involving burn injuries appears to be $2.5 million, an amount that included both economic and non-economic damages (*see Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757). As one might expect in cases producing record-setting awards, the plaintiffs in *Fortman* and *Grimshaw* suffered permanent injuries as grave as those of the most seriously injured plaintiff in this case, injuries that far exceeded even the worst sustained by the other five plaintiffs here.[1] Yet, although the juries in *Fortman* and *Grimshaw* awarded huge intangible damages, the verdicts were nonetheless significantly lower than even the ***smallest*** compensatory award in this case.

Although the injuries of the plaintiffs here were not insubstantial, it is difficult to imagine ***any*** circumstance in which a plaintiff could suffer "emotional distress" or "pain and suffering" so severe as to warrant lifetime annuities in the ranges awarded. Emotional distress damages are necessarily imprecise, but, as the Supreme Court of Texas recently observed, "[j]uries cannot simply pick a number and put it in the blank" provided in the jury form for intangible damages. *Saenz v. Fidelity & Guar. Ins. Underwriters* (Tex. 1996) 925 S.W.2d 607, 614; *accord Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421, 1426-27 (5th Cir. 1988) (remitting $1.25 million pain and suffering award to $600,000 because, while "jury has broad leeway" to determine non-economic damages, "'[t]he sky is simply not the limit'") (alteration in original; citations omitted). To the contrary, "[n]ot only must there be evidence of the existence of compensable mental anguish, there must also be some evidence

---

[1] The plaintiff in *Fortman* suffered economic damages in the amount of $23,742,620, which included, among other things, the cost of lifetime nursing, medical treatment, and therapy associated with the loss of bowel and bladder function, paraplegia, and substantial and irreparable brain injury. *See* 211 Cal.App.3d at 256-57. The plaintiff in *Grimshaw* suffered "severe and permanently disfiguring burns on his face and entire body," losing portions of several fingers and of one ear. *See* 119 Cal.App.3d at 773-74. By contrast, Ms. Tigner, who was not a family member and thus could not recover for witnessing suffering by other plaintiffs (*see Thing v. La Chusa* (1989) 48 Cal.3d 644, 666-667), made a full recovery within two months of the accident (RT 2481-82), yet was awarded a staggering $15 million — six times as much as the *Grimshaw* plaintiff received for economic and non-economic damages combined (RT 13513; AA 0527).

to justify the ***amount*** awarded." *Saenz*, 925 S.W.2d at 614 (emphasis added). A reviewing court must examine the evidence showing "the nature and extent of emotional harm caused by the alleged violation" to ensure that damage awards are reasonably related to that harm. *Patterson v. P.H.P. Healthcare Corp.* (5th Cir. 1996) 90 F.3d 927, 938; *see also Avitia v. Metropolitan Club of Chicago, Inc.* (7th Cir. 1995) 49 F.3d 1219, 1229-30 (Posner, C.J.).

California courts have repeatedly recognized these principles, observing that emotional distress awards cannot be "grossly disproportionate" (*Bertero*, 13 Cal.3d at 64) to the magnitude of distress actually proved (or provable). Even if the evidence in this case may have been "sufficient * * * to support a sizable award for [each] plaintiff's emotional distress," it could not be "sufficient to support an award for emotional distress in an amount anything like" the eight-figure sums awarded to each plaintiff here. *Merlo v. Standard Life & Accident Ins. Co.* (1976) 59 Cal.App.3d 5, 16-17.

In determining whether an emotional distress award is "grossly disproportionate" (*Bertero*, 13 Cal.3d at 64), the Court should bear in mind that the objective in cases involving non-pecuniary losses is not in any strict sense to make the plaintiff "whole," as it is with ordinary economic damages. As one court has explained (on review of a multi-million dollar award for pain and suffering associated with asbestos-related mesothelioma):

> We take it as a given that reasonable people of [the plaintiff's] age, in good mental and physical health, would not have traded one-quarter of his suffering for a hundred million dollars, much less twelve.
>
> It does not follow that courts should permit a verdict of a hundred million dollars, or twelve million, to stand.

Consorti, 72 F.3d at 1009.

Awards of eight-figure damages to each plaintiff — despite the wide variation in evidence of physical and emotional injury — can only be understood as the product of passions so engulfing that they drove the jury to forsake its duty to make a reasoned assessment of the actual damages sustained. When that happens, as it did in this case, the trial ceases to be a tool for achieving justice and becomes nothing more than "a test of a jury's ability to imagine big numbers." *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405,

423 (Brown, J., concurring), *cert. denied* (2000) 121 S. Ct. 307. Such awards "cannot be allowed to stand" (*Las Palmas*, 235 Cal.App.3d at 1252); they impose upon this Court a duty to grant a new trial or, at a minimum, to remit the damages awards to an amount justified by the evidence. *See id.*; *Cunningham*, 1 Cal.3d at 308-09.

II. PLAINTIFFS PROVED NO BASIS FOR PUNITIVE DAMAGES.

Punitive damages are available under Section 3294 of the Civil Code only upon proof "by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice" — which means that the wrongdoing must be "despicable conduct," and that it either is "carried on * * * with a willful and conscious disregard of the rights or safety of others," or else "subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." *College Hosp. Inc. v. Superior Ct.* (1994) 8 Cal.4th 704, 721 nn.8-9, 725 (quoting Civil Code § 3294).

Plaintiffs' principal allegation of "despicable" conduct was not that General Motors exhibited a "conscious disregard for safety" or engaged in any other "malicious" act. Instead, plaintiffs built their case on the claim that General Motors engaged in the "despicable" practice of using cost-benefit analyses in the design of the A-car gas tank.[2] In doing so, plaintiffs persuaded the jury to punish General Motors for doing what the jury itself was required to do to determine whether General Motors was liable at all.

Plaintiffs' other efforts to tar General Motors produced no clear and convincing evidence that General Motors engaged in any form of despicable or malicious misconduct, or that it acted in conscious disregard of passenger safety. Without clear and convincing evidence of the defendant's culpable mental state, no award of punitive damages can be sustained.

A. General Motors Cannot Be Punished For Engaging In Cost-Benefit Analysis.

Plaintiffs' attorneys repeatedly castigated General Motors for weighing costs against benefits in order to determine what safety features to incorporate

---

[2] We are aware that General Motors has denied using the so-called Ivey memorandum or any other cost-benefit analysis in designing the A-car gas tank. As *amicus*, we take no position as to that factual issue.

into its vehicles, and they explicitly exhorted the jury to punish General Motors for doing so. At one point, for example, counsel disparaged General Motors' use of such analyses in a sustained diatribe that filled some twenty pages of trial transcript. RT 12375-95. Then, after recessing for the evening, counsel picked right up with another twelve-page denunciation on the same subject. RT 12605-17. Recognizing that punitive damages are available in this State only for "despicable" conduct (RT 12605) and for conscious disregard for another person's safety (RT 12612), counsel worked overtime to persuade the jury that ***any*** consideration of the comparative benefits of different designs and the costs of added safety precautions is "despicable."

What is particularly disturbing about these attacks is that the cost-benefit analysis plaintiffs' counsel so roundly condemned is, in fact, both a hallmark of corporate good behavior and the very same risk-utility analysis that California law obliges ***juries*** to apply when deciding cases involving alleged design defects. Juries must apply a risk-utility test to allegedly defective automobile fuel tank placement designs, "balanc[ing] and weigh[ing] * * * such competing design considerations as risk, benefit, feasibility, and cost." *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 571; *see also Barker v. Lull Eng'g Co.* (1978) 20 Cal.3d 413, 433. This "careful assessment of feasibility, practicality, risk, and benefit" (*Soule*, 8 Cal.4th at 564) mirrors what any responsible manufacturer must do: decisions about how much to spend on auto safety necessarily involve consideration of cost-benefit trade-offs. As Justice Breyer has explained, consumers will not pay gigantic premiums for only marginally safer automobiles. *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 13-14 (1993). Rather, individual consumers, and society as a whole, place limits on the demand for safety improvements that come with a price tag; hence, some product hazards will never be entirely corrected because the cost of doing so is too high. *See* W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?* (2000) 52 STAN. L. REV. 547, 561.

That does not mean, however, that any"uncorrected" hazard is a "design defect." To the contrary, as one commentator has observed:

> The formulas used to determine whether a product is defective or unreasonably dangerous * * * rel[y], at least to some degree,

> on cost-benefit principles. Safety is important, but the manufacturer must also consider elements such as marketability, appearance, ease of operation, durability, freedom from maintenance or repair, ease of manufacture, and economics of materials and labor.

Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation* (1986) 74 KY. L.J. 1, 88-89 (footnotes omitted); *accord* Susanah Mead, *Punitive Damages and the Spill Felt Round the World: A U.S. Perspective* (1995) 17 LOY. L.A. INT'L & COMP. L.J. 829, 853. It follows that in a case like this one, "[t]he risk-utility test balances benefits and costs to society as a whole, including the manufacturer and all consumers foreseeably affected, not just the litigating parties." Meiring de Villiers, *Technological Risk and Issue Preclusion: A Legal and Policy Critique* (2000) 9 CORNELL J.L. & PUB. POL'Y 523, 527-28. "The social costs considered in risk-utility balancing are the costs of adopting better, safer technology, including both capital and operating costs. The relevant benefits are reductions in accident costs achieved by reducing both the likelihood and the severity of product-related accidents." James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design* (1998) 83 CORNELL L. REV. 867, 882-83 (footnote omitted).

Thus, in a case alleging that an automobile fuel tank configuration was defectively designed,

> Liability would depend on whether the net increase in safety (net number of lives saved by switching designs) outweighed the increase in cost and loss of utility. The manufacturer may defend its design decision by showing that the net increase in safety would be outweighed by the increase in cost and/or loss of utility of the alternative design [proposed by the plaintiff, which] might, for instance, make the car heavier and more expensive and introduce other safety problems.

de Villiers, *supra*, 9 CORNELL J.L. & PUB. POL'Y at 528. General Motors followed exactly that course. Extensive testing showed that placing the gas tank over the axle (where plaintiffs claim it should have been) produced no safety benefits over placement behind the axle (where General Motors situated it). *See* p. 16, *infra*. Moreover, the head of the A-car engineering team reasonably believed that it would be ***less safe*** to place the tank above the axle

because doing so would move it closer to the passenger compartment, that a behind-the-axle tank would be easier to service than an over-the-axle one, and that a behind-the-axle tank would allow for more trunk space — a highly desirable feature for consumers. AA 0879-81. Under a risk-utility test, General Motors should not have been subjected even to compensatory liability: "if the analysis is sound and indicates that the costs of a safety measure exceed the value of the safety benefits it produces, then the firm is not negligent" — much less reckless or malicious — "for foregoing the measure." Viscusi, *Corporate Risk Analysis*, *supra*, 52 STAN. L. REV. at 568.

Though this rule is straightforward and the logic underlying it is unimpeachable, its application is complicated by the fact that juries are not well-positioned to make accurate risk-utility assessments in cases involving complex engineering issues. As a noted federal judge has explained, while design engineers evaluate consumer risk systematically and take into account the likelihood of product-related injuries as the law requires, jurors are sometimes led astray by the fact that they see before them the injured plaintiff — a substantial "cost" — and they are asked to balance that plaintiff's suffering against social "benefits" that are far less tangible and immediate. *See McMahon v. Bunn-O-Matic Corp.* (7th Cir. 1998) 150 F.3d 651, 658; *Carroll v. Otis Elevator Co.* (7th Cir. 1990) 896 F.2d 210, 215-16 (Easterbrook, J., concurring); *see also* W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts* (2001) 30 J. LEGAL STUD. 107, 116 (explaining that corporations' "superior ex ante risk judgments may be outweighed by the ex post reality of the accident victim"). It follows that, while corporations "should be encouraged to make [risk-utility] judgments explicitly" (Viscusi, *Corporate Risk Analysis*, *supra*, 52 STAN L. REV. at 560), jurors will tend to balk at any attempt to put a dollar value on human life. *See*, *e.g.*, Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment* (1982) 56 S. CAL. L. REV. 133, 152. A "skillful plaintiff's lawyer can vivify and dramatize, for the jury's benefit, the traditional public sense of the sanctity of life," *id.*, and portray a corporate defendant's lawful and desirable risk-utility balancing as unspeakable callousness. Viscusi, *Corporate Risk Analysis*, *supra*, 52 STAN L. REV. at 560.

Such arguments can convince the jury to punish corporate defendants for making precisely the judgments that products liability law compels them to make, thus creating a massive disincentive to all businesses to engage in responsible corporate risk assessment when they develop and market new products.

That is what happened here: Plaintiffs' lawyers hammered home the idea that General Motors' good faith attempts to evaluate the relative costs and benefits of alternative automotive designs were not the actions of a responsible manufacturer, but instead were the despicable — and sanctionable — ones of a "mindless and soulless corporation." RT 13899. Not surprisingly, the jurors forsook their duty to conduct their own risk-utility test, and instead slammed General Motors with an unprecedented $4.8 billion punitive exaction that made clear that they would not countenance any attempt to place a dollar value on human life. *See* Andrew Pollack, *4.9 Billion Jury Verdict in G.M. Fuel Tank Case: Penalty Highlights Cracks in Legal System*, N.Y. TIMES, July 10, 1999, at A7 (explaining that "[t]he jurors wanted to send a message to General Motors that human life is more important than profits" and quoting juror as saying "[w]e're just like numbers, I feel, to them * * * statistics. That's something that is wrong"). Moreover, in approving a $1.09 billion punitive award, the superior court abandoned its statutory and constitutional duties to ensure that punitive damages are imposed only for despicable and malicious conduct.

B. Punitive Liability Cannot Rest On Any Other Ground.

The record provides no other basis to establish punitive liability. To the contrary, several other factors ***preclude*** punitive damages. For example, the 1978 A-car design of the Chevrolet Malibu in this case met all relevant government standards for rear-end crashworthiness. The design and testing of the vehicle similarly met industry standards for the placement of fuel tanks in passenger automobiles and for rear-end crash survivability. The very most that plaintiffs can purport to have shown, therefore, is the existence of a genuine dispute among engineering experts about whether an alternative fuel tank placement would have been better. But even if such a dispute somehow could support any tort liability at all, the mere fact that a different product design

might be better than the one the defendant selected is insufficient to support punitive damages as a matter of law unless clear and convincing evidence shows that the selection was made with "willful and conscious disregard" for the safety of others. *See* Civil Code § 3294(c)(1); *College Hosp.*, 8 Cal.4th at 721 nn.8-9, 725.

1. Punitive damages are improper when the defendant has fully satisfied all government safety regulations.

"Punitive damages, unrelated to compensation for any injury or damage sustained by a plaintiff, are 'regulatory' in nature rather than compensatory." *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238, 274-75 (Powell, J., dissenting). Federal and state courts throughout the country have held, therefore, that compliance with federal or state regulations should be an absolute bar to punitive damages.[3] In many such cases, moreover, courts have

---

[3] *See, e.g.*, *Satcher v. Honda Motor Co.* (5th Cir. 1995) 52 F.3d 1311, 1316-17 (vacating punitive award in part because no government or agency had ever required the use of leg guards on motorcycles); *Richards v. Michelin Tire Corp.* (11th Cir. 1994) 21 F.3d 1048, 1058 n.20 (fact that NHTSA had declined to require additional warnings precluded finding of wantonness necessary for imposition of punitive damages); *Boyette v. L.W. Looney & Son, Inc.* (D. Utah 1996) 932 F. Supp. 1344, 1348 (punitive damages unavailable because defendant's warnings complied with federal regulations); *Sloman v. Tambrands, Inc.* (D. Md. 1993) 841 F. Supp. 699, 703-04 n.8 (compliance with federal regulations precludes finding of malice, barring claim for punitive damages); *Olsen v. United States* (E.D. Pa. 1981) 521 F. Supp. 59, 67-70 (punitive damages unavailable for failure to perform roof crush tests that were not required by federal motor vehicle safety regulations), *aff'd* (3d Cir. 1982) 688 F.2d 823; *Stone Man, Inc. v. Green* (Ga. 1993) 435 S.E.2d 205, 206 (as a general rule, punitive damages are improper when a defendant has complied with environmental or safety regulations). *See also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 233 n.41 (5th ed. 1984) ("In most contexts * * * compliance with a statutory standard should bar liability for punitive damages."); Paul Dueffert, Note, *The Role of Regulatory Compliance in Tort Actions* (1989) 26 HARV. J. LEGIS. 175, 200 (same); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products* (1982) 49 U. CHI. L. REV. 1, 41-42 & n.196 (compliance with NHTSA standards "should be * * * a conclusive defense" to punitive damages). *Cf. Lopez v. Three Rivers Elec. Coop., Inc.* (Mo. 2000) 26 S.W.3d 151, 160 (en banc) (factors weighing against submitting punitive damages claim to jury include that "defendant did not knowingly violate a statute, regulation, or clear industry standard designed to prevent the type of injury

explicitly held that compliance with Federal Motor Vehicle Safety Standards ("FMVSS"), such as the rear-end crashworthiness regulation involved here, was an absolute bar to punitive damages.[4]

In this case, production models of the Chevrolet Malibu consistently passed a 30 mph "rear moving barrier" crash test — the only test required pursuant to FMVSS 301, 49 C.F.R. § 571.301 (S5.5). RT 6773-74 (Mutty); 7249 (Kurop); 9162-63 (Cichowski); AA 2616. Moreover, General Motors presented evidence that A-cars survived special 50 mph rear moving barrier crash tests to which its engineers subjected them, on their own initiative, as part of General Motors' continuing effort to improve vehicle safety. RT 8328-30, 8333-34 (Cichowski). These more demanding tests generated twice the force of the government-mandated 30 mph test, and hence significantly exceeded any government safety standard in effect either in the 1970s or today. RT 8328-30 (Cichowski); AA 2670.

We agree fully with General Motors' contention that the jury's finding of liability cannot be squared with the company's successful subjection of its vehicles to safety tests twice as rigorous as those imposed by the federal agency authorized by Congress to regulate vehicle safety.[5] But even if this

---

that occurred").

[4] *See, e.g.*, *Brand v. Mazda Motor Corp.* (D. Kan. 1997) 978 F. Supp. 1382, 1394-95; *Welch v. General Motors Corp.* (N.D. Ga. 1996) 949 F. Supp. 843, 844-46; *Chrysler Corp. v. Wolmer* (Fla. 1986) 499 So. 2d 823, 826 (punitive damages unavailable as a matter of law in part because defendant's vehicle had satisfied FMVSS 301—the same standard at issue here); *Miles v. Ford Motor Co.* (Tex. Ct. App. 1996) 922 S.W.2d 572, 589-590 & n.7 (observing that "most commentators suggest that compliance with a statutory standard should bar liability for punitive damages," and holding that compliance with FMVSS precludes finding of "conscious indifference to the safety of the product users, or * * * conscious indifference to an extreme degree of risk"), *aff'd in part, rev'd in part on other grounds* (Tex. 1998) 967 S.W.2d 377.

[5] In this regard, the California Supreme Court has held:

> Where the evidence shows no unusual circumstances, but only the ordinary situation contemplated by the statute or administrative rule, then 'the minimum standard prescribed by the legislation or regulation may be accepted by the triers of fact, or by the

Court rejects that contention, we submit that it is inexplicable how a manufacturer that on its own initiative conducts such tests, ***in addition*** to satisfying all applicable government safety regulations, can nonetheless be found guilty ***by clear and convincing evidence*** of "despicable conduct" and "willful and conscious disregard of the rights or safety of others."

Such a proposition is not just absurd. It is also unconstitutional and unsound as a matter of public policy. The threat of billion-dollar punitive liability (or, in the case of the original jury verdict, multi-billion-dollar liability) like that imposed here would either bankrupt auto makers or force them to design every vehicle to adhere to the standard of absolute safety at any price that one judge and jury mistook for California law. Because auto makers would have to design every car to function in a crash like a Bradley Armored Personnel Carrier, the threat of liability on this scale would raise the price of passenger automobiles — not to mention maintenance, fuel consumption, environmental harm, and other costs — to such extreme levels that most consumers could no longer afford to own a car. There can be no doubt, in other words, that the staggering billion-dollar exaction in this case, if allowed to stand, would "entirely supplant[]" a carefully wrought federal regulatory scheme (*Silkwood*, 464 U.S. at 265 (Blackmun, J., dissenting)) implemented by Congress to balance the host of complicated considerations of "feasibility, practicality, risk, and benefit" that go into the determination of proper levels of vehicle crashworthiness (*Soule*, 8 Cal.4th at 652 (describing "competing considerations" that juries must as a matter of law take into account when evaluating crashworthiness or other complex design defect issues)).

2. Punitive damages are improper when the defendant met or exceeded all industry standards for product safety.

Courts throughout the country have concluded that "[c]ompliance with industry standard and custom serves to negate conscious disregard and to show

---

court ***as a matter of law***, as sufficient for the occasion.'

Ramirez v. Plough, Inc. (1993) 6 Cal.4th 539, 548 (quoting RESTATEMENT (SECOND) OF TORTS § 288C cmt. a) (emphasis added). A traffic accident plainly is the "ordinary situation contemplated by" NHTSA when it establishes FMVSS crashworthiness requirements.

that the defendant acted with a nonculpable state of mind," thus precluding a punitive damage award. *Drabik v. Stanley-Bostitch, Inc.* (8th Cir. 1993) 997 F.2d 496, 510.[6] That logic should lead this Court to find that General Motors' compliance with industry standards precludes a punitive exaction here.

The uncontroverted evidence at trial was that some 98% of all automobile fuel tanks in the 1970s were located, like the Malibu's, under the floor of the vehicle behind the rear axle. RT 6057-58 (Mutty). That evidence conclusively demonstrates that the A-car design comported with the industry standard. Plaintiffs' expert nonetheless testified that the Malibu — as well as virtually all other 1970s vehicles that had their fuel tanks behind the rear axle — were defectively designed. RT 6946-48, 7304-06 (Kurop). Indeed, the "outlier" vehicles to which plaintiffs pointed as examples of their preferred over-the-axle design were the 1977 Mercedes (which ***failed*** a FMVSS 301 crash test in 1985 (RT 7002-06, 7805-12; AA 2623, 2635)) and a three-ton, million-dollar experimental vehicle (RT 5227-29).

3. A genuine dispute among experts as to product design safety precludes a finding of conscious disregard by clear and convincing evidence.

Evidence of the existence of a genuine dispute among experts as to the safety of a product or the propriety of challenged conduct weighs heavily against the conclusion that the defendant harbored a punishable state of mind.[7]

---

[6] *Accord Satcher*, 52 F.3d at 1316-17; *Alley v. Gubser Dev. Co.* (10th Cir. 1986) 785 F.2d 849, 856; *Liesener v. Weslo, Inc.* (D. Md. 1991) 775 F. Supp. 857, 862 ("it is not reckless conduct for manufacturers to follow accepted industry standards"); *American Cyanamid Co. v. Roy* (Fla. 1986) 498 So. 2d 859, 862-63; *Lane v. Amsted Indus., Inc.* (Mo. Ct. App. 1989) 779 S.W.2d 754, 759; *Nigro v. Remington Arms Co.* (Pa. Super. Ct. 1993) 637 A.2d 983, 990. *See generally* Owen, *supra*, 49 U. CHI. L. REV. at 40-41 ("[r]arely will an entire industry act with flagrant impropriety against the health and safety of the consuming public, and running with the pack in general should shield a manufacturer from later punishment for conforming to the norm").

[7] *See, e.g.*, *Mercer v. Pittway Corp.* (Iowa 2000) 616 N.W.2d 602, 618 (concluding that, where there was reasonable disagreement among experts about adequacy of product design and testing, rational fact finder could not as a matter of law hold defendant liable for punitive damages even though it could reasonably find liability on plaintiff's underlying tort claims); *Loitz v.*

In this case, plaintiffs claimed that an over-the-axle fuel tank would have performed better than the A-car's behind-the-axle tank. RT 3470-72 (Elwell). Though he ran no crash tests, plaintiffs' expert theorized that over-the-axle tank placement would have been safer because it would have allowed for "crush space on either side of the tank." RT 6987 (Kurop). By contrast, the General Motors engineers who designed the A-car concluded that the over-the-axle placement, while perhaps safer in some types of crashes, might be more dangerous in others situations, especially "complete wipeouts." AA 0879. Some of the vehicle's designers, for example, worried that an over-the-axle tank might allow fuel to enter the passenger compartment more easily in the event of a serious crash, increasing the severity of the danger to the occupants. RT 5763-65, 5777-79, 5919-21, 5948 (Mutty); AA 1001. General Motors engineers developed and ran crash tests on ***both*** designs, moreover, and concluded that they performed equally well. RT 1556, 4587-88, 5787-88 (Mutty); AA 1218, 1245, 1289, 1319, 1349.

The most that can be said for plaintiffs, therefore, is that the record evinces a genuine dispute among experts as to the comparative quality of the A-car design. And even if plaintiffs' experts were correct, the California Supreme Court has held that liability for compensatory damages alone — even when that liability rests on a finding of bad faith — "does not in itself establish that defendant acted with the quality of intent that is requisite to an award of punitive damages. For this we must look further — beyond the matter of reasonable response to that of motive and intent." *Neal v. Farmers Ins. Exch.* (1978) 21 Cal.3d 910, 922. Even if, in other words, a jury considering this disagreement among experts could have concluded that General Motors engineers in the end made the wrong choice, that fact cannot establish by clear

---

Remington Arms Co. (Ill. 1990) 563 N.E.2d 397, 407; *Hillrichs v. Avco Corp.* (Iowa 1994) 514 N.W.2d 94, 100 ("an award of punitive damages is inappropriate where room exists for reasonable disagreement over the relative risks and utilities of the conduct and device at issue"); *Owens-Corning Fiberglas Corp. v. Garrett* (Md. 1996) 682 A.2d 1143, 1163-65, 1167-68; *Satcher*, 52 F.3d at 1317; *Burke v. Deere & Co.* (8th Cir. 1993) 6 F.3d 497, 511; *see also* Owen, *supra*, 49 U. CHI. L. REV. at 38.

and convincing evidence that General Motors had the culpable mental state necessary for an award of punitive damages.

* * *

General Motors' cost-benefit analysis does not support a finding of conscious disregard for the safety of others. Under the clear and convincing evidence standard, moreover, such a finding is precluded by the undisputed evidence that General Motors complied with applicable federal safety standards as well as industry standards for safety and safety testing, and by the good faith disagreement (at most) among qualified experts as to the virtues of the A-car fuel tank design. General Motors therefore is entitled to judgment on the punitive damages claim.

III. THE ASTRONOMICAL PUNITIVE EXACTION IS GROSSLY EXCESSIVE AND SHOULD BE SET ASIDE.

Even if this case were an appropriate one for the imposition of punitive damages, the more than one ***billion*** dollar punishment left standing by the trial court is, in a word, preposterous. Punishments of this magnitude may be warranted in class actions against ruthless dictators who were responsible for murdering and torturing thousands of civilians (*see Hilao v. Estate of Marcos,* 103 F.3d 767 (9th Cir. 1996) (upholding $1.2 billion punitive award), but to impose them against legitimate American businesses is both wholly unwarranted and economically suicidal. Punishments of this magnitude — and indeed even an order of magnitude lower — threaten to bankrupt or financially cripple all but the largest companies. And for the few that can pay such exactions without immediately going under, the burden falls not on the individuals involved in making the decision that resulted in the punishment, but instead on millions of innocent investors (including the hundreds of thousands of state employees and retirees whose pensions are invested in the California Public Employees Retirement System) and tens of thousands of innocent employees whose jobs are jeopardized when their employers are saddled with judgments of this magnitude. None of the rationales urged by the plaintiffs in their effort to break the bank justifies the economic dislocation that the punitive award in this case threatens to impose.

A. The Contention That 20-25 Million General Motors Vehicles Were Improperly Designed Weighs Against, Not In Favor Of, Allowing A $1.09 Billion Punishment In A Single Case.

It is becoming standard practice for plaintiffs in products liability cases to attempt to inflate their punitive awards by invoking injuries that have occurred — or might yet occur — to individuals who are not before the court. The present case is no exception. Plaintiffs repeatedly emphasized that General Motors "knew that a certain number of people were going to die each year if they didn't put this over the axle design in or they didn't do something to beef up the rear end on these cars. They knew that there would be hundreds of injuries per year, and it was a sure thing." RT 12612-13. And the punishment reflects that this appeal was successful: It is inconceivable that the jury could have arrived at a $4.8 billion punitive damages award had it not accepted counsel's rhetorical assertion that General Motors' design decision "was like a death sentence for these people in the future." RT 12615. In an individual case (as opposed to a nationwide class action in which all injured persons are before the court and subject to the binding effect of any judgment), this is a manifestly improper basis for calibrating the amount of punishment.[8] Affirmance of the punitive award would, therefore, be unfair and bad policy because it would reward plaintiffs' counsel for improperly suggesting the existence of legions of other "injured" people and inducing the jury to award to the plaintiffs in this case all of the damages that supposedly belonged to those unnamed individuals. Such an approach raises two serious problems.

The danger of aberrational verdicts. First, basing punishment on the total number of individuals allegedly injured or put at risk of future harm by the defendant's conduct or product fails to account for the fact that the jury's

---

[8] We are not suggesting that it would be feasible to try a nationwide class action under the laws of all fifty states. Our point is simply that the only situation in which it is appropriate to punish a defendant for conduct affecting multiple individuals is when all of those individuals are before the court. If, for whatever reason, those individuals cannot all be brought before the court, an individual plaintiff should receive no more than his or her apportioned share of what would be the maximum permissible punitive award if all individuals allegedly injured by the defendant's conduct were before the court.

finding of liability may be aberrational. The present case is a perfect illustration. General Motors made an offer of proof, based on government accident history data, that the risk of fire in a rear impact collision of a Chevrolet Malibu was extremely remote, and as low as or lower than that for comparable vehicles. RT 10051-53. General Motors also showed that the Malibu fully complied with FMVSS 301, the only applicable federal crash-worthiness standard. Yet, incited by counsel's repeated pronouncements that General Motors selected the fuel tank design for plaintiffs' car knowing that "hundreds of these kids" would be injured or die each year (RT 12612), the jury ignored all of the evidence and imposed a punitive exaction of such absurd proportions that it can only be explained, if at all, as massive retribution for each and every "wrong" to these imagined plaintiffs.

It is grossly unfair to allow a single jury to usurp the role of federal regulators and impose punitive sanctions based upon the size of the General Motors A-car fleet or a prediction of the number of people who have been or will be injured in fuel-fed fires. The consequence of granting any one jury that power is to ensure that, sooner or later, every manufacturer of any product that is involved in a non-negligible number of accidents would be subjected to at least one and maybe several enormous punitive exactions. That would be so even if the overwhelming number of "predicted" accidents never transpire, or if, as seems quite likely here, other juries would conclude (or other states' law would compel the conclusion) not only that the defendant did not act with a reprehensible mental state but that the product was not defective at all. *See* pp. 11-17 & nn. 3-7, *supra*. The result would be significantly higher prices for consumers and a severe chilling effect on product innovation.

The danger of excessive punishment. Second, reliance upon the total number of predicted victims ignores the fact that every other injured individual has the right to bring suit and, except in a few states, to pursue an award of punitive damages. If the plaintiffs in this case are entitled to recover punitive damages that are pegged to the number of predicted victims of the allegedly defective product, then logically every other plaintiff would be as well. The result is that the defendant could be punished repeatedly for the full extent of the harm allegedly caused by its design.

Numerous courts have recognized that this kind of punitive damages overkill is a problem of constitutional dimension.[9] But some have simply thrown up their hands and said that the problem could be dealt with in the future, when the aggregate punishment exceeds the constitutional maximum.[10]

As one eminent federal jurist pointed out more than 30 years ago, however, that is an unrealistic solution: "whatever the right result may be in strict theory, we think it somewhat unrealistic to expect a judge, say in New Mexico, to tell a jury that their fellow townsman should get very little by way of punitive damages because Toole in California and Roginsky and Mrs. Ostopowitz in New York had stripped that cupboard bare." *Roginsky v. Richardson-Merrell, Inc.* (2d Cir. 1967) 378 F.2d 832, 839-40 (Friendly, J.); *see also Jackson v. Johns-Manville Sales Corp.* (5th Cir. 1986) 781 F.2d 394, 405 (en banc) ("We believe that the Mississippi Supreme Court would not deny to its own citizens the right to recover that which citizens of dozens of other states are already entitled to recover"); *W.R. Grace & Co. v. Waters* (Fla. 1994) 638 So. 2d 502, 505 (expressing unwillingness to "place Floridians injured by asbestos on an unequal footing with the citizens of other states with regard to the right to recover [punitive] damages from companies who engage in extreme misconduct").[11]

---

[9] *See, e.g.*, *Owens-Corning Fiberglas Corp. v. Malone* (Tex. 1998) 972 S.W.2d 35, 50-51; *Racich v. Celotex Corp.* (2d Cir. 1989) 887 F.2d 393, 398; *In re School Asbestos Litig.* (3d Cir. 1986) 789 F.2d 996, 1003-05; *Roginsky v. Richardson-Merrell, Inc.* (2d Cir. 1967) 378 F.2d 832, 839-40; *Juzwin v. Amtorg Trading Corp.* (D.N.J.) 705 F. Supp. 1053, *order vacated on other grounds* (D.N.J. 1989) 718 F. Supp. 1233; *In re "Agent Orange" Prod. Liab. Litig.* (E.D.N.Y. 1983) 100 F.R.D. 718, 728; *In re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.* (N.D. Cal. 1981) 526 F. Supp. 887, 899, *vacated on other grounds* (9th Cir. 1982) 693 F.2d 847.

[10] *See, e.g.*, *Dunn v. HOVIC* (3d Cir. 1993) 1 F.3d 1371, 1389-90 (en banc); *King v. Armstrong World Indus., Inc.* (5th Cir. 1990) 906 F.2d 1022, 1033; *Simpson v. Pittsburgh Corning Corp.* (2d Cir. 1990) 901 F.2d 277, 280-82; *Juzwin,* 718 F. Supp. at 1235-36; *W.R. Grace & Co. v. Waters* (Fla. 1994) 638 So. 2d 502, 504-05; *Davis v. Celotex Corp.* (W. Va. 1992) 420 S.E.2d 557, 564-66.

[11] In addition, the "pay now, get credit (maybe) later" approach unnecessarily promotes inequity among plaintiffs. *See Roginsky*, 378 F.2d at

The only fair solution to these twin problems is to permit each injured individual no more than his or her apportioned share of the maximum permissible aggregate punishment. The reviewing court should ask what the maximum permissible aggregate punishment would be in a class action in which all persons who were, are, or ever will be injured by the defendant's allegedly wrongful conduct were before the court, and then divide that figure by the total number of injured persons. If the verdict in the individual case exceeds that quotient, it is excessive. To put the inquiry another way, the question for the reviewing court is whether the amount awarded to the plaintiff, if awarded to every other individual who has been or someday will be injured by the allegedly defective design, would produce an excessive aggregate punishment.

This approach addresses the "aberrational verdict problem" because it means that no one jury would be able to override the decisions of other juries through a punitive award that in essence makes up for the amounts the other juries refused to impose. It also addresses the "overkill problem" because, by definition, when all punitive awards are added together they would not produce an excessive aggregate punishment.

Application of this approach in the present case is straightforward and compellingly demonstrates the excessiveness of the $1.09 billion exaction.

839-40 ("Neither does it seem either fair or practicable to limit punitive recoveries to an indeterminate number of first-comers, leaving it to some unascertained court to cry, 'Hold, enough,' in the hope that others would follow. While jurisprudes might comprehend why Toole in California should walk off with $250,000 more than a compensatory recovery and Roginsky in the Southern District of New York and Mrs. Ostopowitz in Westchester County with $100,000, most laymen and some judges would have some difficulty in understanding why presumably equally worthy plaintiffs in the other 75 cases before Judge Croake or elsewhere in the country should get less or none.") (footnote omitted); *Juzwin*, 718 F. Supp. at 1236 ("it would not be fair to bar plaintiffs [from receiving punitive damages] by reason of the conduct of other litigants in other actions without any prior notice"); *Davis*, 420 S.E.2d at 565 ("it seems highly illogical and unfair for courts to determine at what point punitive damage awards should cease"). This approach also encourages an unseemly and undesirable race to the courthouse (or, more accurately, to final judgment). *See id.* ("Obviously, those plaintiffs whose cases were heard first would gain the punitive monetary advantage.").

Even if plaintiffs were correct that "hundreds" of people per year would have been injured or killed in accidents involving the same essential design as the one at issue in this case, a $1.09 billion punishment could not be justified unless an aggregate punishment a thousand times that amount, if not far more, would be justified for the full scope and effects of General Motors' conduct. There can be no doubt that a punishment of ***trillions of dollars*** for General Motors' use of a design that was nearly universal in the industry, and that fully complied with all government safety regulations, would be grossly excessive. Accordingly, there is no justification for allowing the plaintiffs in this case to keep their proportionate share of that grossly excessive multi-trillion dollar aggregate punishment.

B. The Punitive Exaction Is Not Proportional To The Compensatory Damages.

The California Supreme Court has emphasized that the "proportion of punitive to compensatory damages" is an important criterion for evaluating the excessiveness of a punitive damages award. *Neal*, 21 Cal.3d at 932; *see also id*. at 928 n.13. The United States Supreme Court has similarly indicated that a high ratio of punitive to compensatory damages is often a sign of an unconstitutionally excessive punishment. *See BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 580-83. Yet that Court has declined to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id.* at 583 (internal quotation marks omitted). Thus, while finding no justification for the 500:1 ratio at issue in the case before it, the Court in *BMW* identified several circumstances in which a high ratio of punitive to compensatory damages could be justified. *See id.* at 582. The most obvious of these is an intentional tort case in which the plaintiff suffers only nominal compensatory damages. *See id.* ("low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages").

The converse is equally true. Just as there may be some circumstances in which a high ratio of punitive to compensatory damages would not be indicative of an excessive punishment, a modest ratio does not always indicate

a reasonable punishment.[12] Just as a higher ratio may be appropriate when the compensatory damages are nominal and the conduct is egregious, even a ratio of 1:1 may be unreasonable and excessive when the compensatory damages are high and the conduct does not involve intentional malice or a similarly egregious mental state.

In a recent concurring opinion, Justice Brown, joined by Justice Chin, provided a summary of the considerations that should inform judicial oversight of the reasonableness of punitive damage awards under California law. *See Lane*, 22 Cal.4th at 421-22 (Brown, J., concurring). Confirming that "fundamental notions of justice require some correlation between punishment and harm" (*id.* at 424), Justice Brown concluded both that "the Legislature has selected compensatory damages as the best, albeit imperfect, metric for calibrating the punitive component of a damages award," and that "the Legislature has determined that double or treble damages are, in most circumstances, sufficiently punitive" (*id.* at 426 (internal quotation marks omitted)).

Appropriate deference to this legislative judgment suggests that courts should apply a similar guidepost under the common law. Particularly "[i]n the case of large" compensatory "awards, punitive damages should rarely exceed compensatory damages by more than a factor of three, and then only in the most egregious circumstances clearly evident in the record." *Id*. at 423. That is not to say that "three times compensatory damages is a benchmark measure of punitive damages." *Id*. Rather, "[t]he standard is an uppermost limit, and most punitive damage awards should fall well below that limit." *Id*.

---

[12] We do not mean to suggest that either the ratio of nearly 47:1 awarded by the jury or the ratio of 10.6:1 resulting from the remittitur is in any sense "modest." In *BMW*, the Supreme Court equated the principle that punitive damages should bear a reasonable relationship to compensatory damages with the double (1:1), treble (2:1), and quadruple (3:1) damages remedies that prevailed under early English law and that remain a hallmark of federal remedial statutes. 517 U.S. at 580-81 & n.33. The ratio of the remitted punitive damages to compensatory damages in this case is ***more than five times*** the size of the most common (2:1) ratio used by the Supreme Court to illustrate the reasonable relationship requirement.

The ratio of punitive damages to compensatory damages in this case, even after remittitur, remains approximately 10.6:1, a figure that would increase if the emotional distress damages were properly remitted. Even the current ratio dramatically exceeds what the United States Supreme Court indicated would be a reasonable ratio, and what Justices Brown and Chin regard as the "uppermost limit" on punitive exactions. Because this case does not present "the most egregious circumstances clearly evident in the record" (22 Cal.4th at 423), a higher ratio cannot possibly be appropriate.

C. The Compensatory Damages Are More Than Sufficient To Accomplish California's Interest In Deterrence.

The inflated compensatory awards in this case weigh conclusively against any further punitive award. Punitive damages are intended to provide punishment for, and hence deterrence of, particularly objectionable misconduct when other remedies — such as compensatory damages — are insufficient to accomplish this aim.[13] It follows that "the most important question is whether the amount of the punitive damages award will have deterrent effect — without being excessive." *Adams v. Murakami* (1991) 54 Cal.3d 105, 111. The staggering $1.09 billion punitive exaction (as remitted by the superior court) is not only unconstitutionally excessive in its own right. It also is wholly unnecessary, and thus unjustifiable, because the compensatory awards (even if dramatically reduced, as we submit they must be) are more than sufficient to fulfill any need for deterrence or punishment that might exist in this case.

It is a matter of common sense and wide judicial and scholarly recognition that "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). Thus, the California Supreme Court concluded that "the additional deterrent value of punitive damages does not

---

[13] *See, e.g.*, *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1106 ("Punitive damages can be justified only as a deterrent measure or as retribution."); *Adams v. Murakami* (1991) 54 Cal.3d 105, 110 ("the quintessence of punitive damages is to deter future misconduct by the defendant"); *Neal*, 21 Cal.3d at 928 n.13 ("The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts.").

appear to be needed in" securities fraud cases because "actual damages, alone, represent a potentially crushing liability." *Id*; *see Lane*, 22 Cal.4th at 424 (Brown, J., concurring) (collecting authorities).[14] "[T]he key question before the reviewing court is whether the amount of damages 'exceeds the level necessary to properly punish and deter.'" *Adams* 54 Cal.3d at 110 (citation omitted).

Because "the function of punitive damages is not served by an award" that "exceeds the level necessary to properly punish and deter" (*Neal*, 21 Cal.3d at 928 n.13), punitive damages should be imposed only if "the compensatory damage award [is] insufficient to punish or deter" (*Lane*, 22 Cal.4th at 425 (Brown, J., concurring)). And as a consequence, any "punitive award must be limited to an amount needed to deter and punish when added to the sum already imposed as compensatory damages." *Id*.

In recognition of this principle, courts throughout the country have not hesitated to reduce or overturn punitive awards when the compensatory damages were "ample" and the "total verdict" was so large that the addition of substantial punitive damages was "not * * * responsive to the purpose of civil punishment." *Chandler v. Denton* (Okla. 1987) 741 P.2d 855, 868 (ordering $500,000 punitive damages award reduced to $250,000 where

---

[14] *See also*, *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") (emphasis omitted); *San Diego Bldg. Trades Council v. Garmon* (1959) 359 U.S. 236, 247 ("The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."); *Beliz v. W.H. McLeod & Sons Packing Co.* (5th Cir. 1985) 765 F.2d 1317, 1332-33 ("[d]eterrent effect may be achieved without awarding exemplary damages" if compensatory damages are sufficiently large); *Koufakis v. Carvel* (2d Cir. 1970) 425 F.2d 892, 907 (under New York law, factors to be considered in awarding punitive damages include "the sufficiency of an award of compensatory damages and other remedies to deter such conduct in the future"); *In re Kratzer* (Bankr. W.D. Mo. 1981) 9 B.R. 235, 239 (quoting 22 AM. JUR. 2D *Damages* § 264, which states that punitive damages "should not be awarded in a case where the amount of compensatory damages is adequate to punish the defendant").

compensatory damages were $600,000).[15] As *BMW* and the *Lane* concurrence suggest, when the compensatory damages are high and there is no reason to believe that they understate the injury, they "may more appropriately be accompanied by a lower punitive damages ratio." *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.* (3d Cir. 1999) 181 F.3d 446, 467-68, 468-69 (reducing $50 million punitive award to $1 million, where compensatory damages were $48 million), *cert. denied* (2000) 528 U.S. 1076.

This principle applies with particular force when, as here, the compensatory damages greatly exceed the "profit" from the alleged misconduct. See *Lane*, 22 Cal.4th at 424 (Brown, J., concurring). In a fraud or conversion case, the defendant's ill-gotten gain or "profit" is typically the same as the plaintiff's loss, so that an award of compensatory damages alone generally will be insufficient to accomplish the deterrent function. *See generally Kemezy v. Peters* (7th Cir. 1996) 79 F.3d 33, 34-35; *Walker v. Sheldon* (N.Y. 1961) 179 N.E.2d 497, 499; Amelia J. Toy, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective* (1991) 40 EMORY L.J. 303. A ***modest amount*** of punitive damages in excess of compensatory damages may therefore be appropriate in such cases even when the compensatory damages are high. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 6.15, at 227 (5th ed. 1998). In a products liability case,

---

[15] *See also Rosado v. Santiago* (1st Cir. 1977) 562 F.2d 114, 121 (reversing punitive damages award because "[a]n award of actual damages coupled with reinstatement * * * is ample relief * * * and a sufficient deterrent to future wrongdoing"); *Brown v. Farkas* (Ill. App. Ct. 1986) 511 N.E.2d 1143, 1147-48 (reducing punitive award on the basis of large compensatory award); *Maiorino v. Schering-Plough Corp.* (N.J. Super. Ct. App. Div. 1997) 695 A.2d 353, 370 (concluding that "the large compensatory damage award to Maiorino of $435,000 by itself provided significant deterrence even to an employer as large as Schering" and holding therefore that "[a]n $8,000,000 punitive damage award was not necessary to punish Schering or to deter it"); *Quick Air Freight, Inc. v. Teamsters Local Union No. 413* (Ohio Ct. App. 1989) 575 N.E.2d 1204, 1217 (affirming denial of punitive damages because compensatory damages were sufficient to punish defendants and deter them and others from similar conduct); *Buzzard v. Farmers Ins. Co.* (Okla. 1991) 824 P.2d 1105, 1116 (ordering $2 million punitive exaction reduced to $400,000 in light of the compensatory award of $200,000, which, it noted, was "not an insignificant sum").

by contrast, the compensatory damages typically greatly exceed the defendant's "gain," whether measured as the incremental per-unit cost of employing an alternative design or the profit from the sale of the particular unit involved in the injury to the plaintiff.[16] Such compensatory awards may well be large enough to punish the defendant's misconduct as well as compensate the injured plaintiffs and make them whole. "This dual effect of compensatory damages" as both compensation and punishment "is especially strong when there is a large award for noneconomic harms," as there was here. *Lane*, 22 Cal.4th at 425 (Brown, J., concurring). Under those circumstances, anything more than a nominal punitive award would result in undesirable overdeterrence — *i.e.*, a reluctance to develop and market new products.[17]

---

[16] The compensatory damages awarded to a particular plaintiff might not exceed the incremental cost of using an alternative design for ***all*** units sold or the profit earned on ***all*** units sold. That comparison is inapt, however, because it does not include damages and settlements paid to other individuals not before the court. *See* Part III.A., *supra*. Moreover, even if it were possible to ascertain that aggregate figure and compare it to aggregate "gain" or "profit," it would be inappropriate to do so. As discussed above (at pp. 18-19), other courts and other juries might conclude that there was nothing wrong with the product. Accordingly, it would be both unfair and bad policy to assume that the incremental cost of using an alternative design in all units or the "profit" from the sale of all units constitutes ***ill-gotten*** gain. The only fair way to address the fact that not every jury will agree that a product is defective is to compare the damages awarded to the particular plaintiff with the profit or gain from the sale ***to that plaintiff***.

[17] *See generally Perez v. Z Frank Oldsmobile, Inc.* (7th Cir. 2000) 223 F.3d 617, 622 ("Excessive [punitive] awards tend to discourage participation in the underlying economic activity, for some level of error by employees is a risk of doing business."), *cert. denied* (Feb. 20, 2001) 121 S. Ct. 1099; *Loitz*, 563 N.E.2d at 403 ("Threatened with liability for large punitive damage awards, product manufacturers may curtail their research and development of new and beneficial products."); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis* (1998) 111 HARV. L. REV. 869, 882-83 & n.29 (citing examples and authorities); Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)* (1998) 107 YALE L.J. 2071, 2077 & nn.22-23 (observing that "a risk of extremely high awards is likely to produce excessive caution in risk-averse managers and companies" and citing examples of the chilling effects of large punitive damages awards).

D. General Motors' Financial Resources Do Not Excuse An Unconstitutionally Excessive Punitive Award.

As we have shown, plaintiffs did not prove that General Motors had the culpable mental state necessary to support punitive damages. The question, then, is what they ***did*** prove that can explain the grossly excessive award. The answer to this question is quite simple: They proved that General Motors is a corporation with large revenues. *See* Part V.B., *infra*. But the defendant's wealth alone — even the wealth of a large corporation — cannot justify an excessive punitive award.

Although the California Supreme Court has required consideration of the defendant's financial position in the setting and review of punitive awards (*see Adams*, 54 Cal.3d at 110-11, 118), it has never suggested that an otherwise excessive punishment can be justified on the ground that the defendant is wealthy. With the U.S. Supreme Court's decision in *BMW,* the impropriety of using corporate financial condition to justify high punitive damages has become even clearer. When the *BMW* Court identified "guideposts" for determining whether a punitive damages award is excessive, "wealth of the defendant" was conspicuously absent from the list (517 U.S. at 575):

> the degree of reprehensibility of the [conduct]; the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.

Id.

Indeed, use of the defendant's financial condition to justify a large punishment is affirmatively at odds with each of the three guideposts that the Court did identify. First, making the size of the punishment dependent on the defendant's wealth severs the critical link between the punishment and the reprehensibility of the conduct by permitting wildly disparate punishments to be imposed for precisely the same wrongful acts.[18] Second, basing punitive

---

[18] In this regard, suppose that General Motors and a smaller auto manufacturer — Kia, for example — made precisely the same design decision regarding placement of an automobile fuel tank, and did so based upon the

damages on the defendant's wealth preempts any serious consideration of the proportionality of punitive to compensatory awards because it posits that a ratio of, say, 1000:1 might be acceptable with respect to a wealthy defendant, whereas a 4:1 ratio might be unconstitutionally excessive with respect to a poorer but more culpable co-defendant.[19] And third, consideration of wealth undercuts the "comparative fines" guidepost because neither the fines that the Court considered in *BMW* nor most other civil or criminal penalties vary with the wealth of the defendant.

In the wake of *BMW*, therefore, a number of courts — including the Alabama Supreme Court in the *BMW* remand — have held that an otherwise excessive punishment cannot be justified by the fact that the defendant is wealthy.[20] Indeed, one federal court has concluded that, in accordance with

---

same type of design analysis. General Motors is many times larger than Kia, with 1999 gross revenues more than twenty-five times as large as Kia's, total assets almost forty-one times as large as Kia's, and net income over fifty times as great as Kia's. *Compare* http://www.hoovers.com/co/capsule/0/0,2163,10640,00.html (General Motors financial data) *with* http://www.hoovers.com/co/capsule/4/0,2163,43264,00.html (Kia financial data). Would General Motors' conduct, though precisely the same as Kia's, be twenty-five or forty-one or fifty times as reprehensible and worthy of punitive sanctions as Kia's just because of General Motors' size? As one federal court of appeals has explained, it most certainly would not. *See Zazú Designs v. L'Oréal, S.A.* (7th Cir. 1992) 979 F.2d 499, 508-09.

[19] Tellingly, in listing the special circumstances that might warrant higher ratios, the Court chose not to include the commission of a tort by a defendant with a large net worth. *See* 517 U.S. at 582 (specifying that a higher ratio may be warranted when "a particularly egregious act has resulted in only a small amount of economic damages" or when "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine").

[20] *See, e.g.*, *BMW of N. Am., Inc. v. Gore* (Ala. 1997) 701 So. 2d 507, 514 ("where a defendant has not committed an act that would warrant a large punitive damages award, such an award should not be upheld upon judicial review merely because the defendant has the ability to pay it"); *Bowden v. Caldor, Inc.* (Md. 1998) 710 A.2d 267, 279 ("merely because a defendant may be able to pay a very large award of punitive damages, without jeopardizing the defendant's financial position, does not justify an award which is disproportionate to the heinousness of the defendant's conduct"); *Creative Demos, Inc. v. Wal-Mart Stores, Inc.* (S.D. Ind. 1997) 955 F. Supp. 1032, 1044

BMW and principles of equity, evidence of the defendant's financial condition ***should not be admitted at all***. *See Pivot Point Int'l, Inc. v. Charlene Prods., Inc.* (N.D. Ill. 1996) 932 F. Supp. 220, 223 (Easterbrook, J., sitting by designation).

Justice Brown's concurrence in *Lane* takes some initial steps toward reconciling the apparent conflict between *Adams* and *BMW*. As she observed, even if "[w]ealth is relevant" to the size of a punitive award, "the full extent of a defendant's wealth provides too unbounded an upper limit to be a suitable means to calibrate punitive damage awards." 22 Cal.4th at 427. "[T]he law of punitive damages does not punish a large corporation simply for being large," because "the size of a corporate defendant is not an additional evil that in itself warrants an enhanced penalty." *Id*.

Declining to permit corporate financial resources to justify otherwise insupportable awards does not undermine the deterrent effect of punitive damages. To the contrary, "[i]n order to remain competitive, large corporations count small as well as big costs, particularly if those small costs may be recurrent" (*Lane*, 22 Cal.4th at 427 (Brown, J., concurring)), as they are when the challenged conduct affected millions of units sold. "Therefore, even for a large corporation, a relatively modest punitive damage award may

---

("The Supreme Court has consistently stated that the fact that a defendant is a large corporation with deep pockets cannot serve to justify an otherwise excessive punitive damages award."), *aff'd in relevant part on other grounds* (7th Cir. 1998) 142 F.3d 367; *Leab v. Cincinnati Ins. Co.* (E.D. Pa. June 26, 1997) No. Civ. A. 95-5690, 1997 WL 360903, at *16 ("Contrary to Leab's assertions, the wealth of a defendant is not, by itself, sufficient justification for the imposition of a large punitive damages award. * * * To accept Leab's contention that a punitive damages award against a wealthy corporate defendant must be significant in order to have any effect would mean that any punitive damages award against a Fortune 500 company must necessarily be in the millions of dollars to affect the company's behavior. The law makes no such requirement."); *Florez v. Delbovo* (N.D. Ill. 1996) 939 F. Supp. 1341, 1345 ("the Supreme Court's decision in [*BMW*] appears to disfavor consideration of the defendant's financial worth and condition in deciding on what level of punitive damages to award"); *Utah Foam Prods. Co. v. Upjohn Co.* (D. Utah 1996) 930 F.Supp. 513, 531 ("Manifestly, wealth alone does not justify imposition of a disproportionately large punitive damage award."), *aff'd* (10th Cir. 1998) 154 F.3d 1212, *cert. denied* (1999) 526 U.S. 1051.

be sufficient to induce an end to the offensive conduct." *Id*. Because even substantially reduced compensatory awards in this case would fully satisfy any rational deterrence objectives (*see* Part III.C., *supra*), the size of General Motors cannot cleanse the verdict of its unconstitutional excessiveness.[21]

IV. THE ENTIRE JURY VERDICT WAS IMPERMISSIBLY TAINTED BY PASSION AND PREJUDICE.

It has been a recurring and regrettable feature of modern tort litigation that plaintiffs' lawyers deliberately seek to rile up the jury in the hope of receiving a bell-ringing judgment. The Chamber's members have been victimized by such high-handed litigation tactics in courts throughout the country. Unless verdicts that are the product of such tactics are set aside whenever they are encountered, it is predictable to a certainty that plaintiffs' lawyers will continue engaging in them — and indeed will be encouraged to ratchet up the inflammatory rhetoric to ever-higher levels.

In the past, the appellate courts of this State have been vigilant in protecting litigants from awards that are the product of passion and prejudice. The California Supreme Court, for example, has consistently held that damages awards that are the product of passion and prejudice must be set aside. *E.g.*, *Cunningham*, 1 Cal.3d at 308-09; *Neal*, 21 Cal.3d at 927-28; *Bertero*, 13 Cal.3d at 64; *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919. That is manifestly the case here.

---

[21] The fact that a genuinely faulty design would result in more lawsuits against a large manufacturer than a small one means, moreover, that optimal deterrence can only be achieved if the punitive damages award is tied ***solely*** to the nature of the conduct and the relationship to compensatory damages, and ***not*** to the size of the defendant corporation:

> The net judgment bill of the firm will increase with its wrongs, without the need for punitive damages. If a larger firm is more likely to commit a wrong on any given transaction, then its total damages will increase more than proportionally to its size without augmentation in any given case; if a larger firm is equally or less likely to commit a tort per transaction, then the court ought to praise the managers rather than multiply the firm's penalty.

Zazú Designs, 979 F.2d at 508-09.

To begin with, the compensatory and punitive awards are so enormous as to suggest a complete abandonment by the jury of fair and reasoned decisionmaking. As we have explained, the compensatory awards here were more than ***seventeen times*** the largest compensatory award in a products liability case that ever has been permitted to stand in a published California decision, and more than ***twenty-five*** times the largest such award in a burn injury case. As for the gargantuan punitive exaction, even after remittitur it is by far the largest ever imposed in California. Yet, as also discussed above, the conduct plaintiffs condemned here — corporate risk-utility analysis — is not reprehensible at all. The $102 million compensatory award and the $1.09 billion punitive award bear no relationship either to the gravity of General Motors' conduct or to the actual injuries suffered by plaintiffs. It is settled law in California that a "grossly disproportionate" damages award "raise[s] a presumption that it is the result of passion or prejudice," so that "the duty is then imposed upon the reviewing court to act." *Cunningham*, 1 Cal.3d at 308-09.[22] If ever a jury award was "so grossly disproportionate as to raise a presumption that the panel based its result on passion or prejudice" (*Las Palmas*, 235 Cal.App.3d at 1252), the awards in this case were. For the good not just of General Motors, but of all litigants in California courts, these awards "cannot be allowed to stand." *Id*.

Although the gross excessiveness of the verdict by itself is sufficient ground for a new trial, this Court need not rely solely on the presumption flowing from the size of the verdict. The record starkly reflects the repeated attempts by plaintiffs' counsel to incite juror prejudice against General Motors. To distract the jurors from the evidence of General Motors' commitment to vehicle crashworthiness, plaintiffs' counsel vigorously and repeatedly encouraged the jurors to decide the case on the basis of regional prejudice and anti-corporate bias. From the first strains of closing argument to the final chords, counsel carefully orchestrated their remarks to play a common refrain:

---

[22] California is by no means alone in this regard. Throughout the history of the common law in the United States, "[j]udges [have] infer[red] passion, prejudice, or partiality from the size" of damages awards. *Honda Motor Co. v. Oberg* (1994) 512 U.S. 415, 425-26 & n.4 (collecting cases).

General Motors, its employees, and its attorneys are callous, out-of-state, corporate profit-seekers and liars who lined their pockets at the expense of the hapless plaintiffs; they must pay — and pay dearly — for presuming to defend their actions. Such grossly improper jury argument explains the size of the verdict far better than the record evidence in this case ever could.

A. Counsel's Statements That General Motors Is "Mindless," "Soulless," And "Bloodless," As Well As Their Repeated References To General Motors' Corporate Status, Were Grossly Improper.

The rhetorical nadir of plaintiffs' closing argument was a juxtaposition of the "faceless" "fat-cat" General Motors executives (RT 13899, 13903) with the tragically injured children and their poor mother whose lives the company cavalierly put at risk because of its own greed (RT 12349, 12686, 13041, 13058-59, 13903). Whereas the plaintiffs were described as ordinary people, General Motors was portrayed as "one of the largest corporations in the world," a "mindless and soulless corporation" with "no conscience" and "no blood running through [its] veins." RT 12648, 13899, 13902. The case, as counsel described it, pitted impoverished and helpless children against corporate ogres with their "nice, starched suits and nice ties and well-groomed fingernails and cleanly-shaven faces," "smoking their cigars in [their] boardroom," "drinking their hot capuccino [sic] and * * * having their designer muffins." RT 12678, 12686, 13058, 13899, 13903, 13905. The jury could not have forgotten for a second that plaintiffs were Davids fighting a Goliath, while the defendant was nothing but a heartless monstrosity "that only understand[s] one thing: The bottom line." RT 12691.

Rhetoric emphasizing the difference between corporations and individuals in this way has long been condemned as an incitement to prejudice against corporate defendants. For example, the Supreme Court of Mississippi reversed a sizeable punitive damages award because of rhetoric quite similar to that employed by plaintiffs' counsel here. *See Shell Oil Co. v. Pou* (Miss. 1967) 204 So. 2d 155. There, counsel argued in summation "that the defendant was a corporation, had no soul, could neither go to heaven nor hell and that 'the way that the law punishes a corporation for not paying their debts

in a case like this, if you find that they owe actual damage, is to require them to pay a punitive damage.'" *Id.* at 157. The court declared that such "[a]ppeals to passion and prejudice are ***always*** improper and should ***never*** be allowed." *Id*. (emphasis added). A host of other courts have found similar — indeed, virtually identical — comments highly prejudicial, and so reversed the resulting punitive damages awards.[23] Indeed, longstanding jurisprudence more broadly condemns jury arguments that, like plaintiffs' arguments here, emphasize that the defendant is a corporation rather than an individual.[24]

---

[23] *See, e.g.*, *Gordon v. Nall* (Ala. 1980) 379 So.2d 585, 587 (reversing judgment because "[i]t has long been the law of this state that references to a corporate entity as 'soulless' in arguments to the jury are 'objectionable' and 'prejudicial.'"); *Chrysler Corp. v. Hassell* (Ala. 1973) 280 So. 2d 102, 106 (reversing punitive award where counsel made the "improper" and "highly prejudicial" statement that "[a] corporation has no heart, it has got no soul. It has got no fear of Hell and Damnation in the hereafter"); *Western & A.R. Co. v. Cox* (Ga. 1902) 42 S.E. 74, 75-77 (reversing judgment where plaintiff's counsel asserted that the "only way to reach a railroad is to make it pay money" and that "[a] railroad has no soul, no conscience, no sympathy, and no God"); *Swift & Co. v. Rennard* (1906) 128 Ill. App. 181, 186 (reversing judgment because of plaintiff's improper argument that "'[t]he difference between the plaintiff and the defendant was that the plaintiff had a soul and was responsible before Heaven for the truth of what he said while the defendant was a corporation without a soul to answer hereafter'"); *Louisville & N.R. Co. v. Smith* (Ky. 1905) 84 S.W. 755, 757 (reversing judgment because of plaintiff's improper argument that "'defendant in this case is a soulless corporation'"); *Carter Coal Co. v. Hill* (Ky. 1915) 179 S.W. 2, 4-5 (reversing judgment where defendant was described as "'soulless corporation — this thing that's got no life, that you can't hurt and that can't feel'"); Annotation, *Counsel's Appeal to Racial, Religious, Social or Political Prejudices or Prejudice Against Corporations as Ground for a New Trial or Reversal* (1932) 78 A.L.R. 1438, 1477-1478 ("for counsel to attack a corporation as soulless or devoid of feeling" is "such improper argument as to call for the granting of a new trial or for reversal") (collecting cases).

[24] *See, e.g.*, *Reetz v. Kinsman Marine Transit Co*. (Mich. 1982) 330 N.W.2d 638, 646 (reversing judgment because plaintiff's "comments * * * create[d] in the minds of the jurors an image of [defendant] as an unfeeling, powerful corporation" so that "[e]ven a juror who harbored no prejudice against corporations or millionaires might have been swayed by these inflammatory remarks to alter his view of the evidence"); *Southern-Harlan Coal Co. v. Gallaier* (Ky. 1931) 41 S.W.2d 661, 663 ("No attempt should be made to prejudice the jury by the fact that the defendant is a corporation."); Annotation, *Counsel's Appeal to Prejudices*, *supra*, 78 A.L.R. at 1474-85 ("an

As these precedents make clear, counsel's repeated references to General Motors' corporate status and their disparagement of General Motors as a non-human monster were not relevant to any issue before the jury, and were highly improper. The only purpose they served was to incite the jurors to express their perhaps widely-held but nonetheless entirely improper anti-corporate bias in wildly inflated awards. They thus required the trial court, and now this Court, to set aside the verdict as based on prejudice against corporations. *See, e.g.*, *Neal*, 21 Cal.3d at 927-28; *Bertero*, 13 Cal.3d at 64; *Cunningham*, 1 Cal.3d at 308-09; *Las Palmas*, 235 Cal.App.3d at 1252; *Fortman,* 211 Cal.App.3d at 259.

B. Counsel's Repeated References To General Motors' Financial Condition Were Highly Prejudicial.

Plaintiffs' counsel also worked overtime to spotlight General Motors' size and corporate wealth. They harped on the fact that General Motors is "one of the largest corporations in the world" (RT 12648), and leveraged that detail into the preposterous claim that General Motors has "all the money in the world" (RT 13058-59) — an accusation that opens the door to unlimited liability for any corporate defendant. And counsel argued that General Motors has "got plenty of money, and they would rather spend it on the experts and the lawyers than on these children." RT 13056. Then, when it came time to advise the jurors on how they might assign dollar values to the plaintiffs' claims, counsel used often-misleading descriptions of General Motors' corporate financial statements in order to support the fatuous assertion that General Motors would not even notice, much less be troubled by, a punitive award of reasonable scale. RT 13884-86.

The conclusions that counsel asked the jury to draw from the distortions of General Motors' financial records were no less fantastic than the averment that the company has "all the money in the world." In particular, they invited the jurors to speculate as follows:

---

improper appeal to prejudice against a party because such party is a corporation * * * is a sufficient ground for a new trial or reversal") (collecting cases).

> Now, if you were to assess an amount of $500 million, look where that is on that line. It's a mere pimple on the General Motor[s'] total market capitalization. What about $1 billion? How much is that? * * * It's barely registering on the scale. * * * That is minuscule to the eyes of General Motor[s] as they assess value.
>
> * * *
>
> What would it cost if General Motors was docked one week of pay? Well, do you know what their sales are per day? If you take one week, it's $2,210,000,000. That's one week docked pay for General Motors. It certainly doesn't seem like a lot to them.

RT 13885-86.

Although *Adams* requires evidence of a defendant's wealth (but not market capitalization, and certainly not weekly sales data) to be before the jury in order to discourage excessive punishments, the use of that evidence must be limited to prevent lawyers from goading juries into excessive verdicts. The United States Supreme Court has expressed concern on multiple occasions that reliance upon a corporate defendant's financial condition may result in an excessive punishment. *See Honda*, 512 U.S. at 432 ("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); *TXO Prod. Corp. v. Alliance Res. Corp.* (1993) 509 U.S. 443, 464 (plurality opinion) (agreeing with petitioner 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"). It follows that "trial courts should not permit attorneys to argue, as plaintiffs' attorney argued here, that punitive damages should be a fixed percentage of the defendant's total net worth." *Lane*, 22 Cal.4th at 427 (Brown, J., concurring). Plaintiffs' counsel's references to General Motors having "all the money in the world" and their arguments that a $500 million or $1 billion punitive exaction would be "a mere pimple" to General Motors in light of its net worth were not only preposterous but also highly prejudicial. The verdict that resulted from them cannot stand.

C. Counsel's Attacks On General Motors' Advocacy And Their Personal Attacks On The Character And Credibility Of General Motors' Attorneys Were Grossly Improper.

Plaintiffs' counsel also engaged in vicious personal attacks on the honesty and integrity of General Motors' attorneys, as well as roundly criticizing General Motors and its lawyers for defending this action and other products liability suits across the country. As the Supreme Court of California declared long ago, "[s]uch means of winning a lawsuit cannot be commended or receive recognition and indorsement by this court, instituted and maintained, as it is, on the principle of administering justice." *Keena v. United R.Rs.* (1925) 197 Cal. 148, 160.

Plaintiffs' counsel made repeated references to "Mr. Greenfield and his band of lawyers," "the lawyers that go all around the United States to defend these cases," "going on with a road show" that involves "get[ting] up there and * * * tell[ing] you lies," "to defend cases against children like this on a daily basis, courtroom to courtroom, city to city, state to state." They castigated "this lawyer that General Motors sent down here to fool you" by giving a "paid apology by a lawyer that [General Motors has] hired to come into this court and continue to perpetrate the lies and the fraud" because "[i]t's cheaper to come in here and defend a lawsuit and pay lawyers." RT 12375, 12386, 12719, 12743, 13057, 13059, 13881, 13902.

They chastised General Motors more broadly for "continually trying to obstruct, object to evidence coming in, * * * going to the sidebar all the time, interrupting the lawyers when they were trying to question and cross-examine," of "tr[ying] to fight the evidence coming in," and of "continuing to cover up, to lie, to perpetrate a fraud, to buy testimony, to give witnesses 22 1/2 percent raises until they get amnesia." RT 13048, 13900. In short, counsel's unsupported and outlandish claims about alleged misconduct by General Motors and its defense attorneys served as a springboard from which to argue that it was "despicable" for General Motors to hire an attorney and tender a defense at all; and it was a powerful motivator for the jury to punish the company merely for having the temerity to exercise its legal rights. RT 13056-57, 13062.

Courts in California and across the country have long recognized that such brazen "[p]ersonal attacks on opposing parties and their attorneys, whether outright or by insinuation, constitute misconduct," for the very reason that "[s]uch behavior only serves to inflame the passion and prejudice of the jury." *Las Palmas*, 235 Cal.App.3d at 1246.[25] That kind of conduct undermines the administration of justice by "distracting [jurors] from fulfilling their solemn oath to render a verdict based solely on the evidence admitted at trial" (*id.*), and therefore has no place in a court of law. And the impropriety of such conduct is especially deleterious to the sound administration of justice when it serves to inhibit manufacturers and other deep-pocket defendants from tendering legitimate defenses to future legal claims irrespective of the merit of those claims — the inevitable result if the verdict here is allowed to stand. The over-the-top rhetoric with which plaintiffs' counsel impugned the motives, challenged the integrity, and disparaged the lawful actions of General Motors and its attorneys compels reversal of the verdict that it produced.

---

[25] *See, e.g.*, *People v. Sandoval* (1992) 4 Cal.4th 155, 162, 184 ("Personal attacks on opposing counsel are improper and irrelevant to the issues."), *aff'd* (1994) 511 U.S. 1; *Garden Grove Sch. Dist. v. Hendler* (1965) 63 Cal.2d 141, 143-45 (holding that "[t]he question is not whether the award is a reasonable one, but whether it is reasonable to conclude that a verdict more favorable to defendants would have been reached but for the error," and concluding that prejudicial comments by plaintiff's lawyer warranted reversal); *Peacock v. Levy* (1931) 114 Cal.App. 246, 252-53 (reversing judgment because "misconduct in the present case consisted of numerous improper remarks in the argument [including attacks on appellants' counsel] whereby the flames of prejudice were fanned to such a point that no admonition on the part of the court could extinguish the fire"); *Marcus v. Palm Harbor Hosp., Inc.* (1967) 253 Cal.App.2d 1008, 1013 ("An attorney may be guilty of misconduct in denouncing opposing counsel. Derogation of the opposing party and the impugning of his motives may be of such a serious nature as to constitute misconduct requiring a reversal.") (citation omitted); *see also, e.g.*, *Henker v. Preybylowski* (N.J. Super. Ct. App. Div. 1987) 524 A.2d 455, 458-59; *Escobar v. Seatrain Lines Inc.* (App. Div. 1991) 573 N.Y.S.2d 498, 501; *Stephen's Jewelry, Inc. v. Admiral Ins. Co.* (Ohio Ct. App. 1989) 578 N.E.2d 520, 523; *Amelia's Automotive, Inc. v. Rodriguez* (Tex. App.–San Antonio 1996) 921 S.W.2d 767, 773.

D. Counsel's Repeated References To General Motors' Out-Of-State Location Were Grossly Improper.

While appeals to corporate bias and disparagements of General Motors and its attorneys were the rhetorical high points of counsel's jury argument, appeals to parochialism were its motif. As set forth below, plaintiffs' counsel repeatedly emphasized that the plaintiffs were from Los Angeles, while General Motors was based in Detroit, Michigan. Such appeals to local bias have long caused courts to set aside large damage awards as based on jury prejudice.

There is no doubt that plaintiffs' counsel sought to parlay local bias into a large damages award. Plaintiffs' counsel began their closing argument by urging the jury to act as the "conscience of the community." RT 12348. They instructed the jury that, "when your verdict is read, you will speak the truth based on the evidence that you heard in this case in this courtroom in Los Angeles." RT 12350.

In contrast to the Los Angeles jury and the "young lady in Los Angeles" and her children who were the plaintiffs (RT 12686), counsel repeatedly characterized General Motors as a corporation with ties to Detroit. In describing General Motors' alleged failure to bring a witness — Ivey — to the stand, for example, counsel stated that "[t]hey've got planes going back and forth to Detroit." RT 12396. Counsel made frequent mention of "General Motors engineers in Detroit," and of General Motors officers, managers, and engineers "still back there in Detroit * * * risk[ing] hundreds of lives in burn injuries." RT 12404, 12722. They claimed that General Motors' attorneys would try to fool the jury so that it would

> come in here and give a low award so that they can go back to Detroit and tell them, "Hey, we did it again." It's cheaper. It's cheaper to burn them in the crash than spend the money on safety. And you can't let them get away with it, and you've got to stop it here in Department 309 in Los Angeles.

RT 13049.

The list of abuses continues: Counsel at one point posed a hypothetical in which plaintiffs "Alisha and Kiontra and Tyson and Jo and Patricia and Kionna had a chance to get on a bus and go back to Detroit and get to that big

General Motors building" in order to "bargain" over compensation for their injuries. RT 13058. They asked the jury to "hit [General Motors] in the pocketbook and * * * hit them hard [s]o when they go call Detroit, the guy is going to put the phone down and say, 'What? What happened?'" RT 13902. And in the last moments of their closing argument, counsel asked the jury to speculate on what General Motors' response would be "if you took a van and you all rented it and drove back to Michigan" to announce the judgment. They then advised the jurors that "[w]hat you need to do is send that message loud and clear so that when those executives at General Motors are having breakfast and they are drinking their hot capuccino [sic] and they are having their designer muffins and they are sitting there reading that Detroit Press," they could not help but notice the Los Angeles jury's condemnation of General Motors' conduct. RT 13905. All told, plaintiffs' counsel made some ***fifteen*** gratuitous references to "Detroit," and ***two more*** to "Michigan."[26] In short, they seemingly never missed an opportunity to emphasize that, while the plaintiffs, like the jurors themselves, were local, General Motors was not.

Courts have long condemned such blatant appeals to local prejudice. The United States Supreme Court, for example, has on more than one occasion specifically noted that juries may be predisposed to base large punitive awards on local bias. Recognizing that "[p]unitive damages pose an acute danger of arbitrary deprivation of property," the Court has expressed concern about the "potential that juries will use their verdicts to express biases against big businesses, ***particularly those without strong local presences***." *Honda*, 512 U.S. at 432 (emphasis added). A year earlier, a plurality of the Court observed that the risk of "prejudice against large corporations" is "of special concern when the defendant is a nonresident." *TXO*, 509 U.S. at 464.

This "special concern" has led courts for many years to condemn jury argument that appeals to local bias in the way that counsel did here. For example, in *New York Central Railroad Co. v. Johnson* (1929) 279 U.S. 310, 319, counsel made "statements that the [defendant corporation] had '***come into***

---

[26] RT 12350, 12379 (two references), 12396, 12397, 12404, 12718 (three references), 12721 (two references), 12722, 13049, 13058, 13902, 13905 (two references).

this town' and that witnesses and records had been 'sent on from New York.'" (emphasis added). The Supreme Court stated that these comments "tend[ed] to create an atmosphere of hostility toward petitioner as a * * * corporation located in another section of the country [and] have been so often condemned as an appeal to sectional or local prejudice as to require no comment." *Id.*[27] Under these longstanding precedents, plaintiffs' counsel's closing arguments warrant this Court's strongest censure.

E. Counsel Made Prohibited "Golden Rule" Arguments.

On at least three occasions counsel appealed to the jurors to put themselves into the shoes of plaintiffs in order to determine what damages to award. Counsel instructed the jury that, "when you are assessing the issue of damages for these children, ***try to put yourself back to the life of a child and what it would be like*** and what these children have gone through." RT 12676. (emphasis added). Later, counsel directed that:

> For each plaintiff, when you assess damages, ***go through what they have been through***: In the past what they have been through, and what they are going to go through in the future for each one.

RT 12712 (emphasis added). And they led the jury through an entire chain of events from accident to hospital burn ward to post-trauma depression, inviting

---

[27] *Accord Pappas v. Middle Earth Condo. Ass'n* (2d Cir. 1992) 963 F.2d 534, 539, 541 ("There is no doubt whatever that appeals to the regional bias of a jury are completely out of place in a federal courtroom."; "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."); *Westbrook v. General Tire & Rubber Co.* (5th Cir. 1985) 754 F.2d 1233, 1238, 1241 ("us-against-them plea can have no appeal other than to prejudice by pitting 'the community' against a nonresident corporation"; "such appeals to local bias against an outsider are prejudicial"); *City of Cleveland v. Peter Kiewit Sons' Co*. (6th Cir. 1980) 624 F.2d 749, 757-58 (comments "which were intended to inform and emphasize that [defendant] had its corporate 'residence in another state' * * * 'obviously designed to prejudice the jurors'") (citation omitted); *Smith v. Travelers Ins. Co.* (6th Cir. 1971) 438 F.2d 373, 375-76 & n.2 (plaintiff's exhortation to "send them back up to Hartford and let them know how we feel about it in Tennessee" was "obviously designed to prejudice the jurors"); Annotation, *Counsel's Appeal to Prejudice*, *supra*, 78 A.L.R. at 1485-86 ("judgments against corporations have been reversed because of argument of counsel for the adverse party tending to arouse prejudice against the corporation because of its nonresidence") (collecting cases).

jurors at each stage to picture themselves in the situation and to "try and feel what a person feels under these conditions." RT 12664-68.

For compelling reasons, California law explicitly prohibits such grossly improper, highly prejudicial appeals to subjective judgment. *See*, *e.g.*, *Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 860 (golden rule arguments "impermissible"); *see also Beagle v. Vasold* (1966) 65 Cal.2d 166, 182 n.11 (taking pains not to "imply that we * * * approve the so-called 'golden rule' argument, by which counsel asks the jurors to place themselves in the plaintiff's shoes and to award such damages as they would 'charge' to undergo equivalent pain and suffering."). As another division of this Court recently explained, "[t]he only person whose pain and suffering is relevant in calculating a general damage award is the plaintiff. How others would feel if placed in the plaintiff's position is irrelevant." *Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 764-65. This "so-called 'golden rule' argument is impermissible" precisely because "[i]t tends to denigrate the jurors' oath to well and truly try the issue and render a true verdict according to the evidence." *Id*. at 765 (quoting *Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 484-85). Plaintiffs here "in effect ask[ed] each juror to become a personal partisan advocate for the injured party, rather than an unbiased and unprejudiced weigher of the evidence." 60 Cal.App.4th at 765.

There could be no clearer evocation of the "golden rule" argument than counsel's exhortations to "try to put yourself back to the life of a child and what it would be like," and to "go through what they have been through." (RT 12676, 12712.) They should not be condoned by this Court.

F. Counsel's Numerous Other Elicitations Of Jury Passion And Prejudice Were Grossly Improper.

Counsel's other attempts to evoke the jurors' passions and prejudices or otherwise contaminate the jury deliberations in order to obtain large awards are too numerous and varied to catalogue, and we will not attempt to do so here. Some of counsel's improper use of provocative rhetoric was so egregious, however, that it deserves special mention.

Counsel did not hesitate to employ melodramatic and provocative imagery when purportedly describing plaintiffs' accident and injuries. They

condemned burning as "cruel and unjust hardship — unjust punishment" prohibited by the Constitution. RT 12619. And they insinuated that General Motors executives were Nazis, explaining that:

> Pain is used by the oppressors of all society, torture to get what you want. The Gostoppel (phonetic) [*i.e.*, Gestapo]. Everybody uses pain to inflict on others to get what they want. That's what we are talking about here.

RT 12677.[28]

Counsel even went so far as to try to incite religious fervor in support of plaintiffs and against General Motors, using long and colorful quotations from the Bible to liken plaintiffs' accident to God's wrath and hell-fire, and to argue that plaintiffs' injuries were akin to the pains of perdition. RT 12411-12. They claimed that the General Motors executives "in the board room making the decision[s]" were guilty of "what the Bible says about the worst thing that we can conjure up to do to another human being; the sleepless nights of those that are condemned to hell." RT 12618. They pointed to Joan of Arc and claimed that "she was remembered" not for her deeds but "for wearing the garment of flame," thus invoking the image of the burn victim as martyred saint. *Id.*

The only purpose that such lurid images could serve — the only logical explanation for counsel's use of them — was to so rouse the passions of the jurors as to overcome their inclination to make a reasoned and conscientious assessment of plaintiffs' damages and General Motors' culpability in accordance with California law. Those "appeal[s] to religious authority" in support of a drastic penalty were improper and require reversal. *People v. Hill* (1998) 17 Cal.4th 800, 836-37. *See also, e.g.*, *United States v. Steinkoetter*

---

[28] Associating General Motors with the Gestapo was particularly improper and should not be tolerated. *See, e.g.*, *Martin v. Parker* (6th Cir. 1993) 11 F.3d 613, 616 (granting habeas corpus based on "deplorable" comparison drawn between defendant and Adolf Hitler); *United States v. Thiel* (8th Cir. 1980) 619 F.2d 778, 782 (prosecutor's analogizing of defendant's conduct to Holocaust and Jonestown massacre "clearly transgresse[d] the bounds of legitimate advocacy"); *Pennsylvania v. Baranyai* (Pa. Super. Ct. 1982) 442 A.2d 800, 803 (new trial ordered after prosecutor attempted to "stigmatize" defendant as, *inter alia*, someone who used "Gestapo tactics").

(6th Cir. 1980) 633 F.2d 719, 720 (6th Cir. 1980) (comparisons in closing argument between defendant and Pontius Pilate and Judas Iscariot "convey strong prejudicial overtones" requiring reversal).

G. The Failure Of The Superior Court To Set Aside A Verdict Tainted By Passion And Prejudice Deprived General Motors Of Its Right To A Fair Trial.

In failing to set aside the verdict, the Superior Court disregarded a fundamental principle of ordered jurisprudence: the right to a trial by a fair and impartial jury. That right extends to corporate defendants no less than to individuals.

Counsel's repeated appeals to passion and prejudice and the eye-popping compensatory and punitive awards, taken together, point to only one conclusion: that passion and prejudice crept into the jury's verdict and improperly infected its decision on liability as well as damages.

The "right to an impartial jury" is guaranteed by the federal and state constitutions. *See, e.g.*, U.S. CONST. amend. XIV; CAL. CONST. art. 1, § 16; *McDonough Power Equip., Inc. v. Greenwood* (1984) 464 U.S. 548, 549, 554; *People v. Carpenter* (1997) 15 Cal.4th 312, 354; *Holley v. J & S Sweeping Co.* (1983) 143 Cal.App.3d 588, 592; *Dorshkind v. Harry N. Koff Agency, Inc.* (1976) 64 Cal.App.3d 302, 308. By definition, a trial by a jury that is moved by passion or prejudice is not a trial by a fair and impartial jury: "There can be no justice in a trial by jurors inflamed by passion [or] warped by prejudice." *Groppi v. Wisconsin* (1971) 400 U.S. 505, 511 n.12 (quoting *Crocker v. Justices of Superior Ct.* (Mass. 1911) 94 N.E. 369, 376-77); *see also United States v. Haupt* (7th Cir. 1943) 136 F.2d 661, 671 (right to trial by jury "comprehends a fair determination free from passion or prejudice"). For that reason, "a new trial, and not remittitur, is required when an award is the result of passion and prejudice, because the prejudice may have infected the verdict itself." *Dresser Indus., Inc. v. Gradall Co.* (7th Cir. 1992) 965 F.2d 1442, 1448. Indeed, "the general rule" is "that a verdict based on jury prejudice cannot be sustained even when punitive damages are warranted," that is, when some punishment might appropriately have been imposed even by a jury not

overcome by passion or prejudice. *Curtis Publ'g Co. v. Butts* (1967) 388 U.S. 130, 160.

The jury here, incited by plaintiffs' summation, awarded the six plaintiffs almost $5 billion in damages for their injuries. The Superior Court had no authority simply to shave off a bit of the excessive punitive award rendered by a tainted jury and let the remainder of the verdict stand. That course usurped the responsibilities that belong to a fair and impartial jury: to decide whether General Motors bears any civil liability for its design decisions, and, if so, what the legitimate extent of the liability may be. The only permissible remedy for the jury's violation of General Motors' right to a fair and impartial adjudication is a new, untainted trial.[29]

---

[29] That General Motors did not contemporaneously object to each and every one of plaintiffs' counsel's grossly improper comments is of no moment. As courts in other jurisdictions have recognized when confronted with this situation, although an objection typically is necessary to preserve a contention that an improper statement of counsel independently necessitates a new trial, no objection is needed when the statements are being used to support a contention that the verdict was the product of passion and prejudice. *See, e.g.*, *Whitehead v. Food Max of Miss., Inc.* (5th Cir. 1998) 163 F.3d 265, 278 ("Of course, we need not find that each statement, taken individually, was so improper as to warrant a new trial. Rather, taken as a whole, these comments prejudiced the jury's findings with respect to damages. Even though most of the challenged statements were not objected to, substantial injustice would result * * * were we to affirm the awards."); *Clement Bros. Co. v. Everett* (Ky. 1967) 414 S.W.2d 576, 578 ("[W]e are not concerned here with whether the improper argument is reversible error; we simply are identifying it as an obvious source of the passion and prejudice that appears to have influenced the jury in fixing damages.").

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Superior Court.

Respectfully submitted,

Of Counsel:

Robin S. Conrad
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1516 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

_____
Stephen M. Shapiro
Evan M. Tager
Donald M. Falk (SB#150256)
MAYER, BROWN & PLATT
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

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

Dated: March 30, 2001