No. 05-1256

In the Supreme Court of the United States

PHILIP MORRIS USA,
PETITIONER

v.

MAYOLA WILLIAMS,
RESPONDENT

On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF FOR THE TOBACCO CONTROL LEGAL CONSORTIUM AND TOBACCO CONTROL RESOURCE CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

EDWARD L. SWEDA, JR*
TOBACCO CONTROL RESOURCE CENTER
Northeastern University School of Law
102 The Fenway, Suite 117
Boston MA 02115
(617) 373-2026

MARK GOTTLIEB
TOBACCO CONTROL RESOURCE CENTER
Northeastern University School of Law
102 The Fenway, Suite 117
Boston MA 02115
(617) 373-2026

*Counsel of Record for Amici

QUESTIONS PRESENTED

1. Whether, in reviewing a jury's award of punitive damages, an appellate court's conclusion that a defendant's conduct was highly reprehensible can ever create a situation where a greater than single digit ratio of punitive to compensatory damages is constitutionally permissible.

2. Whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

The *amici curiae* are nonprofit organizations with a shared mission centered on improving public health and a shared belief that punitive damages play a critical role in our nation's civil justice system by deterring and punishing misconduct that threatens the public health.[1]

This brief is filed with consent of all parties by letters on file with the Clerk of the Court.

Tobacco Control Legal Consortium ("TCLC")

Amicus Curiae the Tobacco Control Legal Consortium ("TCLC") is a national network of legal centers providing legal technical assistance to public officials, health professionals and advocates in addressing legal issues related to tobacco and health, and supporting public policies that will reduce the harm caused by tobacco use in the United States. TCLC grew out of collaboration among specialized legal resource centers serving six states, and is supported by national advocacy organizations, voluntary health organizations and others.[2] In addition, TCLC prepares legal briefs as *amicus curiae* in cases where its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance.

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[1] Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici* and their counsel made a monetary contribution to the preparation and submission of this brief.

[2] TCLC's coordinating office is located at the Tobacco Law Center of the William Mitchell College of Law in St. Paul, Minnesota. Other affiliated legal centers include the Technical Assistance Legal Center (TALC) at the Public Health Institute of California, in Oakland, California; the Legal Resource Center for Tobacco Regulation, Litigation & Advocacy (TRC) at the University of Maryland School of Law in Baltimore, Maryland; the Tobacco Control Resource Center (TCRC) at Northeastern University School of Law in Boston, Massachusetts; the Smoke-Free Environments Law Project (SFELP) at the Center for Social Gerontology in Ann Arbor, Michigan; and the Tobacco Control Policy and Legal Resource Center at New Jersey GASP in Summit, New Jersey.

TCLC has submitted *amicus* briefs in recent cases before the Supreme Courts of Florida, Kentucky, Montana, New Hampshire, and to the trial court in the U.S. Department of Justice tobacco litigation.

Tobacco Control Resource Center ("TCRC")

Amicus Curiae the Tobacco Control Resource Center, founded in 1979, is a division of the Public Health Advocacy Institute devoted to supporting and enhancing public health understanding and commitment among law teachers and students, legislators and regulators, the courts, and others who shape public policy through the law.

SUMMARY OF ARGUMENT

This Court's jurisprudence on the constitutionality of large punitive damages awards to date has left open the possibility that in very limited circumstances, where a defendant's conduct is extremely reprehensible and causes significant physical injury or death, a ratio of punitive to compensatory damages above 4 to 1 may be permissible.

Verdicts involving cigarette manufacturers such as the present case are leading candidates to be that rare exception where such higher ratios are permissible because: a) the conduct underlying the tort has been found to be extremely reprehensible; b) the conduct resulted in significant physical harm to the Respondent's spouse; and c) the Petitioner and other cigarette companies have long engaged in a campaign of extremely aggressive litigation tactics designed to deter plaintiffs such as the Respondent from ever reaching the courtroom.

Such conduct can be regarded as a secondary reprehensibility that prevents non-parties suffering nearly identical injuries arising out of the same primarily reprehensible conduct that triggered the award of punitive damages from utilizing the civil justice system. Numerous examples of such conduct are cited.

When defendants are able to engage in such conduct to "evade capture," or "beat the system," an analysis of the

punitive damages award should take secondary reprehensibility into account.

ARGUMENT[3]

The need to take measures to punish bad behavior long has been recognized. Such measures serve a vital public health purpose by creating a powerful market disincentive to discourage behaviors that create a high likelihood for harming the public's health.

While compensatory damages seek to recompense a plaintiff for injuries suffered where a fact finder determines liability, punitive damages are "generally defined as those damages assessed, in addition to compensatory damages, for the purpose of punishing the defendant for aggravated or outrageous misconduct and to deter the defendant and others from similar conduct in the future." Marjorie A. Shields, *Annotation, Liability of Cigarette Manufacturers for Punitive Damages*, 108 A.L.R. 5th 343, 349-50 (2003). Because they are not based on the plaintiff's actual monetary or non-monetary loss, determining the appropriate amount of punitive damages within constitutional limits has been an ongoing concern.

I. THIS COURT HAS RECOGNIZED THE LEVEL OF REPREHENSIBILITY OF A DEFENDANT'S CONDUCT AS AN ESSENTIAL FACTOR IN DETERMINING WHETHER PUNITIVE DAMAGES ARE WARRANTED AND,

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[3] The arguments made herein largely are adapted from an article published in 2005 in the University of Pittsburgh Law Review. Sara D. Guardino & Richard A. Daynard, *Punishing Tobacco Industry Misconduct: The Case for Exceeding a Single Digit Ratio Between Punitive and Compensatory Damages*, 67 U. Pitt. L. Rev. 1 (2005) [hereinafter "*Guardino*"].

WHERE WARRANTED, AT WHAT LEVEL.

In several notable cases, this Court has examined the factors contributing to a punitive damages award. None of these cases has established a bright-line "benchmark" for such awards, but rather, these cases have emphasized the importance of the defendant's reprehensibility in calculating the appropriate amount of punitive damages.

In *TXO Production Corp. v. Alliance Resources Corp.*, this Court stated its reluctance to adopt "an approach that concentrates entirely on the relationship between actual and punitive damages." 509 U.S. 443, 460 (1993). This Court found that when comparing punitive and compensatory damages, it is more "appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." *Id*.

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996), this Court set down three "guideposts" for courts to consider when reviewing punitive damages awards:

> (1) the degree of reprehensibility of the defendant's misconduct;
>
> (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and
>
> (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Gore, 517 U.S. at 574-75.

This Court declared that the first of these guideposts, the degree of reprehensibility, *is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award . . . ."* *Id*. at 575 [emphasis added].

Although this Court overturned the punitive damages award, it again stated that it was "not prepared to draw a bright line marking the limits of a constitutionally acceptable punitive damages award."[4]

In *State Farm Mut. Auto. Ins. Co. v. Campbell*, this Court again noted that it has "been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award." 538 U.S. 408, 424-25 (2003). Rather than establish a bright-line ratio between punitive and compensatory damages, the Court stated that "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Id*. at 426.

Importantly, the *State Farm* decision stated that "in practice, *few* awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" *Id*. at 425 (emphasis added). This Court thus left open the possibility that, in those "few" cases where the defendant's conduct is particularly reprehensible, a punitive damages award higher than nine times the compensatory damages amount may be permissible.

II. THE *WILLIAMS* RECORD IS RIFE WITH AN EXTRAORDINARY DEGREE OF REPREHENSIBILITY THAT SUGGESTS THAT IT WOULD BE ONE OF THOSE "FEW" INSTANCES WHERE A HIGH RATIO OF PUNITIVE TO COMPENSATORY DAMAGES IS JUSTIFIED.

In the course of the prior history of the present case, the Oregon Court of Appeals and the Supreme Court of Oregon concluded that Philip Morris's conduct was highly

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[4] This Court found that the defendant's conduct was financially motivated, but not sufficiently reprehensible – particularly in that the health and safety of the consumer was never put at risk – to justify a large punitive damages award. *Gore*, 517 U.S. at 576. This ruling suggests, however, that where the underlying conduct *is* reprehensible and reckless in regard to health and safety, more severe sanctions would not pose constitutional problems.

reprehensible. *Williams v. Philip Morris, Inc.*, 92 P.3d 126 at 142 (2004); *Williams v. Philip Morris, Inc.*, 304 Or. 35 at 52 (2006). Neither court, after applying an analysis based on this Court's ruling in *State Farm*, held that *State Farm* bound them to restrict the punitive damages award to within a single-digit multiple of the compensatory damages award.

The Court of Appeals summarized the reprehensibility of the Defendant/Petitioner before this Court, holding that defendant Philip Morris "used fraudulent means to continue a highly profitable business knowing that, as a result, it would cause death and injury to large numbers of Oregonians." *Williams*, 92 P.3d at 142. The Supreme Court of Oregon emphasized the extremely reprehensible behavior by concluding that Philip Morris,

> with others, engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others, even when Philip Morris always had reason to suspect – and for two or more decades absolutely knew – that the scheme was damaging the health of a very large group of Oregonians – the smoking public – and was killing a number of that group.

Williams, 304 Or. 35 at 52.

III. THE CONCEPT OF REPREHENSIBILITY SHOULD INCLUDE "SECONDARY REPREHENSIBILITY," STEMMING FROM THE DEFENDANT'S LITIGATION TACTICS WHEN ANALYZING THE RATIO OF PUNITIVE TO COMPENSATORY DAMAGES.

Internal company documents, witness testimony, and judicial findings reveal that the Defendant/Petitioner and other tobacco companies have long used their enormous wealth to make it exceedingly difficult for potential plaintiffs to find lawyers, and nearly impossible for those that do to maintain their cases.

Such behavior is evidenced by a now-infamous letter from R.J. Reynolds Tobacco Company counsel J. Michael

Jordan to "Smoking and Health" lawyers. In the letter, Jordan discussed plaintiffs' attorney John Robinson's agreement "to dismiss his cases against the tobacco industry. " One factor that Jordan says contributed to this is that:

> the aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making that other son of a bitch spend all his.

Memorandum from Mike Jordan to S&H Attorneys (Apr. 28, 1988), at http://www.kazanlaw.com/verdicts/images/exb_d_sob.gif (last visited September 12, 2006). *See also Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 421 (D.N.J. 1993) (citing this letter). Jordan's letter embodies the spirit of "secondary reprehensibility." Such secondary reprehensibility involves the reprehensibility of the defendant's "scorched earth" litigation tactics, which often result in the plaintiff's inability to maintain an action against the defendant. *See Guardino* at 4.

Secondary reprehensibility is not a factor that would contribute to the jury's determination of compensatory damages or even whether punitive damages are appropriate. Such an analysis should be an essential part of the review of a punitive damages award in those instances where the defendant's wealth has been used strategically to deter litigation. *Id*.

A. Judge Posner's Opinion in *Mathias*

In a post-*State Farm* Seventh Circuit decision, *Mathias v. Accor Economy Lodging, Inc.* ("*Mathias*"), Judge Richard A. Posner authored a decision holding that a defendant who uses wealth to make litigating a case against it extraordinarily difficult, if not impossible, may warrant a punitive damages award exceeding a single-digit ratio between punitive and compensatory damages.

Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672 (7th Cir. 2003). It is precisely this sort of strategy that is contemplated in the secondary reprehensibility framework.

Mathias involved two plaintiffs who were bitten by bedbugs at a popular hotel chain location. They brought suit against the hotel's affiliated entities (collectively, the "defendant"),[5] claiming "that in allowing guests to be attacked by bedbugs in a motel that charges upwards of $100 a day for a room . . . the defendant was guilty of 'willful and wanton' conduct and thus under Illinois law is liable for punitive as well as compensatory damages." *Id.* at 674. Evidence showed that the hotel had sustained an escalating bedbug problem over prior years, yet had failed to hire an exterminator to remedy the problem. The court noted that the infestation "began to reach farcical proportions" when a guest who had complained about being bitten by bugs found bugs in two subsequent rooms to which the hotel moved him. *Id.* at 675.

Furthermore, hotel staff members were instructed to misinform guests by telling them that the bedbugs actually were ticks and to rent rooms that were designated to remain closed due to the infestation. *Id.* Such a room was rented to the plaintiffs, who suffered bites. A jury awarded each plaintiff $5,000 in compensatory damages and $186,000 in punitive damages, resulting in a ratio of 37.2 to 1 between the two awards. *Id.* at 674.

On appeal, Judge Posner found the defendant's conduct reprehensible enough to justify a punitive damages award. *Id.* at 675. Determining the appropriate *amount* of the award posed more of a challenge. Judge Posner reasoned that instead of following a set ratio, a court should consider "why punitive damages are awarded and why the [Supreme] Court has decided that due process requires that such awards be limited." *Id.* at 676.

While Judge Posner agreed that the punishment should fit the crime, and that there is a presumption against the

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[5] The court treated the affiliated entities as a single entity.

fairness of double digit ratios, this "principle is modified when the probability of detection is very low . . . or the crime is potentially lucrative." *Id.* "The hotel's attempt to pass off the bedbugs as ticks . . . may have postponed the instituting of litigation to rectify the hotel's misconduct," he noted. *Id.* Furthermore, he found, the practice allowed the hotel to continue to generate revenue by renting infested rooms.

Judge Posner stated that the punitive damages award in this case:

> serve[d] the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is "caught" only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away.

Id. at 677.

Judge Posner took note of "the great stubbornness with which [the defendant] has defended this case, making a host of frivolous evidentiary arguments despite the very modest stakes even when the punitive damages awarded by the jury are included." He concluded that the defendant was "investe[d] in developing a reputation intended to deter plaintiffs." *Id.*

Judge Posner found that the defendant's strategy was to use its wealth to engage in litigation tactics that made the cost of sustaining an action unbearable for plaintiffs so as to discourage counsel from bringing such cases on a contingency fee basis. *Id.* He therefore upheld the punitive damages award.

B. Law and Economics Applied to Tobacco Litigation

Judge Posner's decision in *Mathias* to hold the defendant accountable for its litigation tactics (i.e., its secondary reprehensibility) appears to be in accord with the ideas described in his book, The Economic Analysis of Law. In it, he describes the "Learned Hand Formula" of liability for negligence. *See* Richard A. Posner, Economic Analysis of Law 167-70 (Aspen 6th ed. 2003) [hereinafter "*Posner*"]. This formula takes into account the probability of a loss ("P") and the size of the loss ("L"). The expected cost of a loss is P times L. *Id.*

Posner reasoned that a manufacturer should take precautions up to and including the expected cost of a loss and, in most instances, pass this additional amount on to the consumer by adding it to the price of the product at issue. *Id*. at 98-99. This gives the consumer the correct signal as to the product's total cost, enabling her to maximize her welfare with respect to this purchase. *Guardino* at 35.

If L were, for example, 50 cents for a bicycle, the manufacturer with an expectation of loss would add 50 cents per unit sold to the price to protect against the liability for L. Where there is no liability on the manufacturer's part, however, the consumer bears her own loss regardless of the manufacturer's behavior. In such a situation, the manufacturer has no expected loss per unit. However, if the consumer is informed perfectly about the product's safety (or lack thereof), she will in effect add the expected loss to the retail price of the bicycle to reflect its true cost. If, on the other hand, the consumers are not adequately informed about the product's risks, they will purchase the product even if they would not have done so had they known its true cost. *Posner* at 99-100. Because of the history of deception by cigarette manufacturers such as the Petitioner, smokers exemplify the "inadequately informed consumer" in the law and economics products liability model.

Despite the fact that contemporary smokers may be better informed about the risks today than they were decades ago, such general knowledge does not tend to translate into a personal belief that such risks apply to them. *See* K. Michael Cummings, et al., *Are Smokers Adequately Informed About the Health Risks of Smoking and Medicinal Nicotine*?, 6 Nicotine & Tobacco Research 1, 2 (Supp. 3, 2004). For instance, most smokers do not realize that so-called "light" or "low-tar" cigarettes are not safer than regular cigarettes. *See, e.g.*, *id*. Additionally, smokers who have already died from cigarette-caused disease cannot benefit from any increased level of information, nor can those who already are addicted or sick. *See Guardino* at 36.

Under the model articulated by Judge Posner, because these consumers were deceived and thus less than perfectly informed, and because their addiction and already-developing disease processes makes later-acquired knowledge less relevant, they did not fully account for the cost of the risk in their cigarette purchases. A law and economics model dictates that the cigarette manufacturers should carry the liability for those injuries to encourage them to be honest with their customers. *See* Jon D. Hanson & Kyle D. Logue, The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation, 107 Yale L.J. 1163 (1998).

IV. CIGARETTE MANUFACTURERS' REPREHENSIBLE LITIGATION TACTICS SHOULD PERMIT A SECONDARY REPREHENSIBILITY REVIEW AND CONSIDERATION OF A HIGHER RATIO OF PUNITIVE TO COMPENSATORY DAMAGES.

Documents produced in cigarette litigation demonstrate that the Petitioner and other cigarette manufacturers engage systematically in "scorched earth" litigation tactics and use their enormous financial advantage over plaintiffs to game the civil justice system to their advantage. Such behavior effectively denies

access to the courts for the overwhelming majority of potential plaintiffs.

A. Conspiracy

While the Petitioner in the present case is Philip Morris, it is worth noting that many plaintiffs have alleged a conspiracy among cigarette manufacturers, and courts have reached verdicts supporting those allegations. The most recent example is the ruling against the major cigarette manufacturers in the U.S. Department of Justice's massive lawsuit that resulted in defendants' liability under the Racketeer Influenced and Corrupt Organizations Act. *See United States v. Philip Morris USA, Inc*., No. 99-2496, 2006 U.S. Dist. LEXIS 61412 at _____ (D.D.C. August 17, 2006) (finding that "Defendants are liable for conspiracy under 18 U.S.C. § 1962(d) of RICO because they both explicitly and implicitly agreed to violate 18 U.S.C. § 1962(c) of RICO.") *See also* findings of conspiracy among cigarette manufacturers in *Gladys Frankson, et al. v. Brown & Williamson Tobacco Corp. et al.*, No. 24915/00 (NY Sup. Ct. King's County, Brooklyn verdict issued January 9, 2004); *Engle v. Liggett Group, Inc.*, 2006 Fla. LEXIS 1480 (Fla. S. Ct. 2006) (applying *res judicata* effect of jury's classwide conspiracy finding); *Henley v. Philip Morris, Inc*., 9 Cal. Rptr. 3d 29 (Cal. Ct. App. 2004), *aff'd*, 18 Cal. Rptr. 3d 873 (2004), *cert. denied*, 73 U.S.L.W. 3555 (U.S. Mar. 21, 2005) (No. 04-816); and *Boeken v. Philip Morris, Inc*., 127 Cal. App. 4th 1640 (Cal. Ct. App. 2005).

1. Never Settle

The cigarette industry's generally successful litigation history is largely due to an early decision to fight the lawsuits at any cost and never consider even the most modest settlement. The industry felt then, and still does, that if any case were settled, there would be tens of thousands of potential claimants to whom payment – no matter how small – would be prohibitive. *See, e.g.*, E.J. Jacob & Jacob Medinger, *Report Prepared by RJR Outside Legal Counsel Transmitted to RJR Executives for the Purpose of Rendering Legal Advice Concerning*

Smoking and Health Issues and Litigation, Bates: 504681987-504682023, http://tobaccodocuments.org/bliley_rjr/504681987-2023.html, at 50468-1997 (June 27, 1980).

A central strategy for the cigarette industry's approach to litigation "is a lavishly financed and brutally aggressive defense that scares off or exhausts many plaintiffs long before their cases get to trial." Patricia Bellew Gray, *Legal Warfare: Tobacco Firms Defend Smoker Liability Suits With Heavy Artillery*, Wall St. J., Apr. 29, 1987, at 25. Those plaintiffs who proceed with their cases "are vastly outgunned," encountering the tobacco industry's "overwhelming strength and prowess at every turn." *Id*.

As J.F. Hind, an R.J. Reynolds director from 1979 to 1980, stated, the industry must "[v]igorously defend any case; look upon each as being capable of establishing dangerous precedent and refuse to settle any case for any amount." J.F. Hind, *Report Concerning Smoking and Health Prepared by RJR Employee Providing Confidential Information to RJR In-House Legal Counsel, to Assist in the Rendering of Legal Advice, and Transmitted to RJR Managerial Employee*, Bates: 505574976-505574977, http://tobaccodocuments.org/bliley_rjr/505574976-4977.html, at 50557-4977 (June 29, 1977).

2. Extreme Investigation Tactics as Intimidation

A 1988 Philip Morris document entitled "Depositions, Discovery and Investigations Position Statement," attributed to Philip Morris's Victor Han,[6] states: "It is standard practice in all contemporary litigation for plaintiff and defendant attorneys to seek information that could be pertinent in any given court case." V. Han, *Depositions,*

[6] Han was, at various times, Director of Communications for Philip Morris's Worldwide Regulatory Affairs office (1993-95), directed Philip Morris strategy and implementation of internal and external communications, and worked for Philip Morris Corporate Affairs. *See* Han, Victor, at http://tobaccodocuments.org/profiles/people/han_victor.html .

Discovery and Investigations Position Statement, Bates: 92347681, viewed at http://tobaccodocuments.org/blileylor/92347681.html, at 92347681 (Apr. 1, 1988). Mr. Han cited an array of dubious rationales such as stress, diet, cholesterol levels or individual behavioral characteristics as justification for his conclusion that "the backgrounds of plaintiffs must be investigated thoroughly to ascertain which of these factors they encountered during the course of their lives." *Id.*

Another industry document instructs investigators working on smoking litigation for Philip Morris to interview the plaintiff's co-workers, supervisors, neighbors, friends, relatives, schoolmates, teachers, and athletic coaches in order to learn about factors such as the plaintiff's lifestyle. *International Product Liability Conference* 11/12-13/1992, Bates: 2501196322-2501196529, http://tobaccodocuments.org/blileypm/27390.html, at 2501196360 (Nov. 1, 1992).

In a case involving cigarette manufacturer R.J. Reynolds, *Galbraith v. R.J. Reynolds Tobacco Company*, tobacco industry scorched earth litigation tactics were particularly well-documented. *See* William E. Townsley & Dale K. Hanks, *The Trial Court's Responsibility to Make Cigarette Disease Litigation Affordable and Fair*, 4 Tob. Prod. Litig. Rptr. 4.11 (1989). *Galbraith* was a personal injury action tried in Santa Barbara, California, on behalf of smoker John Galbraith and his wife in 1985. According to the plaintiff's attorney, Paul Monzione, Reynolds initially sent subpoenas to "all of Mr. Galbraith's former employers back to the time that [he] was a very young man," and demanded documents from the plaintiff such as Christmas cards, family diaries, phone logs, and lists of attendees at the family's weddings and birthdays." *Id*. at 4.23. After obtaining this documentary evidence, Reynolds "began noticing depositions and subpoenaing witnesses for depositions virtually all over the United States." *Id.* Those deposed included "anyone and everyone remotely connected with Plaintiff, including childhood friends, former spouses, former spouses of

family members, neighbors and store owners in the neighborhood where Plaintiff lived." *Id.* The depositions "would last for hours, and very little, if any relevant or admissible evidence would be obtained." *Id.* Galbraith's wife was deposed for ten days; his mother for several days. According to Monzione, Reynolds justified the depositions by arguing that they needed to obtain information such as whether Galbraith "ate red meat, or used pesticides in his garden . . . ." *Id.*

Despite Reynolds's "burdensome and unreasonable discovery," the company "object[ed] to the vast majority of interrogatories propounded by Plaintiff, and caus[ed] Plaintiff to file motions to compel discovery responses." *Id.* The court granted most of these motions, "but only after great time, inconvenience, and expense." *Id.* Monzione concluded that plaintiffs cannot bring tobacco cases cost effectively "if defendants and their counsel are allowed to engage in what is obviously an approach designed to dissuade and deter plaintiffs from bringing other cases and to force plaintiffs to dismiss these cases rather than try them." *Id.*

A document from a collection of discovery materials originating with Brown & Williamson Tobacco Company was prepared by the law firm of Jones, Day, Reavis & Pogue. It urges that a defense oriented pre-trial record be created that involves the "taking of extensive admission-oriented depositions" because this experience would impress "upon the plaintiffs, their lawyers, and their experts the seriousness of the commitment they must make in bringing these cases." Jones Day, *Smoking and Health Litigation-Tactical Proposals*, Bates: 680712261-680712337, http://tobaccodocuments.org/ness/38741.html, (Aug. 10, 1985).

The "General Patton" strategy of sparing no expense to force the plaintiff to spend all of its money has been documented industry-wide as a means to discourage litigation. It is never part of the underlying tort in a smoker's lawsuit, but it is part of a pattern of secondary

reprehensibility that helps these cigarette manufacturers to escape capture in the civil justice system.

3. Document Destruction

Some of the aggressive tactics described, while forming an industry pattern of scorched earth litigation, arguably may be seen as falling under the attorneys' duty to zealously represent their clients. The tobacco industry's litigation tactics, however, too often have extended beyond the boundaries of zealous advocacy and into the realm of unprofessional conduct. As the Model Rules of Professional Conduct caution, the "lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." *Model Rules of Prof'l Conduct* R. 1.3 cmt. 1 (2003). Furthermore, lawyers may not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value." *Id*. Unfortunately, the tobacco industry has a disturbing record of document destruction.

A 1969 memorandum from Murray Senkus, a Reynolds chemist who ultimately became its Director of Scientific Affairs, to Reynolds General Counsel Max H. Crohn states: "We do not foresee any difficulty in the event a decision is reached to remove certain reports from Research files. Once it becomes clear that such action is necessary for the successful defense of our present and future suits, we will promptly remove all such reports from our files." Murray Senkus, *Memorandum Concerning Scientific Reports Prepared by RJR Scientist Working on Behalf of the Legal Department Legal Counsel for the Purpose of Providing Confidential Information to Assist in the Rendering of Legal Advice and Concerning Activities Performed on Behalf of the Legal Department*, Bates: 500284499, http://tobaccodocuments.org/bliley_rjr/500284499.html (Dec. 18, 1969).

An undated handwritten memorandum attributed to Thomas Osdene, Philip Morris's Director of Research, instructs directly: "Ok to phone & telex (these will be destroyed). . . . If important letters or documents have to be sent please send to home -- I will act on them [and] destroy." Thomas Osdene, *I will act on them and destroy*, http://tobaccodocuments.org/landman/183546.html.

Such actions are not relegated to ancient tobacco litigation history. In pretrial discovery during the U.S. Department of Justice RICO litigation, the court sanctioned Philip Morris for violating its own document retention policy in self-serving ways by destroying potentially important e-mails. Judge Kessler wrote:

> Despite the lengthy submissions and explanations, there is no question that a significant number of emails have been lost and that Philip Morris employees were not following the company's own internal procedures for document preservation. What is particularly troubling is that Phillip Morris specifically identified at least eleven employees who failed to follow the appropriate procedures, and that those eleven employees hold some of the highest, most responsible positions in the company. These individuals include officers and supervisors who worked on scientific, marketing, corporate, and public affairs issues that are of central relevance to this lawsuit.
>
> Specifically, they include, among others, the *Director of Corporate Responsibility*, the Senior Principal Scientist in Research Development and Engineering, and the Senior Vice President of Corporate Affairs. All but one of the eleven employees were noticed for deposition by the United States.

United States v. Philip Morris USA, Inc., No. 99-2496 at 2 (Memorandum and Opinion D.D.C. July 21, 2004) [emphasis added]. The Court also noted, "it is astounding that employees at the highest corporate level in Philip Morris, with significant responsibilities pertaining to issues

in this lawsuit, failed to follow Order #1, the document retention policies of their own employer." *Id*. at 4.

More than three decades of self-serving document destruction strongly suggest that these companies are brazenly abusing civil litigation to avoid capture. This secondary reprehensibility requires redress on those exceedingly rare occasions where punitive damages are available against them.

4. Filing Motions for Tactical Advantage

Tobacco defendants are infamous among plaintiff's attorneys for filing a bewildering number of motions. One internal industry document instructs that "it is critical to file a series of motions *in limine* before each trial," to gain the "slight tactical advantage found in forcing plaintiff's counsel, on the eve of trial, to respond to such motions and to formulate alternative trial strategies in the event that any of defendants' motions are granted" Jones Day, *Smoking and Health Litigation-Tactical Proposals,* Bates: 680712261, http://tobaccodocuments.org/ness/38741.html, (Aug. 10, 1985). This advice comes perilously close to violating Federal Rule of Civil Procedure Rule 11, which prohibits filing motions for "any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation." Fed. R. Civ. P. §11.

Failure to produce documents by cigarette companies is another well-known tactic, whether or not such documents have been destroyed. In the State of Minnesota's lawsuit against the major cigarette manufacturers in the 1990s, epic discovery battles took place. *See State of Minnesota et al. v. American Tobacco Co., et al.* No. C1-94-8565 (Minn Dist. Ct., Ramsay County, *Filed* August 17, 1994). Here, a law firm representing a state and HMO (Minnesota Blue Cross Blue Shield) was able to steadfastly maintain its discovery efforts despite a pattern of willful non-compliance with discovery orders that resulted in countless Motions to Compel. *See, e.g.,* Ciresi, Walburn, & Sutton, *Decades of Deceit: Document Discovery in. the Minnesota Tobacco Litigation*. 25 William Mitchell Law Rev. 477-566 (1999);

Guardino, Friedman & Daynard, *Remedies for Document Destruction: Tales from the Tobacco Wars*, 12 Va. J. Soc. Pol'y & L. 1 (2004).

Such tactics to deliberately create litigation costs to deter plaintiffs' lawyers from filing cases against the Petitioner and other cigarette companies is yet another example of the tobacco industry's secondary reprehensibility. Considering the effect of this secondary reprehensibility on the non-parties deterred from reaching the courtroom due to such tactics is an important way to meaningful punish and deter such conduct. This will require a punitive damages ratio to compensatory damages greater then 1 to 1, 4 to 1, or even 10 to 1 in those extremely uncommon situations where such defendants fail to evade capture.

V. CONCLUSION

Particularly aggressive litigation tactics employed by the Petitioner and other cigarette manufacturers that are designed to create expense to deter plaintiffs from utilizing the civil justice system create a plus factor in any analysis of the amount of punitive damages awarded. Such secondary reprehensibility is important for courts to recognize because it is needed for punitive damages to achieve the dual goals of punishment and deterrence for defendants that not only exhibit extremely reprehensible behavior that causes bodily injury and death, but also use their vast wealth to use the civil justice system in such a way as to prevent potential plaintiffs from ever reaching the courtroom. The harm to these non-parties should be considered when reviewing the appropriateness of punitive damages awards involving defendants that have utilized such tactics.

Respectfully submitted,

_____/s/___ _____/s/____

EDWARD L. SWEDA, JR*
TOBACCO CONTROL
RESOURCE CENTER
Northeastern University
School of Law
102 The Fenway, Suite 117
Boston MA 02115
(617) 373-2026

MARK GOTTLIEB
TOBACCO CONTROL
RESOURCE CENTER
Northeastern University
School of Law
102 The Fenway, Suite 117
Boston MA 02115
(617) 373-2026

Counsel of Record for Amici

No. 05-1256

In the Supreme Court of the United States

PHILIP MORRIS USA,
PETITIONER

v.

MAYOLA WILLIAMS,
RESPONDENT

On Writ Of Certiorari To The Supreme Court Of Oregon

PROOF OF SERVICE OF BRIEF *AMICI CURIAE* TOBACCO CONTROL LEGAL CONSORTIUM AND TOBACCO CONTROL RESOURCE CENTER IN SUPPORT OF RESPONEDENT

EDWARD L. SWEDA, JR*
TOBACCO CONTROL
RESOURCE CENTER
Northeastern University School of Law
102 The Fenway, Suite 117
Boston MA 02115
(617) 373-2026

MARK GOTTLIEB
TOBACCO CONTROL
RESOURCE CENTER
Northeastern University School of Law
102 The Fenway, Suite 117
Boston MA 02115
(617) 373-2026

*Counsel of Record for Amici

I, Edward L. Sweda, hereby certify that on September 15, 2006, I mailed, postage prepaid, three copies of the brief *amicus curiae* Tobacco Control Resource Center, Inc. to each party represented in the proceeding as listed below and also sent electronic versions pursuant to United States Supreme Court Rule 29.

Signed under penalty of perjury

Edward L. Sweda, Jr. Mark Gottlieb

EDWARD L. SWEDA, JR*
TOBACCO CONTROL
RESOURCE CENTER
Northeastern University School of Law
102 The Fenway, Suite 117
Boston MA 02115
(617) 373-2026

MARK GOTTLIEB
TOBACCO CONTROL
RESOURCE CENTER
Northeastern University School of Law
102 The Fenway, Suite 117
Boston MA 02115
(617) 373-2026

Counsel of Record for Amici

Andrew L. Frey
Mayer, Brown, Rowe & Maw
1675 Broadway
New York, NY 10019

Robert S. Peck
Center for Constitutional Litigation, P.C.
1050 31st Street, N.W.
Washington, DC 20007