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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JODIE BULLOCK, Plaintiff and Appellant, v. PHILIP MORRIS USA, INC., Defendant and Appellant; MICHAEL J. PIUZE, Objector and Appellant.	B164398, B169083 (Los Angeles County Super. Ct. No. BC249171) ORDER MODIFYING OPINION AND DENYING PETITIONS FOR HEARING [NO CHANGE IN JUDGMENT]

THE COURT:

The opinion filed in the above-entitled matter on April 21, 2006, is modified as follows:

1. On page 16, paragraph 2, line 2, after the word "direct" insert the words "or indirect" so the sentence reads, "Philip Morris's selective recitation of evidence focuses on whether Bullock was a direct or indirect recipient of specific representations."

2. On page 16, paragraph 2, line 6, after the words “and that the” insert the words “substance of” so the clause reads, “and that the substance of the misinformation reached Bullock indirectly through various means and media sources and caused her to begin and to continue smoking.”

3. On page 49, line 16, delete the word “must” and replace it with the word “should” so that line 16 reads, “pp. 1665-1666.) Evidence of a prior punitive damages award should be presented to the”

4. On page 49, at the end of line 18, add a new footnote designation 26, change all subsequent footnote numbers accordingly, and add a new footnote 26 to read as follows:

> Nonetheless, Philip Morris asks us to consider two specific prior California punitive damages awards totaling $59 million that became final after judgment was entered by the trial court in this matter. We decline to do so. In *Stevens v. Owens-Corning Fiberglas Corp.*, *supra*, 49 Cal.App.4th at page 1664, the court explained that evidence of prior punitive damages awards was necessary to determine the significance of those awards, including whether the defendant actually paid the awards and whether the awards arose from the same course of conduct. “For evidence of other awards to have probative value, it must be tested in an adversary setting, giving the plaintiff a chance to probe the underlying facts. [Citations.]” (*Ibid.*) The Texas Supreme Court in *Owens-Corning Fiberglas Corp. v. Malone*, *supra*, 972 S.W.2d 35, in contrast, held that a trial court reviewing a due process challenge may consider evidence of prior

punitive damages awards beyond what was presented to the jury at trial (*id.*, at p. 52), but refused to consider postjudgment awards cited for the first time on appeal because those awards were not part of the trial court record and there was no proof of payment (*id.*, at p. 53, fn. 7).

Our review of the correctness of a judgment ordinarily is limited to the record before the trial court at the time the judgment was entered. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) If a judgment is affirmed on appeal, it is affirmed as rendered on the date of the judgment, not as of a later date. (*People's Home Sav. Bank v. Sadler* (1905) 1 Cal.App. 189, 193; see 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 330, pp. 371-372.) Absent exceptional circumstances, such as an event that would render our decision moot or otherwise impair its effectiveness (see 9 Witkin, *supra*, §§ 331-333, pp. 372-375), we will not consider new evidence on appeal.

Finally, even if we were to consider the two prior punitive damages awards, our conclusion with respect to the constitutionality of the award in this case would not be altered. Given the judicial admission by counsel that Philip Morris "has billions of dollars in profits . . . and could afford to pay a billion dollars or $6.666 billion in this case" (see discussion *post*), the fact that Philip Morris may have suffered and paid two prior punitive damages awards in California totaling $59 million does not render the award in this case constitutionally excessive.

5. On page 65, paragraph 2, delete the entire paragraph and insert the following in its place:

> As already noted, Philip Morris in this case presented no evidence to the jury of any other punitive damages award but nonetheless has asked that we consider two specific prior California punitive damages awards, including *Boeken v. Philip Morris, Inc.*, *supra*, 127 Cal.App.4th 1640. For the reasons set out earlier (see fn. 26, *ante*), we decline to do so and reject the reasoning of *Boeken* in that regard. With respect to the MSA, we conclude that Philip Morris's agreement not to engage in certain conduct is neither punishment nor an effective deterrent and does not reduce the need for punishment and deterrence, as we have stated.

There is no change in the judgment.

The petitions for rehearing filed by Jodie Bullock and Philip Morris USA, Inc., are denied.

CROSKEY, J.

I CONCUR:

KLEIN, P.J.

In my view, the petition of Philip Morris USA, Inc., should be granted.

KITCHING, J.