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VIA FEDERAL EXPRESS

The Honorable Tani Cantil-Sakauye, Chief Justice,
and the Honorable Associate Justices of the
Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, California 94102-3600

Re: ***Bankhead v. ArvinMeritor, Inc.***
Supreme Court No. S202851
Court of Appeal Nos. A131587 & A132985
Amici Curiae Letter in Support of Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

On behalf of the Motor & Equipment Manufacturers Association (MEMA), National Association of Manufacturers (NAM), and Chamber of Commerce of the United States of America (U.S. Chamber), we submit this amici curiae letter in support of granting review. (See Cal. Rules of Court, rule 8.500(g)(1).)

Interest of Amici Curiae

MEMA represents more than 900 companies that manufacture motor vehicle parts for use in the light vehicle and heavy-duty original equipment and aftermarket industries. Motor vehicle parts manufacturers are the nation's largest manufacturing sector. MEMA represents its members through three affiliate associations: Automotive Aftermarket Suppliers Association (AASA), Heavy Duty Manufacturers Association (HDMA), and Original Equipment Suppliers Association (OESA).

NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The U.S. Chamber is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S.

businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in important matters before the courts, legislatures, and executive agencies. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of vital concern to the nation's business community.

Amici's members conduct business in California and, as representatives of manufacturing employers, have a definite interest in California punitive damage law. Amici are particularly concerned about the problems exemplified by this case, in which the Court of Appeal upheld a $4.5 million punitive damages award without an appropriate analysis of the defendant's ability to pay, and without proper consideration of one of the three constitutionally mandated "guideposts" that protect against excessive awards.

Review Should Be Granted Regarding the "Net Worth" Issue

Over 20 years ago, in *Adams v. Murakami* (1991) 54 Cal.3d 105 (*Adams*), this court said: "Various measures of a defendant's ability to pay a punitive damages award have been suggested. . . . We cannot conclude on the record before us that any particular measure of ability to pay is superior to all others or that a single standard is appropriate in all cases." (*Id.* at p. 116, fn. 7.)

Subsequent to *Adams*, this court still has not settled on the best measure of ability to pay. And the Court of Appeal decisions vary considerably in their financial measure of ability to pay. (See, e.g., *Cummings Medical Corp. v. Occupational Medical Corp.* (1992) 10 Cal.App.4th 1291, 1299-1301 & fn. 8 [ability to pay measured by profits wrongfully gained by the defendant]; *Lara v. Cadag* (1993) 13 Cal.App.4th 1061, 1063-1065 [ability to pay could not be measured by income alone]; *id.* at p. 1065, fn. 3 [asserting, without explanation, that net worth "is subject to easy manipulation"]; *Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 56-58 [disagreeing with *Cummings*]; *Herrick v. Quality Hotels, Inns & Resorts, Inc.* (1993) 19 Cal.App.4th 1608, 1619 [ability to pay measured by net income and gross assets]; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 621, 624-625 [ability to pay measured by the defendant's pension funds' exemption from execution and his "prospects to gain more wealth in the future"]; *Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 580-583; *id.* at p. 583 [asserting, without explanation, that "net worth is [easily] subject

to adjustment for amortization and depreciation"]; *Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 680-681; *id.* at p. 680 ["there should be some evidence of the defendant's actual wealth. Normally, evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income"]; *Green v. Laibco* (2011) 192 Cal.App.4th 441, 452-453 [ability to pay measured by profit for most recent year and unspecified positive net worth].)

The time has come, we respectfully suggest, for this court to provide guidance in this murky area. *Bankhead* provides a good vehicle. The defendant has assets, but the assets are greatly exceeded by liabilities (the difference is over $1 billion). *Bankhead* poses in stark terms the need for a more structured analysis of ability to pay.

In *Bankhead*, the Court of Appeal did what the Court of Appeal so often does in punitive damage cases: focus on assets and say little or nothing about liabilities. (See *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 75-76, 78-84.) But this does not work when the defendant has no equity—when the defendant's liabilities exceed its assets. The equity-less defendant is not the one who loses when punitive damages are assessed. (See *Moore v. American United Life Ins. Co.* (1984) 150 Cal.App.3d 610, 642 ["The deterrent effect of punitive damages is derived from the impact of such an award upon the *profits* of a business. The award provides a pecuniary motivation to the owners of the business to see to it that the affairs of the business are conducted in harmony with established law" (emphasis added)].) When the defendant has no equity, the losers are the defendant's preexisting creditors: a plaintiff with a windfall punitive damage award goes straight to the head of the line of creditors, and the cash used to pay the plaintiff is no longer available to pay the preexisting creditors. They are the ones who effectively end up paying the punitive damages.

This is not to say that punitive damages never should be assessed against a defendant with a negative net worth. It *is* to say, however, that, in reviewing punitive damages against a defendant with a negative net worth, the court should ensure that the preexisting creditors' rights are protected. A much more sophisticated approach to ability to pay is needed, one that gives studied consideration to both the nature and the amount of the defendant's liabilities (depicted in exhibit C to the petition for review).

The 20 years of Court of Appeal decisions since *Adams* suggest that California law on ability to pay is not likely to become consistent unless this court leads the way. The standard the Court of Appeal used in *Bankhead*—that there is not any evidence

defendant will be "*financially destroyed* by an award of $4.5 million in punitive damages," and that the circumstances do not "lead ineluctably to the conclusion that the award resulted from *passion or prejudice*" (*Bankhead, supra,* 205 Cal.App.4th at pp. 83, 84, emphasis added)—does not provide the level of analysis that appropriately takes into account the defendant's actual financial condition.[1]

Review Should Be Granted Regarding the "Third Guidepost" Issue

Regarding federal due process, the central issue in *Bankhead* is whether defendant received "fair notice" that a $4.5 million punitive damage award could be imposed. (See *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1171.) The third of the three guideposts the courts use to determine fair notice is "the state's treatment of comparable conduct in other contexts," i.e., " 'the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.' " (*Id.* at p. 1172; see *id.* at pp. 1183-1184, 1188; *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 718-719.) "[A] reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord "*substantial deference*" to legislative judgments concerning appropriate sanctions for the conduct at issue.' " (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 583-584 [116 S.Ct. 1589, 134 L.Ed.2d 809], emphasis added; see *State Farm, supra,* 538 U.S. at p. 428.) " 'The rationale for this consideration is that, if the penalties for comparable misconduct are much less than a punitive damages award, the tortfeasor lacked fair notice that the wrongful conduct could entail a sizable punitive damages award.' " (*Grassilli v. Barr* (2006) 142 Cal.App.4th 1260, 1290.)

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[1] By urging review on the "net worth" issue under California law, amici do not suggest that a defendant's wealth is relevant to excessiveness analysis under federal constitutional law. While California law requires plaintiffs to present evidence of the defendant's financial condition in order to obtain punitive damages, the defendant's wealth cannot be used to justify an otherwise unconstitutional award. (See *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 427 [123 S.Ct. 1513, 155 L.Ed.2d 585] (*State Farm*)).

In *Bankhead*, the Court of Appeal relegated the third guidepost to a footnote and simply declared that the "civil penalty comparability factor [is] essentially irrelevant." (*Bankhead, supra*, 205 Cal.App.4th at p. 85, fn. 10.) "We . . . will confine our analysis to [the other two guideposts,] the reprehensibility and relationship to actual or potential harm factors." (*Ibid.*) This, despite the fact that defendant had pointed to the $1 million maximum fine that Penal Code section 387, subdivision (a) provides for analogous misconduct. The U.S. Supreme Court has cautioned against using criminal penalties as justification for *sustaining* a punitive damage award. (*State Farm, supra*, 538 U.S. at p. 428 ["Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award"].) But criminal penalties *are* a justification, and a good one, for finding that a punitive damage award *violates* due process. Where is the fair notice when punitive damages greatly exceed the maximum *criminal* penalty for the same or analogous misconduct?

The Court of Appeal's approach in *Bankhead*—finding the third guidepost irrelevant—is all-too-common among the Courts of Appeal. (See, e.g., *Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 570; *Amerigraphics, Inc. v. Mercury Casualty Co.* (2010) 182 Cal.App.4th 1538, 1565-1566; *Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 967; *Sunkist Enterprises Corp. v. Mahmood* (Dec. 12, 2011, A123362) 2011 WL 6152888, at p. *9, fn. 15 [nonpub. opn.]; *Liu v. Wong* (Dec. 8, 2011, A128668) 2011 WL 6100443, at p. *14 [nonpub. opn.]; *Hardie v. Wizard Gaming, Inc.* (Oct. 19, 2011, F060236) 2011 WL 4965470, at p. *6 [nonpub. opn.]; *Miller v. Faiz* (Apr. 13, 2011, G042917) 2011 WL 1404936, at p. *8 [nonpub. opn.]; *Belk v. Electra Cruises, Inc.* (July 16, 2010, G041325) 2010 WL 2796875, at p. *9 [nonpub. opn.]; *Stone v. Fidelity Nat'l Ins. Co.* (Oct. 29, 2007, B190329) 2007 WL 3138396, at pp. *27-28 [nonpub opn.]; *Amusement Indus., Inc. v. Antin* (Apr. 30, 2007, B181465) 2007 WL 1241548, at pp. *17-19 [nonpub. opn.].)

The third guidepost is just as relevant to fair notice as the other two guideposts. Arguably, even more relevant; what fairer notice could there be than a statute prescribing a civil penalty of x amount for the same or analogous misconduct? Even the absence of such a statute is important. If the same or analogous misconduct has not even drawn the Legislature's attention, that misconduct should not be considered serious enough to warrant a substantial punitive damage award. (See *F.D.I.C. v. Hamilton* (10th Cir. 1997) 122 F.3d 854, 862 [absence of comparable penalties suggests the defendant did not have fair notice that substantial punishment could be imposed].)

The "third guidepost" and the "net worth" issues are important-enough, and the approaches the Courts of Appeal have taken to these issues are disparate-enough, to warrant this court's attention. Review should be granted.

Respectfully submitted,

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cc: See attached Proof of Service

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

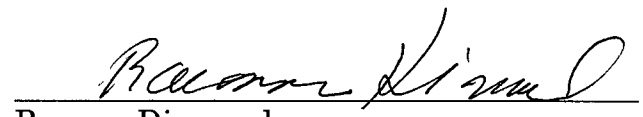
On June 11, 2012, I served true copies of the following document(s) described as **AC LETTER** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on June 11, 2012, at Encino, California.



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