

IN THE SUPREME COURT OF FLORIDA

LINDA PRENTICE, as Personal Representative
of the Estate of JOHN C. PRICE,

Petitioner,

Case No. SC20-291

vs.

L.T. Case Nos. 1D17-210
2007-CA-11551

R.J. REYNOLDS TOBACCO COMPANY,

Respondent.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

PETITIONER'S AMENDED SUPPLEMENTAL APPENDIX

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PETITIONER'S AMENDED SUPPLEMENTAL APPENDIX

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Florida Court's E-Filing Portal on all counsel in the Service List below on this 19th day of March 2021.

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AAMC
IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO: 94-08273 CA 20

HOWARD A. ENGLE, M.D., et al.,

Plaintiffs,

v.

RJ REYNOLDS TOBACCO COMPANY,
et al.,

Defendants.

3
DARLENE WILLIAMS

ANSWER OF DEFENDANT
PHILIP MORRIS INCORPORATED
TO AMENDED CLASS ACTION
COMPLAINT FOR COMPENSATORY
AND PUNITIVE DAMAGES

CLERK OF DISTRICT COURT
DADE COUNTY, FLA.

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FILED FOR RECORD

For its Answer to the Amended Class Action Complaint for Compensatory
and Punitive Damages, Defendant Philip Morris Incorporated says:

JURISDICTION AND IDENTIFICATION OF THE PARTIES

1. Defendant admits that this action purports to seek damages in excess
of Fifteen Thousand Dollars, exclusive of interest and costs, but denies that any Plaintiff
has any claim against Defendant.

2. Defendant is without knowledge or information sufficient to form a
belief as to the truth of the allegations of paragraph 2 and therefore denies each and every
allegation of paragraph 2.

3. Defendant denies that Plaintiff Howard A. Engle has suffered any
alleged injury as a result of smoking. Defendant further denies that smoking is addictive
and that plaintiff is addicted to nicotine in cigarettes. Defendant is without knowledge or
information sufficient to form a belief as to the truth of the remaining allegations of
paragraph 3 and therefore denies each and every remaining allegation of paragraph 3.

002096

4. Defendant denies that Plaintiff Robert W. Angell has suffered any alleged injury as a result of smoking. Defendant further denies smoking is addictive and that Plaintiff could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 4 and therefore denies each and every remaining allegation of paragraph 4.

5. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 5 and therefore denies each and every allegation of paragraph 5.

6. Defendant denies smoking is addictive and that Plaintiff Raymond Lacey could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 6 and therefore denies each and every remaining allegation of paragraph 6.

7. Defendant denies that Plaintiff Raymond Lacey has suffered any alleged injury as a result of smoking. Defendant further denies smoking is addictive and that Plaintiff could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 7 and therefore denies each and every remaining allegation of paragraph 7.

8. Defendant denies each and every allegation in the first, second and ninth sentences of paragraph 8, and Defendant denies that Plaintiff Raymond Lacey has suffered any alleged injury as a result of smoking. Defendant further denies smoking is addictive and that Plaintiff could not and/or cannot quit smoking due to addiction.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 8 and therefore denies each and every remaining allegation of paragraph 8.

9. Defendant denies that Plaintiff Raymond Lacey has suffered any alleged injury as a result of smoking. Defendant further denies smoking is addictive and that Plaintiff could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 9 and therefore denies each and every remaining allegation of paragraph 9.

10. Defendant denies that Plaintiff Frosene D. Steevens has suffered any alleged injury as a result of smoking. Defendant further denies smoking is addictive and that Plaintiff could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 10 and therefore denies each and every remaining allegation of paragraph 10.

11. Defendant denies that Plaintiff Arthur R. Reeves has suffered any alleged injury as a result of smoking. Defendant further denies smoking is addictive and that Plaintiff could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 11 and therefore denies each and every remaining allegation of paragraph 11.

12. Defendant denies that Plaintiff Richard Starr has suffered any alleged injury as a result of smoking. Defendant further denies smoking is addictive and that Plaintiff could not and/or cannot quit smoking due to addiction. Defendant is without

knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 12 and therefore denies each and every remaining allegation of paragraph 12.

13. Defendant denies each and every allegation of paragraph 13.

14. Defendant denies each and every allegation of paragraph 14.

15. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 15 and therefore denies each and every allegation of paragraph 15.

16. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16 and therefore denies each and every allegation of paragraph 16. Defendant further states that RJR Nabisco, Inc. has been dismissed from this action pursuant to Order entered July 11, 1994.

17. Defendant admits that it is a Virginia corporation. Defendant states that it is responsible for the manufacture and sale of cigarettes in the United States. Defendant denies each and every remaining allegation of paragraph 17.

18. Defendant admits that Philip Morris Companies, Inc. is a Virginia corporation. Defendant denies each and every remaining allegation of paragraph 18. Defendant further states that Philip Morris Companies, Inc. has been dismissed from this lawsuit by Order entered July 11, 1994.

19-25. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 19 through 25 and therefore denies each and every allegation of paragraphs 19 through 25.

26. Defendant states that The Council for Tobacco Research - USA, Inc. is a New York corporation. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 26 and therefore denies each and every remaining allegation of paragraph 26.

27. Defendant admits that Tobacco Institute, Inc. is a New York corporation. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 27 and therefore denies each and every remaining allegation of paragraph 27.

28. Defendant states that Tobacco Institute, Inc. has been involved in lobbying and related activities. Defendant further states that The Council for Tobacco Research - USA, Inc. has been involved in funding scientific research. Defendant denies each and every remaining allegation of paragraph 28.

29. Defendant states that it is responsible for the manufacture and distribution of its cigarettes in the United States. Defendant further states that the cigarettes it manufactures and sells contain tobacco and that nicotine occurs naturally in tobacco; Defendant denies that the nicotine contained in its cigarettes is addictive. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations which pertain to other defendants, and on that basis denies said allegations. Defendant denies each and every remaining allegation of paragraph 29.

30. Defendant denies each and every allegation of paragraph 30.

CLASS REPRESENTATION ALLEGATIONS

31. Defendant admits that this lawsuit purports to be brought as a class action, but Defendant denies that this lawsuit is appropriate for class action treatment. Defendant denies each and every remaining allegation of paragraph 31.

32. Defendant admits that Plaintiffs propose to exclude Defendants' officers, directors and agents from the proposed class, but Defendant denies that this lawsuit is appropriate for class action treatment.

33. Defendant denies smoking is addictive and that Plaintiff Howard A. Engle could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 33 and therefore denies each and every remaining allegation of paragraph 33.

34. Defendant denies that Plaintiff Robert W. Angell has suffered any alleged injury as a result of smoking. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 34 and therefore denies each and every remaining allegation of paragraph 34.

35. Defendant denies that Plaintiff Raymond Lacey has suffered any alleged injury as a result of smoking. Defendant further denies smoking is addictive and that Plaintiff could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 35 and therefore denies each and every remaining allegation of paragraph 35.

36. Defendant denies that Plaintiff Frosene Steevens has suffered any alleged injury as a result of smoking. Defendant further denies smoking is addictive and that Plaintiff could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 36 and therefore denies each and every remaining allegation of paragraph 36.

37. Defendant denies that Plaintiff Arthur R. Reeves has suffered any alleged injury as a result of smoking. Defendant further denies smoking is addictive and that Plaintiff could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 37 and therefore denies each and every remaining allegation of paragraph 37.

38. Defendant denies that Plaintiff Richard Starr has suffered any alleged injury as a result of smoking. Defendant further denies smoking is addictive and that Plaintiff could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 38 and therefore denies each and every remaining allegation of paragraph 38.

39-47. Defendant denies each and every allegation of paragraphs 39 through 47.

48. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that the named class representatives are highly intelligent and therefore denies said allegation. Defendant denies each and every remaining allegation of paragraph 48.

49-50. Defendant denies each and every allegation of paragraphs 49 and 50.

51. Defendant admits the allegations in the second and third sentences of paragraph 51; except Defendant denies there are thirty plaintiffs in Broin or that the Broin plaintiffs sustained any injury from exposure to second-hand smoke or otherwise have any claims against the Broin defendants. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first, fifth and sixth sentences of paragraph 51 and therefore denies those allegations. Regarding the allegations in the fourth sentence of paragraph 51, Defendant admits that the Third District Court of Appeals has issued a per curiam decision in Broin, but Defendant denies that said opinion authorizes class action treatment of litigation against cigarette manufacturers.

52-54. Defendant denies each and every allegation of paragraphs 52 through 54.

FACTS GIVING RISE TO THE CAUSE OF ACTION

55. Defendant denies each and every allegation of paragraph 55.

56. Defendant admits that representatives of various tobacco manufacturers have stated their belief that nicotine in cigarettes is not addictive. Defendant denies each and every remaining allegation of paragraph 56.

57. Defendant admits that William Dunn authored a 1972 memorandum which related to a January 1972 scientific symposium held in St. Martin; Defendant states that the symposium was funded as a special project of The Council for Tobacco Research - USA, Inc. Said memorandum speaks for itself and therefore Defendant denies all

allegations regarding the contents or meaning of said memorandum. Defendant denies each and every remaining allegation of paragraph 57.

58. Defendant admits that a document titled "Smoking Behavior: Motives and Incentives" was published. Defendant states that said document speaks for itself and therefore Defendant denies all allegations regarding the contents or meaning of said document. Defendant denies each and every remaining allegation of paragraph 58.

59. Defendant denies each and every allegation of paragraph 59.

60. Defendant admits that representatives from various tobacco manufacturers have testified before the House Subcommittee on Health and the Environment to the effect that their respective companies do not "manipulate" nicotine levels in cigarettes. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 60 and therefore denies each and every remaining allegation of paragraph 60.

61. Defendant states that, on March 25, 1994, Charles O. Whitley, on behalf of Tobacco Institute, Inc., submitted a written statement to the House Subcommittee on Health and the Environment which contains language similar (but not identical) to the quotation alleged in paragraph 61. Defendant states that said written statement speaks for itself and therefore Defendant denies all allegations regarding the contents or meaning of said written statement. Defendant denies each and every remaining allegation of paragraph 61.

62. Defendant admits that, on March 27, 1994, Brennan Dawson appeared on "Face The Nation" on behalf of Tobacco Institute, Inc. Defendant states that.

Ms. Dawson made a statement similar (but not identical) to the quoted statement in paragraph 62. Defendant denies each and every remaining allegation of paragraph 62.

63. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the statements or activities of Dr. Spears and/or Lorillard Tobacco Company and therefore denies said allegations. Defendant denies each and every remaining allegation of paragraph 63.

64. Defendant denies each and every allegation of paragraph 64.

65. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the statements allegedly made by Arthur Godfrey and therefore denies said allegations. Defendant denies each and every remaining allegation of paragraph 65.

66. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 66 and therefore denies each and every allegation of paragraph 66.

67. Defendant admits that the quoted statements in paragraph 67 appear in a published judicial opinion by United States District Court Judge H. Lee Sarokin. Defendant states that the written statements of Judge Sarokin speak for themselves and therefore Defendant denies all allegations regarding the findings, opinions or statements made by Judge Sarokin. Defendant denies each and every remaining allegation of paragraph 67.

68. Defendant denies each and every allegation of paragraph 68.

69. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in the second and third sentences of paragraph 69,

which pertain to the purported advertising of R.J. Reynolds, and therefore denies said allegations. Defendant denies each and every remaining allegation of paragraph 69.

70-76. Defendant denies each and every allegation of paragraphs 70 through 76.

77. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first and second sentences of paragraph 77 and therefore denies said allegations. Defendant denies each and every remaining allegation of paragraph 77.

78. Defendant denies each and every allegation of paragraph 78.

79. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 79 and therefore denies each and every allegation of paragraph 79.

80. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 80 and therefore denies each and every allegation of paragraph 80.

81-83. Defendant denies each and every allegation of paragraphs 81 through 83.

84. Defendant admits that the public is informed of the alleged risks of smoking. Defendant denies each and every allegation of paragraph 84.

COUNT I

**CLAIM FOR STRICT LIABILITY IN TORT AGAINST ALL
DEFENDANTS EXCEPT DEFENDANTS COUNCIL FOR TOBACCO
RESEARCH - USA AND TOBACCO INSTITUTE, INC.**

Defendant adopts, realleges, and incorporates by reference its responses to paragraphs 55 through 84 above, and further says:

85-88. Defendant denies each and every allegation of paragraphs 85-88.

COUNT II

**CLAIM AGAINST ALL DEFENDANTS FOR
FRAUD AND MISREPRESENTATION**

Defendant adopts, realleges, and incorporates by reference its responses to paragraphs 55 through 84 above, and further says:

89. Defendant denies each and every allegation of paragraph 89.

90. Defendant denies each and every allegation of paragraph 90.

91. Defendant admits that its Chief Executive Officer and officers of other tobacco manufacturers testified before Congress on April 14, 1994, that they believe cigarettes are not addictive and that their respective companies do not "manipulate" nicotine levels in cigarettes. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 91 which pertain to other defendants and therefore denies said allegations. Defendant denies each and every remaining allegation of paragraph 91.

92-103. Defendant denies each and every allegation of paragraphs 92 through 103.

COUNT III

**CLAIM AGAINST ALL DEFENDANTS FOR
CONSPIRACY TO MISREPRESENT AND COMMIT FRAUD**

Defendant adopts, realleges, and incorporates by reference its responses to paragraphs 55 through 84 above, and further says:

104-125. Defendant denies each and every allegation of paragraphs 104 through 125.

COUNT IV

**CLAIM FOR BREACH OF IMPLIED WARRANTY OF
MERCHANTABILITY AND FITNESS AGAINST ALL DEFENDANTS
EXCEPT COUNCIL FOR TOBACCO RESEARCH - USA
AND TOBACCO INSTITUTE, INC.**

Defendant adopts, realleges, and incorporates by reference its responses to paragraphs 55 through 84 above, and further says:

126-130. Defendant denies each and every allegation of paragraphs 126 through 130.

COUNT V

**CLAIM FOR INTENTIONAL INFLECTION OF
EMOTIONAL DISTRESS AGAINST ALL DEFENDANTS**

Defendant adopts, realleges, and incorporates by reference its responses to paragraphs 55 through 84 above, and further says:

131-135. Defendant denies each and every allegation of paragraphs 131 through 135.

COUNT VI

**CLAIM FOR NEGLIGENCE AGAINST ALL DEFENDANTS
EXCEPT COUNCIL FOR TOBACCO RESEARCH - USA
AND TOBACCO INSTITUTE, INC.**

Defendant adopts, realleges, and incorporates by reference its responses to paragraphs 55 through 84 above, and further says:

136-141. Defendant denies each and every allegation of paragraphs 136 through 141.

COUNT VII

CLAIM AGAINST ALL DEFENDANTS FOR EQUITABLE RELIEF

Defendant adopts, realleges, and incorporates by reference its responses to paragraphs 55 through 84 above, and further says:

142-145. Defendant denies each and every allegation of paragraphs 142 through 145.

COUNT VIII

**CLAIM AGAINST ALL DEFENDANTS FOR BREACH OF
EXPRESS WARRANTY EXCEPT DEFENDANTS
COUNCIL FOR TOBACCO RESEARCH - USA
AND TOBACCO INSTITUTE, INC.**

146. Defendant adopts, realleges, and incorporates by reference its responses to paragraphs 55 through 84 above, and further says:

147. Defendant states that it is responsible for the manufacture and distribution of its cigarettes in the United States. Defendant further states that the cigarettes it manufactures and sells contain tobacco and that nicotine occurs naturally in tobacco. Defendant is without knowledge or information sufficient to form a belief as to

the truth of the allegations in paragraph 147 which pertain to other defendants, and on that basis denies said allegations. Defendant denies each and every remaining allegation of paragraph 147.

148-153. Defendant denies each and every allegation of paragraphs 148 through 153.

CLAIMS OF CLASS REPRESENTATIVES AND MEMBERS OF THE CLASS

154. Defendant denies each and every allegation of paragraph 154.

Defendant denies each allegation of the Amended Class Action Complaint for Compensatory and Punitive Damages which has not been expressly admitted herein.

DEFENSES

First Defense

Plaintiffs' claims, if any, are barred, in whole or in part, by the applicable statutes of limitations, and statutes of repose, and/or the doctrines of laches, waiver and estoppel.

Second Defense

The Amended Class Action Complaint for Compensatory and Punitive Damages fails to state a cause of action against Defendant.

Third Defense

Plaintiffs' claims for punitive damages should be dismissed, pursuant to Florida Statute § 768.72, for failure to make the statutory showing that would provide a basis for recovering such damages.

Fourth Defense

Plaintiffs' claims are barred by the operation of the Supremacy Clause of the Constitution of the United States and by the Federal Cigarette Labelling and Advertising Act, as amended, 15 U.S.C. § 1331, et seq.

Fifth Defense

Plaintiffs' claims are barred, in whole or in part, because any cigarettes manufactured and sold by this Defendant at all material times conformed with available technological, medical, scientific, and industrial state-of-the-art.

Sixth Defense

Plaintiffs' claims are barred by the doctrine of assumption of risk and consent.

Seventh Defense

Plaintiffs' injuries, if any, were caused, in whole or in part, by their contributory negligence and, therefore, Plaintiffs are barred from any recovery.

Eighth Defense

Pursuant to Fla. R. Civ. P. 1.250, there is a misjoinder of parties in this action. Each Plaintiff's claim is based upon unique facts and circumstances, and differing legal principles, and Plaintiffs should not be permitted to proceed in a single action.

Ninth Defense

The Amended Class Action Complaint for Compensatory and Punitive Damages purports to state claims of fraud and misrepresentation and conspiracy to commit fraud and misrepresentation. However, these claims are not pleaded with the particularity

required by Fla. R. Civ. P. 1.120(b), and must be dismissed for failure to state a cause of action.

Tenth Defense

Plaintiffs' claims are barred, in whole or in part, by their failure to mitigate any damages allegedly sustained.

Eleventh Defense

Plaintiffs' claims for punitive damages cannot be sustained because an award of punitive damages under Florida law by a jury that (1) is permitted to award punitive damages under a standard for determining liability for punitive damages that is vague and does not define with sufficient clarity the conduct or mental state that makes an award of punitive damages permissible; (2) is not expressly instructed that any award of punitive damages is discretionary and limited to the amount necessary to punish the defendant and to deter others from similar wrongdoing; (3) is not expressly prohibited from considering improper criteria such as Defendant's residence, corporate status, and/or wealth in determining whether and/or how much to award in punitive damages; and (4) is not subject to trial court and appellate judicial review for reasonableness on the basis of objective standards, would violate Defendant's privileges and immunities, due process and equal protection rights guaranteed under the Fourteenth Amendment to the United States Constitution, and Defendant's right against imposition of excessive fines guaranteed under the Eighth Amendment to the United States Constitution, and the Commerce Clause under Article I of the United States Constitution, as well as Article 1, Sections 9 and 17 of the Florida Constitution, and would be improper under the common law and public policies of the State of Florida.

Twelfth Defense

While Defendant denies that Plaintiffs are entitled to any recovery whatsoever, Plaintiffs' recovery, if any, must be reduced by the doctrine of comparative fault, in that the negligence or fault of the Plaintiffs proximately caused or contributed to cause their alleged injuries and damages which bars or reduces their recovery herein.

Thirteenth Defense

If Plaintiffs have sustained any injuries and incurred any expenses, the injuries and expenses, if any, were caused in whole or in part by the acts or omissions of others for whose conduct Defendant is not responsible.

Fourteenth Defense

Plaintiffs' breach of warranty claims are barred due to the failure to provide the requisite or timely notice to Defendant of any claimed breach of warranty.

Fifteenth Defense

Venue is improper.

Sixteenth Defense

Any injuries or damages alleged by Plaintiffs were the result of intervening or superseding events, factors, occurrences or conditions, which were in no way caused by Defendant and for which Defendant is not liable.

Seventeenth Defense

The causes of action and claims alleged in the Amended Class Action Complaint for Compensatory and Punitive Damages may not properly be maintained or certified as a class action.

Eighteenth Defense

Defendant hereby gives notice that it intends to rely upon any other defense that may become available or appear during the discovery proceedings in this case and hereby reserves its right to amend its answer to assert any such defense. Defendant also reserves its right to assert other and related defenses as may become available in the event of a determination that the action, or some part thereof, is governed by the substantive law of a state other than Florida.

Nineteenth Defense

Plaintiffs' breach of implied warranty claims are barred under Florida law.

Twentieth Defense

If this action is certified and tried as a class action, Defendants' rights under the Fifth, Seventh and Fourteenth Amendments of the Constitution of the United States and Defendants' rights under applicable provisions of state constitutions will be violated.

WHEREFORE, Philip Morris Incorporated respectfully requests that the Court dismiss Plaintiffs' Amended Class Action Complaint for Compensatory and Punitive Damages with prejudice and grant such further relief as the Court deems proper.

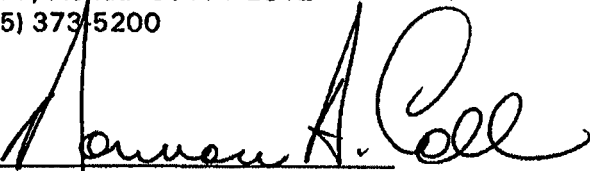
DEMAND FOR JURY TRIAL

Defendant demands a trial by jury of all claims triable as of right by jury.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by hand to Stanley M. Rosenblatt, Esq., Stanley M. Rosenblatt, P.A., 12th Floor, Concord Building, 66 West Flagler Street, Miami, FL 33130, and by mail to all other counsel listed on the attached Service List this 6th day of October, 1994.

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59568

Howard A. Engle, M.D., et al.
v. RJ Reynolds Tobacco Company, et al.

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002117

DARLENE WILLIAMS

AA MC

THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 94-8273 (CA 20)

HOWARD A. ENGLE, M. D., et al.,)

Plaintiffs,)

v.)

R. J. REYNOLDS TOBACCO COMPANY,)
et al.,)

Defendants.)

ANSWER OF DEFENDANT LORILLARD
TOBACCO COMPANY TO AMENDED
CLASS ACTION COMPLAINT FOR
COMPENSATORY AND PUNITIVE
DAMAGES

Florida Bar No. 270954 ✓

For its Answer to the Amended Class Action Complaint for
Compensatory and Punitive Damages, Defendant Lorillard Tobacco
Company says:

JURISDICTION AND IDENTIFICATION OF THE PARTIES

1. Defendant admits that this action purports to seek
damages in excess of Fifteen Thousand Dollars, exclusive of
interest and costs, but denies that any Plaintiff has any claim
against Defendant.

2. Defendant is without knowledge or information
sufficient to form a belief as to the truth of the allegations of
paragraph 2 and therefore denies each and every allegation of
paragraph 2.

3. Defendant denies that Plaintiff Howard A. Engle has
suffered any alleged injury as a result of smoking. Defendant
further denies that smoking is addictive and that plaintiff is
addicted to nicotine in cigarettes. Defendant is without knowledge
or information sufficient to form a belief as to the truth of the

remaining allegations of paragraph 3 and therefore denies each and every remaining allegation of paragraph 3.

4. Defendant denies that Plaintiff Robert W. Angell has suffered any alleged injury as a result of smoking. Defendant further denies smoking is addictive and that Plaintiff could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 4 and therefore denies each and every remaining allegation of paragraph 4.

5. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 5 and therefore denies each and every allegation of paragraph 5.

6. Defendant denies smoking is addictive and that Plaintiff Raymond Lacey could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 6 and therefore denies each and every remaining allegation of paragraph 6.

7. Defendant denies that Plaintiff Raymond Lacey has suffered any alleged injury as a result of smoking. Defendant further denies smoking is addictive and that Plaintiff could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 7 and therefore denies each and every remaining allegation of paragraph 7.

8. Defendant denies each and every allegation in the first, second and ninth sentences of paragraph 8, and Defendant denies that Plaintiff Raymond Lacey has suffered any alleged injury as a result of smoking. Defendant further denies smoking is addictive and that Plaintiff could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 8 and therefore denies each and every remaining allegation of paragraph 8.

9. Defendant denies that Plaintiff Raymond Lacey has suffered any alleged injury as a result of smoking. Defendant further denies smoking is addictive and that Plaintiff could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 9 and therefore denies each and every remaining allegation of paragraph 9.

10. Defendant denies that Plaintiff Frosene D. Steevens has suffered any alleged injury as a result of smoking. Defendant further denies smoking is addictive and that Plaintiff could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 10 and therefore denies each and every remaining allegation of paragraph 10.

11. Defendant denies that Plaintiff Arthur R. Reeves has suffered any alleged injury as a result of smoking. Defendant further denies smoking is addictive and that Plaintiff could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 11 and therefore denies each and every remaining allegation of paragraph 11.

12. Defendant denies that Plaintiff Richard Starr has suffered any alleged injury as a result of smoking. Defendant further denies smoking is addictive and that Plaintiff could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 12 and therefore denies each and every remaining allegation of paragraph 12.

13. Defendant denies each and every allegation of paragraph 13.

14. Defendant denies each and every allegation of paragraph 14.

15. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 15 and therefore denies each and every allegation of paragraph 15.

16. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16 and therefore denies each and every allegation of paragraph 16. Defendant further states that RJR Nabisco, Inc. has

been dismissed from this action pursuant to Order entered July 11, 1994.

17-18. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 17 and 18 and therefore denies each and every allegation of paragraph 17 and 18.

19. Defendant admits that it is a Delaware corporation. Defendant further states that it is presently engaged in the production and distribution of cigarettes in the United States. Defendant denies each and every remaining allegation of paragraph 19.

20. Defendant admits that Lorillard, Inc. is a New York corporation. Defendant further states that Lorillard, Inc. was previously engaged in the production and distribution of cigarettes in the United States. Defendant denies each and every remaining allegation of paragraph 20.

21-25. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 21 through 25 and therefore denies each and every allegation of paragraphs 21 through 25.

26. Defendant states that The Council for Tobacco Research - USA, Inc. is a New York corporation. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 26 and therefore denies each and every remaining allegation of paragraph 26.

27. Defendant admits that Tobacco Institute, Inc. is a New York corporation. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 27 and therefore denies each and every remaining allegation of paragraph 27.

28. Defendant states that Tobacco Institute, Inc. has been involved in lobbying and related activities. Defendant further states that The Council for Tobacco Research - USA, Inc. has been involved in funding scientific research. Defendant denies each and every remaining allegation of paragraph 28.

29. Defendant states that it is responsible for the manufacture and distribution of its cigarettes in the United States. Defendant further states that the cigarettes it manufactures and sells contain tobacco and that nicotine occurs naturally in tobacco; Defendant denies that the nicotine contained in its cigarettes is addictive. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations which pertain to other defendants, and on that basis denies said allegations. Defendant denies each and every remaining allegation of paragraph 29.

30. Defendant denies each and every allegation of paragraph 30.

CLASS REPRESENTATION ALLEGATIONS

31. Defendant admits that this lawsuit purports to be brought as a class action, but Defendant denies that this lawsuit

is appropriate for class action treatment. Defendant denies each and every remaining allegation of paragraph 31.

32. Defendant admits that Plaintiffs propose to exclude Defendants' officers, directors and agents from the proposed class, but Defendant denies that this lawsuit is appropriate for class action treatment.

33. Defendant denies smoking is addictive and that Plaintiff Howard A. Engle could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 33 and therefore denies each and every remaining allegation of paragraph 33.

34. Defendant denies that Plaintiff Robert W. Angell has suffered any alleged injury as a result of smoking. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 34 and therefore denies each and every remaining allegation of paragraph 34.

35. Defendant denies that Plaintiff Raymond Lacey has suffered any alleged injury as a result of smoking. Defendant further denies smoking is addictive and that Plaintiff could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 35 and therefore denies each and every remaining allegation of paragraph 35.

36. Defendant denies that Plaintiff Frosene Steevens has suffered any alleged injury as a result of smoking. Defendant further denies smoking is addictive and that Plaintiff could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 36 and therefore denies each and every remaining allegation of paragraph 36.

37. Defendant denies that Plaintiff Arthur R. Reeves has suffered any alleged injury as a result of smoking. Defendant further denies smoking is addictive and that Plaintiff could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 37 and therefore denies each and every remaining allegation of paragraph 37.

38. Defendant denies that Plaintiff Richard Starr has suffered any alleged injury as a result of smoking. Defendant further denies smoking is addictive and that Plaintiff could not and/or cannot quit smoking due to addiction. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 38 and therefore denies each and every remaining allegation of paragraph 38.

39-47. Defendant denies each and every allegation of paragraphs 39 through 47.

48. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that the named class representatives are highly intelligent and

therefore denies said allegation. Defendant denies each and every remaining allegation of paragraph 48.

49-50. Defendant denies each and every allegation of paragraphs 49 and 50.

51. Defendant admits the allegations in the second and third sentences of paragraph 51; except Defendant denies there are thirty plaintiffs in Broin or that the Broin plaintiffs sustained any injury from exposure to second-hand smoke or otherwise have any claims against the Broin defendants. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first, fifth and sixth sentences of paragraph 51 and therefore denies those allegations. Regarding the allegations in the fourth sentence of paragraph 51, Defendant admits that the Third District Court of Appeals has issued a per curiam decision in Broin, but Defendant denies that said opinion authorizes class action treatment of litigation against cigarette manufacturers.

52-54. Defendant denies each and every allegation of paragraphs 52 through 54.

FACTS GIVING RISE TO THE CAUSE OF ACTION

55. Defendant denies each and every allegation of paragraph 55.

56. Defendant admits that representatives of various tobacco manufacturers have stated their belief that nicotine in cigarettes is not addictive. Defendant denies each and every remaining allegation of paragraph 56.

57. Defendant admits that a scientific symposium was held in January 1972 in St. Martin and that Dr. Spears attended the symposium; Defendant states that the symposium was funded as a special project of The Council for Tobacco Research - USA, Inc. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the statements or activities of Dr. Dunn and/or Philip Morris and therefore denies said allegations. Defendant denies each and every remaining allegation of paragraph 57.

58. Defendant admits that a document titled "Smoking Behavior: Motives and Incentives" was published. Defendant states that said document speaks for itself and therefore Defendant denies all allegations regarding the contents or meaning of said document. Defendant denies each and every remaining allegation of paragraph 58.

59. Defendant denies each and every allegation of paragraph 59.

60. Defendant states that, on or about March 25, 1994, Dr. Spears submitted a written statement to the House Subcommittee on Health and the Environment. Defendant further states that said written statement speaks for itself and therefore Defendant denies all allegations regarding the alleged statements of Dr. Spears. Defendant admits that representatives from various tobacco manufacturers have testified before the House Subcommittee on Health and the Environment to the effect that their respective companies do not "manipulate" nicotine levels in cigarettes.

Defendant denies each and every remaining allegation of paragraph 60.

61. Defendant states that, on March 25, 1994, Charles O. Whitley, on behalf of Tobacco Institute, Inc., submitted a written statement to the House Subcommittee on Health and the Environment which contains language similar (but not identical) to the quotation alleged in paragraph 61. Defendant states that said written statement speaks for itself and therefore Defendant denies all allegations regarding the contents or meaning of said written statement. Defendant denies each and every remaining allegation of paragraph 61.

62. Defendant admits that, on March 27, 1994, Brennan Dawson appeared on "Face The Nation" on behalf of Tobacco Institute, Inc. Defendant states that Ms. Dawson made a statement similar (but not identical) to the quoted statement in paragraph 62. Defendant denies each and every remaining allegation of paragraph 62.

63. Defendant states that Dr. Spears co-authored a document titled "Chemical and Physical Criteria for Tobacco Leaf of Modern Day Cigarettes." Defendant further states that said document speaks for itself and therefore Defendant denies all allegations regarding the contents or meaning of said document. Defendant denies each and every remaining allegation of paragraph 63.

64. Defendant denies each and every allegation of paragraph 64.

65. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the statements allegedly made by Arthur Godfrey and therefore denies said allegations. Defendant denies each and every remaining allegation of paragraph 65.

66. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 66 and therefore denies each and every allegation of paragraph 66.

67. Defendant admits that the quoted statements in paragraph 67 appear in a published judicial opinion by United States District Court Judge H. Lee Sarokin. Defendant states that the written statements of Judge Sarokin speak for themselves and therefore Defendant denies all allegations regarding the findings, opinions or statements made by Judge Sarokin. Defendant denies each and every remaining allegation of paragraph 67.

68. Defendant denies each and every allegation of paragraph 68.

69. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in the second and third sentences of paragraph 69, which pertain to the purported advertising of R.J. Reynolds, and therefore denies said allegations. Defendant denies each and every remaining allegation of paragraph 69.

70-76. Defendant denies each and every allegation of paragraphs 70 through 76.

77. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first and second sentences of paragraph 77 and therefore denies said allegations. Defendant denies each and every remaining allegation of paragraph 77.

78. Defendant denies each and every allegation of paragraph 78.

79. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 79 and therefore denies each and every allegation of paragraph 79.

80. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 80 and therefore denies each and every allegation of paragraph 80.

81-83. Defendant denies each and every allegation of paragraphs 81 through 83.

84. Defendant admits that the public is informed of the alleged risks of smoking. Defendant denies each and every allegation of paragraph 84.

COUNT I

**CLAIM FOR STRICT LIABILITY IN TORT AGAINST ALL
DEFENDANTS EXCEPT DEFENDANTS COUNCIL FOR TOBACCO
RESEARCH - USA AND TOBACCO INSTITUTE, INC.**

Defendant adopts, realleges, and incorporates by reference its responses to paragraphs 55 through 84 above, and further says:

85-88. Defendant denies each and every allegation of paragraphs 85-88.

COUNT II

**CLAIM AGAINST ALL DEFENDANTS FOR
FRAUD AND MISREPRESENTATION**

Defendant adopts, realleges, and incorporates by reference its responses to paragraphs 55 through 84 above, and further says:

89. Defendant denies each and every allegation of paragraph 89.

90. Defendant denies each and every allegation of paragraph 90.

91. Defendant admits that its Chief Executive Officer and officers of other tobacco manufacturers testified before Congress on April 14, 1994, that they believe cigarettes are not addictive and that their respective companies do not "manipulate" nicotine levels in cigarettes. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 91 which pertain to other defendants and

therefore denies said allegations. Defendant denies each and every remaining allegation of paragraph 91.

92-103. Defendant denies each and every allegation of paragraphs 92 through 103.

COUNT III

**CLAIM AGAINST ALL DEFENDANTS FOR
CONSPIRACY TO MISREPRESENT AND COMMIT FRAUD**

Defendant adopts, realleges, and incorporates by reference its responses to paragraphs 55 through 84 above, and further says:

104-125. Defendant denies each and every allegation of paragraphs 104 through 125.

COUNT IV

**CLAIM FOR BREACH OF IMPLIED WARRANTY OF
MERCHANTABILITY AND FITNESS AGAINST ALL DEFENDANTS
EXCEPT COUNCIL FOR TOBACCO RESEARCH - USA
AND TOBACCO INSTITUTE, INC.**

Defendant adopts, realleges, and incorporates by reference its responses to paragraphs 55 through 84 above, and further says:

126-130. Defendant denies each and every allegation of paragraphs 126 through 130.

COUNT VIII

**CLAIM AGAINST ALL DEFENDANTS FOR BREACH OF
EXPRESS WARRANTY EXCEPT DEFENDANTS
COUNCIL FOR TOBACCO RESEARCH - USA
AND TOBACCO INSTITUTE, INC.**

146. Defendant adopts, realleges, and incorporates by reference its responses to paragraphs 55 through 84 above, and further says:

147. Defendant states that it is responsible for the manufacture and distribution of its cigarettes in the United States. Defendant further states that the cigarettes it manufactures and sells contain tobacco and that nicotine occurs naturally in tobacco. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 147 which pertain to other defendants, and on that basis denies said allegations. Defendant denies each and every remaining allegation of paragraph 147.

148-153. Defendant denies each and every allegation of paragraphs 148 through 153.

CLAIMS OF CLASS REPRESENTATIVES AND MEMBERS OF THE CLASS

154. Defendant denies each and every allegation of paragraph 154.

Defendant denies each allegation of the Amended Class Action Complaint for Compensatory and Punitive Damages which has not been expressly admitted herein.

DEFENSES

First Defense

Plaintiffs' claims, if any, are barred, in whole or in part, by the applicable statutes of limitations, and statutes of repose, and/or the doctrines of laches, waiver and estoppel.

Second Defense

The Amended Class Action Complaint for Compensatory and Punitive Damages fails to state a cause of action against Defendant.

Third Defense

Plaintiffs' claims for punitive damages should be dismissed, pursuant to Florida Statute § 768.72, for failure to make the statutory showing that would provide a basis for recovering such damages.

Fourth Defense

Plaintiffs' claims are barred by the operation of the Supremacy Clause of the Constitution of the United States and by the Federal Cigarette Labelling and Advertising Act, as amended, 15 U.S.C. § 1331, et seq.

Fifth Defense

Plaintiffs' claims are barred, in whole or in part, because any cigarettes manufactured and sold by this Defendant at all material times conformed with available technological, medical, scientific, and industrial state-of-the-art.

Sixth Defense

Plaintiffs' claims are barred by the doctrine of assumption of risk and consent.

Seventh Defense

Plaintiffs' injuries, if any, were caused, in whole or in part, by their contributory negligence and, therefore, Plaintiffs are barred from any recovery.

Eighth Defense

Pursuant to Fla. R. Civ. P. 1.250, there is a misjoinder of parties in this action. Each Plaintiff's claim is based upon unique facts and circumstances, and differing legal principles, and Plaintiffs should not be permitted to proceed in a single action.

Ninth Defense

The Amended Class Action Complaint for Compensatory and Punitive Damages purports to state claims of fraud and misrepresentation and conspiracy to commit fraud and misrepresentation. However, these claims are not pleaded with the particularity required by Fla. R. Civ. P. 1.120(b), and must be dismissed for failure to state a cause of action.

Tenth Defense

Plaintiffs' claims are barred, in whole or in part, by their failure to mitigate any damages allegedly sustained.

Eleventh Defense

Plaintiffs' claims for punitive damages cannot be sustained because an award of punitive damages under Florida law by a jury that (1) is permitted to award punitive damages under a standard for determining liability for punitive damages that is vague and does not define with sufficient clarity the conduct or mental state that makes an award of punitive damages permissible; (2) is not expressly instructed that any award of punitive damages is discretionary and limited to the amount necessary to punish the defendant and to deter others from similar wrongdoing; (3) is not expressly prohibited from considering improper criteria such as Defendant's residence, corporate status, and/or wealth in determining whether and/or how much to award in punitive damages; and (4) is not subject to trial court and appellate judicial review for reasonableness on the basis of objective standards, would violate Defendant's privileges and immunities, due process and equal protection rights guaranteed under the Fourteenth Amendment to the United States Constitution, and Defendant's right against imposition of excessive fines guaranteed under the Eighth Amendment to the United States Constitution, and the Commerce Clause under Article I of the United States Constitution, as well as Article 1, Sections 9 and 17 of the Florida Constitution, and would be improper under the common law and public policies of the State of Florida.

Twelfth Defense

While Defendant denies that Plaintiffs are entitled to any recovery whatsoever, Plaintiffs' recovery, if any, must be reduced by the doctrine of comparative fault, in that the negligence or fault of the Plaintiffs proximately caused or contributed to cause their alleged injuries and damages which bars or reduces their recovery herein.

Thirteenth Defense

If Plaintiffs have sustained any injuries and incurred any expenses, the injuries and expenses, if any, were caused in whole or in part by the acts or omissions of others for whose conduct Defendant is not responsible.

Fourteenth Defense

Plaintiffs' breach of warranty claims are barred due to the failure to provide the requisite or timely notice to Defendant of any claimed breach of warranty.

Fifteenth Defense

Venue is improper.

Sixteenth Defense

Any injuries or damages alleged by Plaintiffs were the result of intervening or superseding events, factors, occurrences or conditions, which were in no way caused by Defendant and for which Defendant is not liable.

Seventeenth Defense

The causes of action and claims alleged in the Amended Class Action Complaint for Compensatory and Punitive Damages may not properly be maintained or certified as a class action.

Eighteenth Defense

Defendant hereby gives notice that it intends to rely upon any other defense that may become available or appear during the discovery proceedings in this case and hereby reserves its right to amend its answer to assert any such defense. Defendant also reserves its right to assert other and related defenses as may become available in the event of a determination that the action, or some part thereof, is governed by the substantive law of a state other than Florida.

Nineteenth Defense

Plaintiffs' breach of implied warranty claims are barred under Florida law.

Twentieth Defense

If this action is certified and tried as a class action, Defendants' rights under the Fifth, Seventh and Fourteenth Amendments of the Constitution of the United States and Defendants' rights under applicable provisions of state constitutions will be violated.

WHEREFORE, Lorillard, Inc. respectfully requests that the Court dismiss Plaintiffs' Amended Class Action Complaint for Compensatory and Punitive Damages with prejudice and grant such further relief as the Court deems proper.

DEMAND FOR JURY TRIAL

Defendant demands a trial by jury of all claims triable as of right by jury.

Respectfully submitted,

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By: David L. Ross

DAVID L. ROSS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered to Stanley Rosenblatt, Esq., Attorney for Plaintiffs and mailed to all counsel of record listed on the attached service list, this 6 day of October, 1994.

David L. Ross
DAVID L. ROSS

ENGLE, et al v. RJ REYNOLDS TOBACCO COMPANY, et al

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CASE NO. 94-8273 (CA 20)

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07/10/94 11:10:06

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION

CASE NO. 94-08273 CA (20)

HOWARD A. ENGLE, M.D. et al.,
Plaintiffs,

v.

RJ REYNOLDS TOBACCO COMPANY,
et al.,

Defendants.

ANSWER OF DEFENDANT
LIGGETT GROUP INC.
AND DEMAND FOR
JURY TRIAL

CECILIA CHIO

FILED FOR RECORD
94 OCT -6 PM 2:00
CLERK, CIRCUIT COURT
DADE COUNTY, FLA.
CIVIL #93

Defendant Liggett Group Inc., ("Liggett") by and through its attorneys, files this Answer to plaintiffs' Amended Class Action Complaint, and answers each numbered paragraph of plaintiffs' Amended Class Action Complaint as follows:

JURISDICTION AND IDENTIFICATION OF THE PARTIES

1. Liggett admits that this action purports to seek damages in excess of fifteen thousand dollars, but denies that any plaintiff has a claim for damages against Liggett in any amount.

2. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 2.

3. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 3; except Liggett denies that any injuries alleged in this paragraph were caused by cigarette smoking. Liggett also denies that Howard A. Engle, M.D. is addicted to nicotine.

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4. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 4; except Liggett denies that Robert Angell "continued to smoke because of his addiction." Liggett also denies that "[d]ue to his addiction, Mr. Angell had a cigarette on his way to the operating room." Liggett also denies that Plaintiff Robert W. Angell has suffered any alleged injury as a result of smoking.

5. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 5.

6. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 6; except Liggett denies that Mr. Lacey "has been addicted" to cigarette smoking since "he was approximately eleven years of age."

7. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 7; except Liggett denies that any injuries alleged in this paragraph, including Buerger's Disease, were caused by cigarette smoking. Liggett also denies that "Mr. Lacey's body screamed out for cigarette smoke and he could not stop smoking although he repeatedly attempted to quit."

8. Liggett denies each and every allegation contained in the first and second sentence of paragraph 8, and Liggett denies that Plaintiff Raymond Lacey has suffered any alleged injury as a result of smoking. Liggett further denies that smoking is

addictive and that Plaintiff could not and/or cannot quit smoking due to addiction. Liggett is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 8.

9. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 9; except Liggett denies that "Raymond Lacey is hopelessly addicted to nicotine and cigarettes."

10. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 10; except Liggett denies that Frosene D. Stevens "is addicted to nicotine," that "she has been unable to quit" smoking, and that "Mrs. Stevens has also suffered repeated bronchial problems and pneumonias as a result of her nicotine addiction."

11. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11; except Liggett denies that Arthur R. Reeves "cannot live without cigarettes," that "addiction does not permit him to stop smoking," and that "[h]e is hopelessly addicted to nicotine." Liggett further denies that Plaintiff Arthur R. Reeves has suffered any alleged injury as a result of smoking.

12. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 12; except Liggett denies that Mr. Starr has been unable to quit smoking "because of his addiction to nicotine." Liggett

further denies that Plaintiff Richard Starr has suffered any alleged injury as a result of smoking.

13. Liggett denies the allegations of paragraph 13.

14. Liggett denies the allegations of paragraph 14.

15. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 15.

16. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16.

17. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 17.

18. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 18.

19. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 19.

20. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 20.

21. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 21.

22. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 22.

23. Liggett denies the allegations of paragraph 23; except Liggett admits that it is a Delaware corporation. Liggett states that it is engaged in the business of manufacturing and distributing cigarettes at the wholesale level, including in Florida.

24. Liggett denies the allegations of paragraph 24; except Liggett admits that Brooke Group Ltd. is a Delaware corporation. Liggett states that prior to June, 1990, Brooke Group Ltd., or its predecessors, was engaged in the business of manufacturing and distributing cigarettes at the wholesale level, including in Florida. Liggett also states that since December 1993, Brooke Group Ltd.'s place of business has been in Miami, Dade County, Florida.

25. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 25.

26. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 26.

27. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 27.

28. Liggett denies the allegations of paragraph 28.

29. Liggett denies the allegations of paragraph 29; except Liggett is without knowledge or information sufficient to form a belief as to whether the defendants named in this paragraph, other than Brooke Group Ltd. and Liggett, "were and are manufacturers and distributors of tobacco products throughout Florida and the United States." Liggett states that it is engaged in the business of manufacturing and distributing cigarettes at the wholesale level, including in Florida. Liggett also states that prior to June 1990, Brooke Group Ltd., or its predecessors, was engaged in the business of manufacturing and distributing cigarettes at the wholesale level, including in Florida.

30. Liggett denies the allegations of paragraph 30.

CLASS REPRESENTATION ALLEGATIONS

31. Liggett denies the allegations of paragraph 31; except Liggett admits that this action purports to be brought as a class action.

32. Liggett admits that Plaintiffs propose to exclude Defendants' officers, directors and agents from the proposed class, but Liggett denies that this lawsuit is appropriate for class action treatment.

33. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 33; except Liggett denies that Howard A. Engle, M.D. has been "unable to quit smoking due to his addiction to nicotine."

34. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of

paragraph 34; except Liggett denies that Plaintiff Robert W. Angell has suffered any alleged injury as a result of smoking.

35. Liggett denies the allegations of paragraph 35; except Liggett is without knowledge or information sufficient to form a belief as to whether Mr. Lacey presently smokes or was diagnosed with Buerger's Disease or has lost two limbs.

36. Liggett denies the allegations of paragraph 36; except Liggett is without knowledge or information sufficient to form a belief as to whether Frosene Stevens has been smoking cigarettes for "approximately twenty seven years" or had "major heart surgery and pneumonia."

37. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 37; except Liggett denies that Arthur R. Reeves is "addicted to nicotine and cannot quit." Liggett further denies that Plaintiff Arthur R. Reeves has suffered any alleged injury as a result of smoking.

38. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 38; except Liggett denies that "[d]ue to his addiction to nicotine he [Richard Starr] has been unable to quit smoking cigarettes." Liggett further denies that Plaintiff Richard Starr has suffered any alleged injury as a result of smoking.

39. Liggett denies the allegations of paragraph 39.

40. Liggett denies the allegations of paragraph 40.

41. Liggett denies the allegations of paragraph 41.

42. Liggett denies the allegations of paragraph 42.
43. Liggett denies the allegations of paragraph 43.
44. Liggett denies the allegations of paragraph 44.
45. Liggett denies the allegations of paragraph 45,
including the allegations of each and every subpart of paragraph
45.

46. Liggett denies the allegations of paragraph 46.
47. Liggett denies the allegations of paragraph 47.
48. Liggett denies the allegations of paragraph 48.
49. Liggett denies the allegations of paragraph 49.
50. Liggett denies the allegations of paragraph 50.
51. Liggett denies the allegations of paragraph 51;
except Liggett admits that Stanley M. Rosenblatt, P.A. represents
plaintiffs in a separate action entitled Norman R. Broin et al v.
Philip Morris Companies, Inc. et al; Case N. 91-49738 CA (22).

52. Liggett denies the allegations of paragraph 52.
53. Liggett denies the allegations of paragraph 53.
54. Liggett denies the allegations of paragraph 54.

FACTS GIVING RISE TO THE CAUSE OF ACTION

55. Liggett denies the allegations of paragraph 55.
56. Liggett denies the allegations of paragraph 56;
except Liggett admits that representatives of various tobacco
manufacturers have denied that nicotine in cigarettes is addictive.

57. Liggett denies the allegations of paragraph 57.
58. Liggett denies the allegations of paragraph 58.
59. Liggett denies the allegations of paragraph 59.

60. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 60; except Liggett admits that representatives of various tobacco manufacturers have testified before the House Subcommittee on Health and the Environment to the effect that their respective companies do not "manipulate" nicotine levels in cigarettes.

61. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 61.

62. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 62.

63. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 63.

64. Liggett denies the allegations of paragraph 64.

65. Liggett denies the allegations of paragraph 65; except Liggett admits that the statements quoted in paragraph 65, beginning with "That ought to" and ending with "Remember that when you're wondering about cigarettes," appear in substantially the same form in a judicial opinion published at 893 F.2d 541 (3d Cir. 1990).

66. Liggett denies the allegations of paragraph 66.

67. Liggett denies the allegations of paragraph 67; except Liggett admits that statements quoted in paragraph 67 appear

in a published judicial opinion by United States District Court Judge H. Lee Sarokin.

68. Liggett denies the allegations of paragraph 68.

69. Liggett denies the allegations of paragraph 69; except Liggett is without knowledge or information sufficient to form a belief as to the accuracy of the statements concerning a purported 1984 advertisement of Defendant R.J. Reynolds.

70. Liggett denies the allegations of paragraph 70.

71. Liggett denies the allegations of paragraph 71.

72. Liggett denies the allegations of paragraph 72.

73. Liggett denies the allegations of paragraph 73.

74. Liggett denies the allegations of paragraph 74.

75. Liggett denies the allegations of paragraph 75.

76. Liggett denies the allegations of paragraph 76.

77. Liggett denies the allegations of paragraph 77.

78. Liggett denies the allegations of paragraph 78.

79. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 79.

80. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 80.

81. Liggett denies the allegations of paragraph 81.

82. Liggett denies the allegations of paragraph 82.

83. Liggett denies the allegations of paragraph 83.

84. Liggett denies the allegations of paragraph 84.

COUNT I

**CLAIM FOR STRICT LIABILITY IN TORT AGAINST
DEFENDANTS EXCEPT DEFENDANTS COUNCIL
FOR TOBACCO RESEARCH -- U.S.A. AND TOBACCO INSTITUTE, INC.**

Liggett readopts and realleges its answers to paragraphs 55 through 84, under "Facts Giving Rise to the Cause of Action," and further answers:

85. Liggett denies the allegations of paragraph 85, including the allegations of each and every subpart of paragraph 85.

86. Liggett denies the allegations of paragraph 86.

87. Liggett denies the allegations of paragraph 87.

88. Liggett denies the allegations of paragraph 88.

COUNT II

**CLAIM AGAINST ALL DEFENDANTS
FOR FRAUD AND MISREPRESENTATION**

Liggett realleges and readopts its answers to paragraph 55 through 84, as set forth under "Facts Giving Rise to the Cause of Action," and further answers:

89. Liggett denies the allegations of paragraph 89.

90. Liggett denies the allegations of paragraph 90.

91. Liggett denies the allegations of paragraph 91. Liggett states that its chief executive officer testified before the U.S. Congress on April 14, 1994.

92. Liggett denies the allegations of paragraph 92, including the allegations of each and every subpart of paragraph 92.

93. Liggett denies the allegations of paragraph 93.

94. Liggett denies the allegations of paragraph 94, including the allegations of each and every subpart of paragraph 94.

95. Liggett denies the allegations of paragraph 95, including the allegations of each and every subpart of paragraph 95.

96. Liggett denies the allegations of paragraph 96.

97. Liggett denies the allegations of paragraph 97.

98. Liggett denies the allegations of paragraph 98.

99. Liggett denies the allegations of paragraph 99.

100. Liggett denies the allegations of paragraph 100.

101. Liggett denies the allegations of paragraph 101.

102. Liggett denies the allegations of paragraph 102.

103. Liggett denies the allegations of paragraph 103.

COUNT III

CLAIM AGAINST ALL DEFENDANTS FOR CONSPIRACY TO MISREPRESENT AND COMMIT FRAUD

Liggett readopts and realleges its answers to paragraphs 55 through 84, as contained within the "Facts Giving Rise to the Cause of Action," and further answers:

104. Liggett denies the allegations of paragraph 104.

105. Liggett denies the allegations of paragraph 105.

106. Liggett denies the allegations of paragraph 106.

107. Liggett denies the allegations of paragraph 107.

108. Liggett denies the allegations of paragraph 108.

109. Liggett denies the allegations of paragraph 109.
110. Liggett denies the allegations of paragraph 110.
111. Liggett denies the allegations of paragraph 111.
112. Liggett denies the allegations of paragraph 112.
113. Liggett denies the allegations of paragraph 113.
114. Liggett denies the allegations of paragraph 114.
115. Liggett denies the allegations of paragraph 115.
116. Liggett denies the allegations of paragraph 116.
117. Liggett denies the allegations of paragraph 117.
118. Liggett denies the allegations of paragraph 118.
119. Liggett denies the allegations of paragraph 119.
120. Liggett denies the allegations of paragraph 120.
121. Liggett denies the allegations of paragraph 121.
122. Liggett denies the allegations of paragraph 122.
123. Liggett denies the allegations of paragraph 123.
124. Liggett denies the allegations of paragraph 124.
125. Liggett denies the allegations of paragraph 125.

COUNT IV

**CLAIM FOR BREACH OF IMPLIED WARRANTY
OF MERCHANTABILITY AND FITNESS AGAINST ALL
DEFENDANTS EXCEPT DEFENDANTS COUNCIL FOR
TOBACCO RESEARCH -- U.S.A. AND TOBACCO INSTITUTE, INC.**

Liggett readopts and realleges its answers to paragraphs 55 through 84, above, under "Facts Giving Rise to the Cause of Action," and further answers:

126. Liggett denies the allegations of paragraph 126.
127. Liggett denies the allegations of paragraph 127.
128. Liggett denies the allegations of paragraph 128.

129. Liggett denies the allegations of paragraph 129.

130. Liggett denies the allegations of paragraph 130.

COUNT V

**CLAIM FOR INTENTIONAL INFLICTION OF
EMOTIONAL DISTRESS AGAINST ALL DEFENDANTS**

Liggett readopts and realleges its answers to paragraph 55 through 84, as contained within the "Facts Giving Rise to the Cause of Action," and further answers:

131. Liggett denies the allegations of paragraph 131.

132. Liggett denies the allegations of paragraph 132.

133. Liggett denies the allegations of paragraph 133.

134. Liggett denies the allegations of paragraph 134.

135. Liggett denies the allegations of paragraph 135.

COUNT VI

**CLAIM FOR NEGLIGENCE AGAINST ALL
DEFENDANTS EXCEPT DEFENDANTS COUNCIL FOR
TOBACCO RESEARCH -- U.S.A. AND TOBACCO INSTITUTE, INC.**

Liggett readopts and realleges its answers to paragraphs 55 through 84, above, as contained within the "Facts Giving Rise to the Cause of Action," and further answers:

136. Liggett denies the allegations of paragraph 136.

137. Liggett denies the allegations of paragraph 137.

138. Liggett denies the allegations of paragraph 138.

139. Liggett denies the allegations of paragraph 139.

140. Liggett denies the allegations of paragraph 140, including the allegations of each and every subpart of paragraph 140.

141. Liggett denies the allegations of paragraph 141.

COUNT VII

CLAIM AGAINST ALL DEFENDANTS FOR EQUITABLE RELIEF

Liggett readopts and realleges its answers to paragraphs 55 through 84, above, as contained within the "Facts Giving Rise to the Cause of Action," and further answers:

142. Liggett denies the allegations of paragraph 142.

143. Liggett denies the allegations of paragraph 143.

144. Liggett denies the allegations of paragraph 144.

145. Liggett denies the allegations of paragraph 145.

COUNT VIII

**CLAIM AGAINST ALL DEFENDANTS FOR BREACH OF EXPRESS
WARRANTY EXCEPT DEFENDANTS COUNCIL FOR TOBACCO
RESEARCH -- U.S.A., INC. AND TOBACCO INSTITUTE, INC.**

146. Liggett readopts and realleges its answers to paragraphs 55 through 84, above, under "Facts Giving Rise to the Cause of Action," and further answers:

147. Liggett is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 147; except that Liggett denies the allegations of paragraph 147 as to Brooke Group Ltd. and Liggett; Liggett states that it is engaged in the business of manufacturing and distributing cigarettes at the wholesale level. Liggett also states that prior to June 1990, Brooke Group Ltd., or its predecessors, was engaged in the business of manufacturing and distributing cigarettes at the wholesale level.

148. Liggett denies the allegations of paragraph 148.

149. Liggett denies the allegations of paragraph 149.

150. Liggett denies the allegations of paragraph 150.

151. Liggett denies the allegations of paragraph 151.

152. Liggett denies the allegations of paragraph 152.

153. Liggett denies the allegations of paragraph 153.

CLAIMS OF CLASS REPRESENTATIVES AND MEMBERS OF THE CLASS

154. Liggett denies the allegations of paragraph 154, including the allegations of each and every subpart of paragraph 154.

Each and every allegation in the complaint that has not been specifically admitted is hereby denied.

WHEREFORE, Defendant Liggett Group Inc. demands that judgment be entered in its favor and against plaintiffs, alleged class representatives, and alleged members of the class, dismissing the complaint with prejudice and with costs, and demands a trial by jury of all issues triable of right by a jury.

AFFIRMATIVE DEFENSES

In further answer to plaintiffs' complaint and as affirmative defenses thereto Liggett avers:

First Affirmative Defense

Venue does not lie in this Court.

Second Affirmative Defense

Each and every count of plaintiffs' complaint fails to state a cause of action against Liggett.

Third Affirmative Defense

There is a misjoinder of parties in this action pursuant to Fla. R. Civ. P. 1.250. Each Plaintiff's claim is based upon unique facts and circumstances, and differing legal principles, and Plaintiffs should not be permitted to proceed in a single action.

Fourth Affirmative Defense

Plaintiffs' claims are barred, in whole or in part, by applicable statutes of limitation.

Fifth Affirmative Defense

Plaintiffs' claims are barred, in whole or in part, by applicable statutes of repose.

Sixth Affirmative Defense

Plaintiffs' claims are barred, in whole or in part, by the doctrine of laches.

Seventh Affirmative Defense

Plaintiffs claims are barred by the doctrine of assumption of risk and consent.

Eighth Affirmative Defense

If plaintiffs consumed cigarettes manufactured by Liggett, as to which Liggett lacks sufficient information to form a belief, plaintiffs did so solely by reason of their own choice and volition.

Ninth Affirmative Defense

If there were any hazards to plaintiffs in consuming cigarettes manufactured by Liggett, which Liggett denies, plaintiffs were, at all times material to the allegations contained in the complaint, on notice of such hazards and were therefore able to protect themselves from injury, if any.

Tenth Affirmative Defense

Any injuries sustained by plaintiffs were proximately caused or contributed to by plaintiffs' own negligence or lack of due care, or, in the alternative, the negligence or lack of due care of plaintiffs should be compared against the fault, if any, of defendants, so as to defeat or reduce any recovery to which plaintiffs would otherwise be entitled.

Eleventh Affirmative Defense

Plaintiffs' claims are barred, in whole or in part, by the doctrine of waiver.

Twelfth Affirmative Defense

Plaintiffs' claims are barred, in whole or in part, by the doctrine of estoppel.

Thirteenth Affirmative Defense

Plaintiffs' injuries, if any, were caused, in whole or in part, by the acts or omissions of persons other than this defendant, whether individual, corporate, associate, or otherwise, whether named or unnamed in the complaint, and for whose conduct Liggett is not liable.

Fourteenth Affirmative Defense

Plaintiffs' injuries, if any, were the result of intervening or superseding events, factors, occurrences or conditions, which were in no way caused by Liggett and for which Liggett is not liable.

Fifteenth Affirmative Defense

Claims of plaintiffs are barred, in whole or in part, by the operation of the Supremacy Clause of the Constitution of the United States and the Public Health Cigarette Smoking Act of 1969, as amended.

Sixteenth Affirmative Defense

Insofar as plaintiffs' complaint purports to state claims for misrepresentation and fraud and conspiracy to misrepresent and commit fraud, the allegations in plaintiffs' complaint lack the particularity required by Fla. R. Civ. P. 1.120 (b).

Seventeenth Affirmative Defense

Plaintiffs' claims are barred, in whole or in part, because the products manufactured and sold by Liggett conformed with available technological, medical, scientific, and industrial state-of-the-art at all material times.

Eighteenth Affirmative Defense

Plaintiffs' claims are barred due to the failure to provide requisite or timely notice to Liggett of any claimed breach of warranty.

Nineteenth Affirmative Defense

Liggett's products were manufactured and sold in conformity with all applicable laws at all relevant times.

Twentieth Affirmative Defense

Plaintiffs' claims for relief are barred by the First Amendment to the Constitution of the United States.

Twenty-first Affirmative Defense

The imposition of punitive damages on the facts alleged in Plaintiffs' complaint would violate the due process clause of, and is otherwise violative of, the Constitutions of the United States and comparable provisions of the applicable State Constitutions, as well as applicable statute, regulations, common law and public policies.

Twenty-second Affirmative Defense

Plaintiffs' claims for punitive damages are barred because plaintiffs have failed to show that some reasonable basis exists to support the recovery of punitive damages, as required by Fla. Stat. Ann. § 768.72.

Twenty-third Affirmative Defense

Plaintiffs have failed to mitigate any damages allegedly sustained.

Twenty-fourth Affirmative Defense

The causes of action and claims alleged in the Amended Class Action Complaint may not properly be maintained or certified as a class action.

Twenty-fifth Affirmative Defense

Plaintiffs breach of implied warranty claims are barred under Florida law.

Defenses Reserved

Liggett hereby gives notice that it intends to rely upon any other defense that may become available or appear during the discovery proceedings in this case and hereby reserves its right to amend its answer to assert any such defense. Liggett also reserves its right to assert other and related defenses as may become available in the event of a determination that the action, or some part thereof, is governed by the substantive law of a state other than Florida.

WHEREFORE, Defendant Liggett Group Inc. respectfully demands that judgment be entered in its favor and against plaintiffs, alleged class representatives and alleged members of the class, that the complaint against Liggett be dismissed with prejudice, and that Liggett be awarded its costs and attorneys' fees in defending this action, together with such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

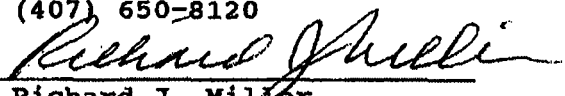
Defendant Liggett Group Inc. respectfully demands a trial
by jury of all issues triable of right by a jury.

Dated: October 6, 1994

Respectfully submitted,

MUDGE ROSE GUTHRIE ALEXANDER
& FERDON
515 North Flagler Drive
West Palm Beach, Florida 33401
Tel: (407) 650-8120

By:


Richard J. Miller

State Bar No.: 0759678

Attorneys for Defendant Liggett Group Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of October 1994, a true and correct copy hereof was furnished by First Class Mail, Postage Prepaid, to STANLEY M. ROSENBLATT, ESQ., STANLEY M. ROSENBLATT, P.A., Attorneys for Plaintiffs, 12th Floor, Concord Building, 66 West Flagler Street, Miami, Florida 33130, and to the following counsel of record, by first class mail:

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Dated: October 6, 1994



Richard J. Miller
State Bar No.: 0759678

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR DADE
COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 94-08273 CA (20)

AAMC
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OCT - 7 PM 3:19
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Plaintiffs,

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RJ REYNOLDS TOBACCO COMPANY,
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Defendants.

DARLENE WILLIAMS

DEFENDANT R.J. REYNOLDS TOBACCO COMPANY'S
ANSWER TO AMENDED CLASS ACTION COMPLAINT
FOR COMPENSATORY AND PUNITIVE DAMAGES

Defendants R.J. Reynolds Tobacco Company ("Reynolds")
answers the Amended Class Action Complaint for Compensatory and
Punitive Damages as follows:

JURISDICTION AND IDENTIFICATION OF THE PARTIES

1. Reynolds admits that this action purports to seek
damages in excess of \$15,000.00, but deny that plaintiffs have
any claim against Reynolds or are entitled to any relief from
Reynolds.

2. Reynolds is without knowledge or information
sufficient to form a belief as to the truth of the allegations of
Paragraph 2.

3. Reynolds denies that plaintiff Howard A. Engle has suffered any alleged injury as a result of smoking. Reynolds further denies that smoking is addictive and that plaintiff is addicted to nicotine in cigarettes. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 3.

4. Reynolds denies that plaintiff Robert W. Angell has suffered any alleged injury as a result of smoking. Reynolds further denies that smoking is addictive and that plaintiff could not and/or cannot quit smoking due to addiction. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 4.

5. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 5.

6. Reynolds denies that smoking is addictive and that plaintiff Raymond Lacey could not and/or cannot quit smoking due to addiction. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 6.

7. Reynolds denies that plaintiff Raymond Lacey has suffered any alleged injury as a result of smoking. Reynolds further denies that smoking is addictive and that plaintiff could not and/or cannot quit smoking due to addiction. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 7.

8. Reynolds denies the allegations in the first, second and ninth sentences of Paragraph 8. Reynolds further denies that plaintiff Raymond Lacey has suffered any alleged injuries as a result of smoking. Reynolds further denies that smoking is addictive, that plaintiff is addicted to nicotine in cigarettes and that plaintiff could not and/or cannot quit smoking due to addiction. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 8.

9. Reynolds denies that plaintiff Raymond Lacey has suffered any alleged injuries as a result of smoking. Reynolds further denies that smoking is addictive, that plaintiff is addicted to nicotine in cigarettes and that plaintiff could not and/or cannot quit smoking due to addiction. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 9.

10. Reynolds denies that plaintiff Frosene D. Steevens has suffered any alleged injuries as a result of smoking. Reynolds further denies that smoking is addictive, that plaintiff is addicted to nicotine in cigarettes and that plaintiff could not and/or cannot quit smoking due to addiction. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 10.

11. Reynolds denies that plaintiff Arthur R. Reeves has suffered any alleged injuries as a result of smoking. Reynolds further denies that smoking is addictive, that plaintiff is addicted to nicotine in cigarettes and that plaintiff could

not and/or cannot quit smoking due to addiction. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 11.

12. Reynolds denies that plaintiff Richard Starr has suffered any alleged injuries as a result of smoking. Reynolds further denies that smoking is addictive, that plaintiff is addicted to nicotine in cigarettes and that plaintiff could not and/or cannot quit smoking due to addiction. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 12.

13. Reynolds denies the allegations of Paragraph 13.

14. Reynolds denies the allegations of Paragraph 14.

15. Reynolds admits the allegations of Paragraph 15.

16. Reynolds admits that RJR Nabisco, Inc. ("RJR") is a Delaware corporation. Reynolds denies the remaining allegations of Paragraph 16.

17. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 17.

18. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 18.

19. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 19.

20. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 20.

21. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 21.

22. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 22.

23. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 23.

24. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 24.

25. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 25.

26. Reynolds admits that the Council for Tobacco Research -- USA, Inc. is a New York non-profit corporation. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 26.

27. Reynolds admits that Tobacco Institute, Inc. is a New York non-profit corporation. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 27.

28. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 28.

29. Reynolds states that it is responsible for the manufacture and distribution of its cigarettes in the United States. Reynolds further states that the cigarettes it manufactures contain tobacco and that nicotine occurs naturally in tobacco. Reynolds denies that the nicotine contained in its products is addictive or that Reynolds manipulated the level of nicotine in its products. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the allegations which relate to the other defendants. Reynolds denies the remaining allegations of Paragraph 29.

30. Reynolds denies the allegations of Paragraph 30.

CLASS REPRESENTATIONS ALLEGATIONS

31. Reynolds admits that plaintiffs contend that this is a class action lawsuit, but Reynolds denies that this action is appropriate for class action treatment. Reynolds denies the remaining allegations of Paragraph 31.

32. Reynolds admits that plaintiffs purport to exclude defendants' officers, directors and agents from the proposed class, but Reynolds denies that this lawsuit is appropriate for class action treatment.

33. Reynolds denies that smoking is addictive, that plaintiff is addicted to nicotine in cigarettes and that plaintiff Howard A. Engle could not and/or cannot quit smoking due to addiction. Reynolds is without knowledge or information

sufficient to form a belief as to the truth of the remaining allegations of Paragraph 33.

34. Reynolds denies that plaintiff Robert W. Angell has suffered any alleged injuries as a result of smoking. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 34.

35. Reynolds denies that plaintiff Raymond Lacey has suffered any alleged injuries as a result of smoking. Reynolds further denies that smoking is addictive, that plaintiff is addicted to nicotine in cigarettes and that plaintiff could not and/or cannot quit smoking due to addiction. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 35.

36. Reynolds denies that plaintiff Frosene W. Steevens has suffered any alleged injuries as a result of smoking. Reynolds further denies that smoking is addictive, that plaintiff is addicted to nicotine in cigarettes and that plaintiff could not and/or cannot quit smoking due to addiction. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 36.

37. Reynolds denies that plaintiff Arthur R. Reeves has suffered any alleged injuries as a result of smoking. Reynolds further denies that smoking is addictive, that plaintiff is addicted to nicotine in cigarettes and that plaintiff could not and/or cannot quit smoking due to addiction. Reynolds is

without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 37.

38. Reynolds denies that plaintiff Richard Starr has suffered any alleged injuries as a result of smoking. Reynolds further denies that smoking is addictive, that plaintiff is addicted to nicotine in cigarettes and that plaintiff could not and/or cannot quit smoking due to addiction. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 38.

39. Reynolds denies the allegations of Paragraph 39.

40. Reynolds denies the allegations of Paragraph 40.

41. Reynolds denies the allegations of Paragraph 41.

42. Reynolds denies the allegations of Paragraph 42.

43. Reynolds denies the allegations of Paragraph 43.

44. Reynolds denies the allegations of Paragraph 44.

45. Reynolds denies the allegations of Paragraph 45, including all subparts.

46. Reynolds denies the allegations of Paragraph 46.

47. Reynolds denies the allegations of Paragraph 47.

48. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the allegation that the named class representatives are highly intelligent. Reynolds denies the remaining allegations of Paragraph 48.

49. Reynolds denies the allegations of Paragraph 49.

50. Reynolds denies the allegations of Paragraph 50.

51. Reynolds admits the allegations in the second and third sentences of Paragraph 51; except Reynolds denies that

there are 30 plaintiffs in Broin or that the Broin plaintiffs sustained any injury from exposure to second-hand smoke or otherwise have any claim against the Broin defendants. Regarding the allegations in the fourth sentence of Paragraph 51, Reynolds admits that the Third District Court of Appeals has issued a per curiam decision in Broin, but Reynolds denies that that opinion authorizes class action treatment of litigation against the tobacco industry. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 51.

52. Reynolds denies the allegations of Paragraph 52.

53. Reynolds admits that no plaintiff has ever obtained a judgment against the tobacco industry. Reynolds denies the remaining allegations of Paragraph 53.

54. Reynolds denies the allegations of Paragraph 54.

FACTS GIVING RISE TO THE CAUSE OF ACTION

55. Reynolds denies the allegations of Paragraph 55.

56. Reynolds admits that representatives of various tobacco manufacturers have stated their belief that nicotine in cigarettes is addictive. Reynolds denies the remaining allegations of Paragraph 56.

57. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the allegations relating to a meeting in St. Martin and the preparation of a memorandum by William Dunn. Reynolds denies the remaining allegations of Paragraph 57.

58. Reynolds admits that a document entitled "Smoking Behavior: Motives and Incentives" was published. Reynolds states that the document speaks for itself and, therefore, Reynolds denies all allegations regarding the contents or meaning of said document. Reynolds denies the remaining allegations of Paragraph 58.

59. Reynolds denies the allegations of Paragraph 59.

60. Reynolds admits that representatives from various tobacco manufacturers have testified before the House Subcommittee on Health and the Environment to the effect that their respective companies do not "manipulate" nicotine levels in cigarettes. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 60.

61. Reynolds states that, on March 25, 1994, Charles O. Whitley, on behalf of Tobacco Institute, Inc., submitted a written statement to the House Subcommittee on Health and the Environment which contains language similar, but not identical, to the quotation alleged in Paragraph 61. Reynolds states that said written statement speaks for itself and, therefore, Reynolds denies all allegations regarding the contents or meaning of said written statement. Reynolds denies the remaining allegations of Paragraph 61.

62. Reynolds admits that, on March 27, 1994, Brennan Dawson appeared on "Face the Nation" on behalf of Tobacco Institute, Inc. Reynolds states that Ms. Dawson made a statement

similar, but not identical, to the quoted statement in Paragraph 62. Reynolds denies the remaining allegations of Paragraph 62.

63. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the statements or activities of Dr. Spears and/or Lorillard Tobacco Company. Reynolds denies the remaining allegations of Paragraph 63.

64. Reynolds denies the allegations of Paragraph 64.

65. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding statements allegedly made by Arthur Godfrey. Reynolds denies the remaining allegations of Paragraph 65.

66. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the allegations relating to Chesterfield cigarettes or statements allegedly made by Arthur Godfrey. Reynolds admits that it had a Camel advertisement which contains language similar, but not identical, to the language alleged in the sixth sentence of Paragraph 66. Reynolds denies the remaining allegations of Paragraph 66.

67. Reynolds admits that the quoted statements in Paragraph 67 appear in a published judicial opinion by United States District Judge H. Lee Sarokin. Reynolds states that the written statements of Judge Sarokin speak for themselves, but Reynolds denies all allegations regarding the findings, opinions or statements made by Judge Sarokin. Reynolds denies the remaining allegations of Paragraph 67.

68. Reynolds denies the allegations of Paragraph 68.

69. Reynolds admits that in 1984 it published a statement in The New York Times similar, but not identical, to the statements in the second and third sentences of Paragraph 69. Reynolds denies the remaining allegations of Paragraph 69.

70. Reynolds denies the allegations of Paragraph 70.

71. Reynolds denies the allegations of Paragraph 71.

72. Reynolds denies the allegations of Paragraph 72.

73. Reynolds denies the allegations of Paragraph 73.

74. Reynolds denies the allegations of Paragraph 74.

75. Reynolds denies the allegations of Paragraph 75.

76. Reynolds denies the allegations of Paragraph 76.

77. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first and second sentences of Paragraph 77. Reynolds denies the remaining allegations of Paragraph 77.

78. Reynolds denies the allegations of Paragraph 78.

79. Reynolds admits that in 1988 it began advertising Camel brand cigarettes featuring "Joe Camel." Reynolds further admits that it offered utilitarian items in exchange for "Camel Cash." Reynolds denies the remaining allegations of Paragraph 79.

80. Reynolds admits that it spends over 40 million dollars annually on advertising Camel brand cigarettes. Reynolds further admits that it engages in advertising to maintain brand loyalty and to encourage adult smokers to switch to Camel brand cigarettes. Reynolds denies the remaining allegations of Paragraph 80.

81. Reynolds denies the allegations of Paragraph 81.
82. Reynolds denies the allegations of Paragraph 82.
83. Reynolds denies the allegations of Paragraph 83.
84. Reynolds admits that the public is informed of the alleged risks of smoking. Reynolds denies the remaining allegations of Paragraph 84.

COUNT I

CLAIM FOR STRICT LIABILITY IN TORT AGAINST
ALL DEFENDANTS EXCEPT DEFENDANT COUNCIL FOR
TOBACCO RESEARCH--USA, INC. AND TOBACCO RESEARCH, INC.

Reynolds adopts, realleges, and incorporates by reference its responses to Paragraphs 55 through 84 above, and further states:

85. Reynolds denies the allegations of Paragraph 85, including all subparts.
86. Reynolds denies the allegations of Paragraph 86.
87. Reynolds denies the allegations of Paragraph 87.
88. Reynolds denies the allegations of Paragraph 88.

COUNT II

CLAIM AGAINST ALL DEFENDANTS
FOR FRAUD AND MISREPRESENTATION

Reynolds adopts, realleges, and incorporates by reference its responses to Paragraphs 55 through 84 above, and further states:

89. Reynolds admits that smoking is an individual choice. Reynolds denies the remaining allegations of Paragraph 89.

90. Reynolds denies the allegations of Paragraph 90.

91. Reynolds admits that Reynolds' chief executive officer and officers of other tobacco manufacturers testified before Congress on April 14, 1994, about their belief that cigarettes are not addictive and that their respective companies do not "manipulate" nicotine levels in cigarettes. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 91 which relate to the other defendants. Reynolds denies the remaining allegations of Paragraph 91.

92. Reynolds denies the allegations of Paragraph 92.

93. Reynolds denies the allegations of Paragraph 93.

94. Reynolds denies the allegations of Paragraph 94.

95. Reynolds denies the allegations of Paragraph 95, including all subparts.

96. Reynolds denies the allegations of Paragraph 96.

97. Reynolds denies the allegations of Paragraph 97.

98. Reynolds denies the allegations of Paragraph 98.

99. Reynolds denies the allegations of Paragraph 99.

100. Reynolds denies the allegations of Paragraph 100.

101. Reynolds denies the allegations of Paragraph 101.

102. Reynolds denies the allegations of Paragraph 102.

103. Reynolds denies the allegations of Paragraph 103.

COUNT III

CLAIM AGAINST ALL DEFENDANTS FOR
CONSPIRACY TO MISREPRESENT AND TO COMMIT FRAUD

Reynolds adopts, realleges, and incorporates by reference its responses to Paragraphs 55 through 84 above, and further states:

- 104. Reynolds denies the allegations of Paragraph 104.
- 105. Reynolds denies the allegations of Paragraph 105.
- 106. Reynolds denies the allegations of Paragraph 106.
- 107. Reynolds denies the allegations of Paragraph 107.
- 108. Reynolds denies the allegations of Paragraph 108.
- 109. Reynolds denies the allegations of Paragraph 109.
- 110. Reynolds denies the allegations of Paragraph 110.
- 111. Reynolds denies the allegations of Paragraph 111.
- 112. Reynolds denies the allegations of Paragraph 112.
- 113. Reynolds denies the allegations of Paragraph 113.
- 114. Reynolds denies the allegations of Paragraph 114.
- 115. Reynolds denies the allegations of Paragraph 115.
- 116. Reynolds denies the allegations of Paragraph 116.
- 117. Reynolds denies the allegations of Paragraph 117.
- 118. Reynolds denies the allegations of Paragraph 118.
- 119. Reynolds denies the allegations of Paragraph 119.
- 120. Reynolds denies the allegations of Paragraph 120.
- 121. Reynolds denies the allegations of Paragraph 121.
- 122. Reynolds denies the allegations of Paragraph 122.
- 123. Reynolds denies the allegations of Paragraph 123.
- 124. Reynolds denies the allegations of Paragraph 124.
- 125. Reynolds denies the allegations of Paragraph 125.

COUNT IV

CLAIM FOR BREACH OF IMPLIED WARRANTY
OF MERCHANTABILITY AND FITNESS
AGAINST ALL DEFENDANTS EXCEPT DEFENDANTS
COUNCIL FOR TOBACCO RESEARCH--USA, INC.
AND TOBACCO INSTITUTE, INC.

Reynolds adopts, realleges, and incorporates by reference its responses to Paragraphs 55 through 84 above, and further states:

126. Reynolds denies the remaining allegations of Paragraph 126.

127. Reynolds denies the allegations of Paragraph 127.

128. Reynolds denies the allegations of Paragraph 128.

129. Reynolds denies the allegations of Paragraph 129.

130. Reynolds denies the allegations of Paragraph 130.

COUNT V

CLAIM FOR INTENTIONAL INFLICTION OF
EMOTIONAL DISTRESS AGAINST ALL DEFENDANTS

Reynolds adopts, realleges, and incorporates by reference its responses to Paragraphs 55 through 84 above, and further states:

131. Reynolds denies the allegations of Paragraph 131.

132. Reynolds denies the allegations of Paragraph 132.

133. Reynolds denies the allegations of Paragraph 133.

134. Reynolds denies the allegations of Paragraph 134.

135. Reynolds denies the allegations of Paragraph 135.

COUNT VI

CLAIM FOR NEGLIGENCE AGAINST ALL
DEFENDANTS EXCEPT DEFENDANTS
COUNCIL FOR TOBACCO RESEARCH--USA, INC.
AND TOBACCO RESEARCH, INC.

Reynolds adopts, realleges, and incorporates by reference its responses to Paragraphs 55 through 84 above, and further states:

136. Reynolds denies the allegations of Paragraph 136.

137. Reynolds denies the allegations of Paragraph 137.

138. Reynolds denies the allegations of Paragraph 138.

139. Reynolds denies the allegations of Paragraph 139.

140. Reynolds denies the allegations of Paragraph 140, including all subparts.

141. Reynolds denies the allegations of Paragraph 141.

COUNT VII

CLAIM AGAINST ALL DEFENDANTS
FOR EQUITABLE RELIEF

Reynolds adopts, realleges, and incorporates by reference its responses to Paragraphs 55 through 84 above, and further states:

142. Reynolds denies the allegations of Paragraph 142.

143. Reynolds denies the allegations of Paragraph 143.

144. Reynolds denies the allegations of Paragraph 144.

145. Reynolds denies the allegations of Paragraph 145.

COUNT VIII

CLAIM AGAINST ALL DEFENDANTS FOR BREACH
OF EXPRESS WARRANTY EXCEPT DEFENDANTS
COUNCIL FOR TOBACCO RESEARCH--USA, INC.
AND TOBACCO INSTITUTE, INC.

146. Reynolds adopts, realleges, and incorporates by reference its responses to Paragraphs 55 through 84 above, and further states:

147. Reynolds admits that Reynolds has been responsible for the manufacture and distribution of its cigarettes in the United States. Reynolds further states that its cigarettes contain tobacco and that nicotine occurs naturally in tobacco. Reynolds is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 147 relating to the other defendants. Reynolds denies the remaining allegations of Paragraph 147.

148. Reynolds denies the allegations of Paragraph 148.

149. Reynolds denies the allegations of Paragraph 149.

150. Reynolds denies the allegations of Paragraph 150.

151. Reynolds denies the allegations of Paragraph 151.

152. Reynolds denies the allegations of Paragraph 152.

153. Reynolds denies the allegations of Paragraph 153.

CLAIMS OF CLASS REPRESENTATIVES
AND MEMBERS OF THE CLASS

154. Reynolds denies the allegations on Paragraph 154, including all subparts.

155. All allegations not specifically addressed herein are hereby denied.

002206

FIRST AFFIRMATIVE DEFENSE

Plaintiffs' Amended Complaint fails to state a claim upon which relief can be granted against Reynolds.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs' claims against Reynolds, if any, are barred, in whole or in part, by the applicable statutes of limitation, statutes of repose, and/or the equitable doctrines of laches, waiver, and estoppel.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by operation of the Supremacy Clause, Article VI, Section 2 of the United States Constitution and the Federal Cigarette Labelling and Advertising Act, as amended, 15 U.S.C. § 1331 et seq.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred, in whole or in part, because any cigarettes manufactured and sold by Reynolds at all material times conformed with available technological, medical, scientific, and industrial state-of-the-art.

FIFTH AFFIRMATIVE DEFENSE

Pursuant to Fla. R. Civ. P. 1.250, there is a misjoinder of parties in this action because each plaintiff's claim is based upon unique facts, circumstances and differing legal principles, and plaintiffs should not be permitted to proceed in a single action.

SIXTH AFFIRMATIVE DEFENSE

While denying all averments of negligence, fault, or liability on its part, Reynolds states that any damages awarded to plaintiffs must be defeated or reduced in proportion to plaintiffs' percentage of responsibility by the doctrine of comparative fault.

SEVENTH AFFIRMATIVE DEFENSE

The causes of action and claims alleged in the Amended Complaint may not properly be maintained or certified as a class action.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs' injuries, if any, were caused, in whole or in part, by their contributory negligence and, therefore, plaintiffs are barred from recovery.

NINTH AFFIRMATIVE DEFENSE

Plaintiffs' recovery is barred, in whole or in part, by plaintiffs' failure to mitigate any damages allegedly sustained.

TENTH AFFIRMATIVE DEFENSE

Plaintiffs' breach of warranty claims are barred by plaintiffs' failure to provide proper and/or timely notice to Reynolds of any claimed breach of warranty.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiffs' breach of implied warranty claims are barred under Florida law.

TWELFTH AFFIRMATIVE DEFENSE

If plaintiffs have sustained any injuries and incurred any expenses, the injuries and expenses, if any, were caused in whole or in part by the acts and omissions of others for whose conduct Reynolds is not responsible.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the doctrines of assumption of the risk and consent.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims for punitive damages under Florida law against Reynolds violate Reynolds' procedural and substantive due process and equal protection rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, the Commerce Clause under Article I of the United States Constitution, Article I, Sections 2, 9 and 17 of the Florida Constitution, and would violate the common law and public policy of the State of Florida.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' Amended Complaint fails to plead claims of fraud and misrepresentation and conspiracy to commit fraud and misrepresentation with sufficient particularity as required by Fla. R. Civ. P. 1.120(b), and must be dismissed for failure to state a cause of action.

SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiffs are barred from recovering any damages by virtue of the fact that the dangers, if any, claimed by plaintiffs were open and obvious at all relevant times.

SEVENTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' injuries, if any, were the result of intervening and/or superseding events, factors, occurrences or conditions which were in no way caused by Reynolds, and for which Reynolds is not liable.

EIGHTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims for punitive damages should be dismissed pursuant to Fla. Stat. Ann. § 768.72, for failure to make the statutory showing that would provide a basis for recovering such damages.

NINETEENTH AFFIRMATIVE DEFENSE

Venue does not lie in this Court.

TWENTIETH AFFIRMATIVE DEFENSE

Reynolds expressly reserves the right to assert additional affirmative defenses as discovery in this matter proceeds.

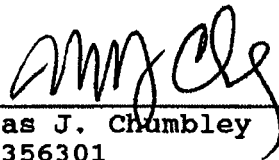
WHEREFORE, defendant R.J. Reynolds Tobacco Company respectfully prays for relief as follows:

1. that judgment be entered in favor of R.J. Reynolds Tobacco Company and against the plaintiffs and any alleged class members in all claims asserted in the Amended Complaint;
2. that plaintiffs have and recover nothing of the defendants;

3. that all costs of this action be taxed against the plaintiffs; and

4. for such other and further relief as this Court deems just and proper.

R.J. Reynolds Tobacco Company further demands a trial on all triable issues as of right by jury.

By: 

Douglas J. Chumbley
FBN: 356301

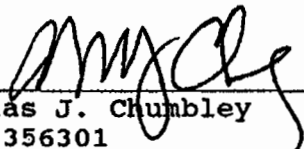
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer of R.J. Reynolds Tobacco Company to Amended Class Action Complaint for Compensatory and Punitive Damages, was furnished by U.S. mail to all counsel on the attached service this 7th day of October, 1994.

By: 

Douglas J. Chumbley
FBN: 356301

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ENGLE, et al. v. RJ REYNOLDS TOBACCO COMPANY
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1994 WL 17118375 (Fla.Cir.Ct.) (Jury Instruction)
Circuit Court of Florida,
Eleventh Judicial Circuit, General Jurisdiction Division.
Miami-Dade County

Howard A. ENGLE, M.D., et al., Plaintiffs,
v.
R.J. REYNOLDS TOBACCO COMPANY, et al., Defendants.

No. 94-08273 CA (22).
1994.

Certain Defendants' Preliminary Draft¹

PHASE I TRIAL VERDICT FORM

The Court has instructed the jury on the law. Based on the those instructions and the evidence in the case, please answer the following questions.

Question No. 1. Have plaintiffs proven that cigarette smoking causes any of the following diseases in some smokers?

Aortic Aneurysm	Yes ____	No ____
Bladder Cancer	Yes ____	No ____
Cerebrovascular Disease	Yes ____	No ____
Cervical Cancer	Yes ____	No ____
Chronic Obstructive Pulmonary Disease	Yes ____	No ____
Coronary Heart Disease	Yes ____	No ____
Esophageal Cancer	Yes ____	No ____
Infertility	Yes ____	No ____
Kidney Cancer	Yes ____	No ____
Laryngeal Cancer	Yes ____	No ____
Leukemia	Yes ____	No ____
Lung Cancer		
Adenocarcinoma	Yes ____	No ____
Bronchioloalveolar carcinoma	Yes ____	No ____
Large cell carcinom	Yes ____	No ____

Small cell carcinoma	Yes ____	No ____
Squamous cell carcinoma	Yes ____	No ____
Miscarriage	Yes ____	No ____
Oral Cavity/Tongue Cancer	Yes ____	No ____
Pancreatic Cancer	Yes ____	No ____
Peripheral Vascular Disease	Yes ____	No ____
Pharyngeal Cancer	Yes ____	No ____
Stomach Cancer	Yes ____	No ____
Ulcers	Yes ____	No ____

If your answer to Question No. 1 is “No” as to all diseases, stop now, sign the verdict form, and inform the bailiff that you have reached a verdict. If your answer to Question No. 1 is “Yes” as to any disease, answer Question No. 2a.

Question No. 2a. Have plaintiffs proven that there was a technologically and commercially feasible alternative design for cigarettes, that was not made available to smokers, and that plaintiffs have proven would have prevented the types of diseases for which you checked “yes” in Question No. 1?

Yes ____ No ____

If your answer to Question No. 2a is “No,” skip Question Nos. 2b, 3a and 3b, and go directly to Question No. 4a. If your answer to Question No. 2a is “Yes,” answer Question No. 2b.

Question No. 2b. If you answered “Yes” to Question No. 2a, identify the periods of time during which plaintiffs have proven that there existed a technologically and commercially feasible alternative design for cigarettes that was not made available, and that would have prevented the types of diseases for which you checked “Yes” in Question No. 1, and identify the technologically and commercially feasible alternative design.

Periods of Time

Alternative Design

Question No. 3a. Have plaintiffs proven that any of the cigarettes manufactured by any defendant after July 1, 1974, was defective and unreasonably dangerous?

Yes ____ No ____

If your answer to Question No. 3a is “No,” skip Question No. 3b, and go directly to Question No. 4a. If your answer to Question No. 3a is “Yes,” answer Question No. 3b.

Question No. 3b. If you answered “Yes” to Question No. 3a, identify the specific defect(s) that plaintiffs have proven by identifying the defendant(s), the specific product(s) (brand and brand style) you find to be defective and unreasonably dangerous, the periods of time during which the product was defective and unreasonably dangerous, and the specific defect of the product, if any:

Defendant	Product	Defect	Period of Time
	(Brand & Brand Style)		
_____	_____	_____	_____
_____	_____	_____	_____

Question No. 4a. Have plaintiffs proven that any defendant intentionally published a false statement of material fact in the State of Florida after May 4, 1982, knowing that the statement was false when published?

Yes ____

No ____

If your answer to Question No. 4a is “No,” skip Question Nos. 4b, 5a and 5b, and go directly to Question No. 6a. If your answer to Question No. 4a is “Yes,” answer Question No. 4b.

Question No. 4b. If your answer to Question No. 4a is “Yes,” identify each false statement of material fact that plaintiffs have proven was published in the State of Florida after May 4, 1982, by listing the defendant that published the statement, the statement itself, the date the statement was published, and how the statement was published.

Defendant	False Statement Published in Florida	Date of Statement	Form of Publication
_____	_____	_____	_____
_____	_____	_____	_____

Question No. 5a. With respect to any false statement of material fact identified in response to Question No. 4b above, have plaintiffs proven that two or more of the defendants entered into a conspiracy to intentionally make that statement, knowing that the statement was false when made?

Yes ____

No ____

If your answer to Question No. 5a is “No,” skip Question No. 5b and go directly to Question No. 6a. If your answer to Question No. 5a is “Yes,” answer Question No. 5b.

Question No. 5b. If your answer to Question No. 5a is “Yes,” identify which defendants plaintiffs have proven entered into such a conspiracy, when any such conspiracy was made, and the false statement of material fact that the identified defendants conspired to make.

Defendants who Conspired	False Statement That Defendants Conspired To Make	Period of Time of Conspiracy
_____	_____	_____

Question No. 6a. Have plaintiffs proven that any defendant did not exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances?

Yes ____

No ____

If your answer to Question No. 6a is “No,” skip Question No. 6b, sign the verdict form and inform the bailiff that you have reached a verdict. If your answer to Question No. 6a is “Yes,” answer Question No. 6b.

Question No. 6b. If your answer to Question No. 6a is “Yes,” identify each defendant that plaintiffs have proven did not exercise a reasonable degree of care, the act by that defendant demonstrating the lack of that degree of care, the product (brand & brand style) that was the subject of that act, and the date upon which each act was committed.

Defendant	Product (Brand & Brand Style)	Act	Date of Act
_____	_____	_____	_____
_____	_____	_____	_____

Dated _____

Foreperson

Footnotes

- ¹ This preliminary draft form is submitted on behalf of all Defendants except Brown & Williamson Tobacco Corporation (for itself and for the defendant named as The American Tobacco Company), Liggett Group, Inc., and Brooke Group, Ltd., Inc.

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District Court of Appeal of Florida, Third District.

LIGGETT GROUP INCORPORATED; Brooke Group Limited; Philip Morris Incorporated;
Council for Tobacco Research-USA, Incorporated; Tobacco Institute, Incorporated; Lorillard
Tobacco Company; Lorillard, Incorporated; Brown & Williamson Tobacco Corporation;
American Tobacco Company; and R.J. Reynolds Tobacco Company, Defendants-Appellants,

v.

Howard A. ENGLE, M.D., et al., Plaintiffs-Appellees.

No. 3D00-3400.

Consolidated: 3D00-3206, 3D00-3207, 3D00-3208, 3D00-3210, 3D00-3212, 3D00-3215
Lower Tribunal Case No. 94-08273 CA 22.
November 26, 2001.

On Appeal From The Circuit Court For The Eleventh Judicial Circuit In And For Miami-Dade County, Florida

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Similarly, here the trial court's "extrapolation" creates an irrebuttable presumption that 700,000 or more unidentified individuals suffered injuries comparable to those suffered by the three Phase II-A plaintiffs. The presumption is irrebuttable because the \$145 billion award will remain fixed, even if Phase III shows that the vast majority of class members did *not* suffer such injuries. This irrebuttable presumption violates the law applied in *Associated Industries*.

3. The Trial Plan Deprived Defendants Of Their Right To Have Punitive Damages Determined Separately For Each Class Member

As a separate matter, the trial plan violated Florida law by denying defendants' right to have the jury decide, on an individualized basis, whether and to what extent particular class members should receive punitive damages. This Court's 1996 mandate specifically recognized that "the issue of damages" in this case must "be tried as to each class member."  *Engle*, 672 So. 2d at 41. This Court's ruling made no distinction between compensatory and punitive damages.

The trial plan improperly deprived the jury of the ability to decide punitive damages "as to each class member." Where claims are individualized, the jury must be able to award or withhold punitive damages through an individualized exercise of discretion. Under settled Florida law, "awarding punitive damages along with compensatory damages [is] discretionary, even if the elements authorizing punitive damages [are] present."  *Bankers Multiple Line Insurance*, 464 So. 2d at 532; see also  *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 486-87 (Fla. 1999);  *Wackenhut Corp. v. Canty*, 359 So. 2d 430, 436 (Fla. 1978);  *Humana Health Insurance Co. v. Chipps*, 2001 WL 1093051 (Fla. 4th DCA Sept. 19, 2001); 1 J. Kircher & C. Wiseman, *Punitive Damages: Law & Practice* § 5: 23, at 5-152 (2d ed. 2000) ("the jury, in its discretion, may withhold [punitive] damages in the face of overwhelming proof of the requisite egregious conduct on the part of the defendant").

The jury's exercise of individualized discretion is necessary in this case because key elements of each class member's claims are individualized. The jury must make particularized determinations as to whether, and how, punishable conduct affected each claimant. One class member's circumstances cannot serve as a proxy for another's. See, e.g.,  *Smith v. Texaco*, 263 F.3d at 410 (where class members' injuries are not uniform, "an individualized inquiry is necessary" to determine punitive damages);  *In re Copley Pharmaceutical, Inc.*, 161 F.R.D. 456, 467 (D. Wyo. 1995) (rejecting proposal to try punitive liability as a classwide issue because "punitive damages are measured, in part, by how outrageous such punitive conduct is *relative to a particular plaintiff*") (emphasis added); see also  *Reap v. Continental Casualty Co.*, 199 F.R.D. 536, 549 (D.N.J. 2001) (denying class certification because "calculating compensatory and punitive damages . . . would prove to be quite an individualized task"); *Adams v. Henderson*, 197 F.R.D. 162, 172 (D. Md. 2000) (denying class certification due to, among other things, "the individualized damages inquiries that inevitably accompany a claim for compensatory and punitive damages"). (See also Point VI below.)

B. The Generalized Phase I Findings Violated Defendants' Jury Trial And Due Process Rights

The Phase I jury findings are legally useless and cannot be properly applied to the Phase III trials that must follow for all other class members. Because the Phase I findings lack necessary specificity, defendants face endless "re-examination" of those findings by new juries in Phase III. The resulting risk of inconsistent verdicts violates defendants' rights to a jury trial and due process.

Under the trial plan, new juries in Phase III must apply the Phase I jury's findings to determine the liability and compensatory-damage claims of hundreds of thousands of class members. By requiring only generalized Phase I findings, the court left Phase III juries unable to determine whether the conduct found to be wrongful in Phase I was the legal cause of any Phase III claimant's injury.

In Phase I, plaintiffs presented evidence of alleged misconduct by various companies at different times over nearly half a century. Defendants requested that the Phase I verdict form require specification of any conduct the jury might deem improper. (R. 210: 48512-18; R. 215: 49495-98; T. 35915-16, 35952-54, 35967-71, 36298-300.) The court denied defendants' requests and instead adopted a generalized verdict form that made it impossible to determine the basis for the jury's verdict. (R. 304: 69449-60, A. 1: 12.)

For example, during Phase I plaintiffs placed in the record hundreds of documents, asserting generally that they evidenced fraudulent misstatements or omissions. (E.g., T. 11707-11, 11746-48, 11751-54, 11763-67, 11823-24, 11831-35, 14514-24, 14534-38, 14590-94, 19656-72, 19685-86, 19718-20, 19746-50, 24010-11, 24017-18, 24133-35, 24139-42, 36175-76.) The Phase I verdict form, however, merely asked whether each defendant “ma[d]e a false statement of a material fact”; it did not ask what that statement was or to whom it was made. (R. 304: 69452-53, A. 1: 12.) Thus, the jury may have found that only a few of the statements presented in Phase I were fraudulent and all of the others were proper. Nevertheless, Phase III juries will be free to decide that any of the *other* statements were fraudulent and impose liability on that basis. The possibilities of jury re-examination and inconsistent verdicts are endless.

The verdict form asked a similarly generalized question with respect to “fraudulent concealment.”¹¹ Furthermore, under the heading “Entitlement to Punitive Damages,” the verdict form merely asked whether defendants' conduct “rose to a level that would permit a potential award or entitlement to punitive damages.” Again, the jury was never asked to specify what that conduct was -- either in Phase I *or* in Phase II. (R. 304: 69460, A. 1: 12; R. 266: 59327; R. 304: 69461-78, A. 1: 20; R. 285: 64337-38; R. 286: 64605; R. 304: 69479-80, A. 1: 21.)

The right to a jury trial under the Florida Constitution (Art. I, § 22) “is not to be narrowly construed.”  *In re Forfeiture of 1978 Chevrolet Van*, 493 So. 2d 433, 435 (Fla. 1986). Florida's right is as broad as the right guaranteed by the Seventh Amendment of the U.S. Constitution. *See id.* (“federal decisions construing [the Seventh Amendment] are helpful and persuasive in construing this state's constitutional provision of like import”); *see also*  *Department of Revenue v. Printing House*, 644 So. 2d 498, 500 (Fla. 1994) (construing Florida's jury trial right by reference to the Seventh Amendment). Under the Seventh Amendment, issues decided by one jury cannot be re-examined by other juries. *See*  *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931);  *Castano v. American Tobacco Co.*, 84 F.3d 734, 750-51 (5th Cir. 1996);  *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1302-03 (7th Cir. 1995);  *Smith v. Brown & Williamson*, 174 F.R.D. at 96 & n. 7.

This rule is inherent in the guarantee of a trial by jury. It avoids the re-examination of issues by multiple juries, which impermissibly exposes defendants to the risks of jury confusion and inconsistent verdicts. *See*  *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978); *cf.*  *Rowlands v. Signal Construction Co.*, 549 So. 2d 1380, 1383 (Fla. 1989) (some issues are so intertwined that they have to be tried together); *Casper v. Melville Corp.*, 656 So. 2d 1354, 1356 (Fla. 4th DCA 1995);  *Lindenfield v. Dorazio*, 606 So. 2d 1255, 1258 (Fla. 4th DCA 1992); *Diamond v. Whaley, Chapman & Hannah, M.D.'s, P.A.*, 550 So. 2d 54, 55 (Fla. 2d DCA 1989) (where a “risk of inconsistent verdicts is a legitimate concern,” use of a verdict form with “special interrogatories” is appropriate).

By exposing defendants to jury confusion and inconsistent verdicts, jury re-examination also violates state and federal due process. *See*  *Gasoline Products*, 283 U.S. at 500 (where two issues are “so interwoven” that one “cannot be submitted to the jury independently of the [other] without confusion and uncertainty,” trying the issues separately “would amount to a denial of a fair trial”);  *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993) (trying cases in a way that is “likely to lead to jury confusion” is a denial of fundamental fairness); *Flintkote Co. v. Allis-Chalmers Corp.*, 73 F.R.D. 463, 464-65 (S.D.N.Y. 1977) (in devising trial procedures, “considerations of convenience and economy must yield to the interests of justice

in a fair and impartial trial”);  *Kritzman v. State*, 520 So. 2d 568, 569-70 (Fla. 1988) (“due process requires that a defendant be given a fair trial in the substantive sense”); *State v. Davis*, 720 So. 2d 220, 227 (Fla. 1998) (a defendant's right to a fair trial is protected by “federal and Florida” due process).

The impropriety of a generalized verdict in a multi-phase proceeding is aptly illustrated in  *Blyden v. Mancusi*, 186 F.3d 252 (2d Cir. 1999), a prisoners' class action alleging illegal reprisals by prison officials in the aftermath of a riot. The trial took place in two phases. The first phase purported to address defendants' “liability or non-liability to the entire class.” The second phase involved “new juries determining the damages suffered by each individual plaintiff.”  *Id.* at 257. This procedure violated defendants' rights because the first-phase verdict form was improperly generalized:

[The first-phase verdict form] did not ask the jury to specify which acts were found to be “reprisals” and which were not.... [T]he jurors in the [second-phase] damages trials were told that there had been “reprisals” but were asked to determine for themselves which particular acts constituted such “reprisals.”... This of course created the real possibility -- amounting to a probability -- that acts found to be “reprisals” by the liability jury were different from the acts found to be “reprisals” by the damages juries.

 *Id.* at 268-69. As a result, the second-phase juries “reexamine[d] issues decided by the liability jury and thereby violated the Seventh Amendment.”  *Id.* at 268; see also  *Henley v. FMC Corp.*, 2001 WL 733110, at *8 (4th Cir. June 29, 2001) (without identification of the ground for the jury's finding, the court could not “resolve whether the jury's denial of relief is binding on the entire class”).

As the following examples demonstrate, the same jury trial and due process problems are pervasive here because the Phase I verdict form lacked essential specificity:

Fraud. In Phase I, plaintiffs introduced numerous advertisements and other statements stretching over nearly half a century. (E.g., T. 11202-03, 12879-83, 12940-51, 16385-87, 18982-19000.) However, over defendants' objections, the jury was never asked to specify the advertisement(s) or other statement(s) it found to be fraudulent, or which fact(s) defendants fraudulently concealed or omitted. (T. 35915-16, 35952-54, 35967-71, 36298-301, 37571-72; R. 215: 49495-97; R. 304: 69452-53, A. 1: 12.)

Then, in Phase II-A, the same jury was asked to determine whether the three individual plaintiffs were aware of and reasonably relied to their detriment on “any false statements of material fact *which formed the basis of your verdict in Phase I.*” (T. 50249, emphasis added; R. 304: 69452-53, A. 1: 12.) Similarly, the jury was asked to determine whether any concealment or omission, “*as determined in Phase I*, was the legal cause of injury to” the three individual plaintiffs. (T. 50250, emphasis added.) No such determinations can be made in Phase III trials because those trials will be resolved by *different* juries -- juries that did not render the verdict in Phase I and have no way of knowing what statement(s), concealment(s), or omission(s) the Phase I jury found to be fraudulent. (R. 132: 31279, A. 1: 9.) Therefore, in order to determine the fraud claims of any particular Phase III claimant, a Phase III jury will have to re-determine for itself the fraudulent character of the conduct that allegedly caused the Phase III claimant's injury, in violation of defendants' jury trial and due process rights.

For example, although plaintiffs in Phase I placed heavy emphasis on the 1954 “Frank Statement,” the jury may have found that the “Frank Statement” was *not* fraudulent. (PX0018; T. 10857-64, 36433-34, 36463-64.) Juries in Phase III, however, will have no idea whether the Phase I jury found that the “Frank Statement” was fraudulent, and so any Phase III jury faced with a plaintiff who claims to have relied on the “Frank Statement” will have to re-determine whether that statement was fraudulent. The potential for inconsistent verdicts is manifest.

“Emotional Distress.” The same problems apply to any Phase III determination of class members' claims for “intentional infliction of emotional distress.” In Phase I, the jury made a generalized finding that defendants had “engaged in extreme and outrageous conduct or with reckless disregard relating to cigarettes sold or supplied to Florida smokers with the intent to inflict severe emotional distress.” (T. 37742; R. 304: 69459, A. 1: 12.) There was no specification of what that conduct was. Then, in Phase II-A, the jury was merely asked whether the three individual plaintiffs had suffered “severe emotional distress,” and, if so, “whether [each] Defendant's extreme and outrageous conduct” was the legal cause of injury to him or her -- again, without specifying the conduct involved. (R. 304: 69473, A. 1: 20.) Because no one can say what conduct the Phase I jury found to be “extreme and outrageous,” the Phase III juries cannot properly determine whether *that conduct* was the legal cause of “severe emotional distress” to any Phase III claimants. Thus, Phase III juries will be free to hold defendants liable for conduct that the Phase I jury may have found *not* to be extreme and outrageous.

Comparative Negligence. Similarly, whenever comparative negligence is raised in Phase III trials, separate juries will have to decide that issue without knowing the basis for the Phase I findings of negligence, strict liability, and breach of warranty. As this Court recognized in *Metropolitan Dade County v. Cox*, 453 So. 2d 1171, 1173 (Fla. 3d DCA 1984), a jury “cannot” assess comparative negligence “without complete information as to the quantity, quality, nature and degree of the defendant's conduct so that the jury knows just what to ‘compare’ with its assessment of the plaintiff's.” Because negligence and comparative negligence are plainly interrelated, those issues must be considered together by a single jury:

Comparative negligence means comparison. The trier of fact compares the negligence of plaintiff and defendant. Fault is compared to fault. Thus to determine the negligence of the parties, the trier of the facts must hear the totality of fault.

Id. (quoting *Amend v. Bell*, 570 P.2d 138, 142 (Wash. 1977)); *see also* *Rowlands*, 549 So. 2d at 1383 (“liability is inextricably bound up with the apportionment of damages under the doctrine of comparative negligence”).

* * * *

As the preceding illustrations show, the Phase I findings are legally useless and cannot be applied in Phase III. This was the result of the court's failure to give the jury a particularized verdict form. It was also the result of a year-long trial in which the evidence itself was improperly generalized.

For example, Florida law required plaintiffs to plead and prove their fraud claims with particularity. *See* Fla. R. Civ. P. 1.120(b); *Reina v. Gingerale Corp.*, 472 So. 2d 530, 531 (Fla. 3d DCA 1985); *Steyr Daimler Puch of America v. A & A Bicycle Mart, Inc.*, 453 So. 2d 1149, 1150 (Fla. 4th DCA 1984). State and federal due process impose a corresponding requirement. “Due process requires that the defendant know what he is accused of having misrepresented.” *Schopler v. Smilovits*, 689 So. 2d 1189, 1189-90 (Fla. 4th DCA 1997); *State Farm Mutual Automobile Insurance Co. v. Rosenfeld*, 1986 WL 2376, at *1 (E.D. Pa. Feb. 14, 1986).

The court repeatedly failed to enforce these requirements as the trial proceeded. (T. 6536-39, 23174-90, 26703-22, 27447-61, 36298-301; R. 214: 49258-72, 49296-322.) In its post-trial review of the evidence, the court itself failed to specify any supposed misstatement other than the “Frank Statement” and unidentified advertising “over extended periods of time.” (R. 304: 69487-89, A. 1: 22.) Thus, neither the trial record nor the jury's findings provide any guidance for the Phase III trials to come, in which new juries will necessarily make their own determinations of whether various statements or omissions were fraudulent.

In addition, the generalized nature of plaintiffs' proof improperly divorced the Phase I evidence from any actual, identifiable claimants. The court subjected defendants to an artificial proceeding, not a real trial, in which the jury was inundated with evidence of abstract "misconduct" unconnected to any real person's knowledge, choices, or other circumstances -- thus setting the stage for an enormous punitive award in Phase II-B. Plaintiffs were allowed to "mix and match" their evidence, creating a hypothetical plaintiff who was exposed to and relied on every alleged misstatement over the course of nearly 50 years, smoked every brand of cigarette, and suffered every asserted disease plus "emotional distress." (R. 132: 31277, A. 1: 9; T. 36760-62, 37405-07, 37561-65, 37570-78.) This composite form of "trial" violates state and federal due process, even in cases where only a single jury is involved. See  *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344-45 (4th Cir. 1998); see also *M.W. v. Davis*, 756 So. 2d 90, 97 (Fla. 2000) (Florida due process requires "fair treatment through the proper administration of justice where substantive rights are at issue") (quoting  *Department of Law Enforcement v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991)). (See also Point VI.C below.) Here, with the addition of separate juries in thousands of Phase III trials, the lack of specific proof tied to *some* real person creates due process violations that are infinitely worse.

The trial court failed to address either defect -- (1) the impermissibly composite nature of plaintiffs' proof, and (2) the improper generality of the jury's findings. Instead, the court attempted to sidestep all re-examination problems in its final judgment by suggesting that the only issues left to be determined in Phase III were "whether the injuries complained of were the result of cigarette smoking or from other causes, and what[, if any, damages resulted from that activity." (R. 304: 69508, A. 1: 22.) Thus, the court closed its eyes to a host of other issues -- e.g., individual knowledge, reliance, and the statute of limitations -- which *must* be tried in Phase III, just as they were tried in Phase II-A.

Any procedure that seeks to avoid such issues by relieving class members of their obligation to prove essential elements of their claims, or to confront and overcome affirmative defenses, violates defendants' due process and jury trial rights under Florida and federal law. See, e.g., *Ramos v. State*, 505 So. 2d 418, 421 (Fla. 1987) ("Substantive rights conferred by law can be neither diminished nor enlarged by procedural rules");  *Boyd v. Becker*, 627 So. 2d 481, 484 (Fla. 1993);  *Cimino*, 151 F.3d at 312 (class action rules cannot "alter the required elements which must be found to impose liability and fix damages (or the burden of proof thereon)").

C. The Trial Court Improperly Entered A "Final Judgment" Before All Judicial Labor Was Completed

At the end of Phase II, the trial court precipitously entered a "final judgment" for \$145 billion in punitive damages, ordering defendants to pay that amount immediately into the court's registry even though 99.999% of all class members had not yet established -- and may never establish -- their liability and compensatory-damage claims. (R. 304: 69483-549, A. 1: 22.) The court did so without briefing or oral argument on the issue of whether such a judgment was proper at this stage of the proceedings. Quite apart from the improprieties discussed above, the court's premature entry of a final judgment was reversible error.¹²

Florida law forbids entry of a final judgment if any "judicial labor" remains to be performed.  *McGurn v. Scott*, 596 So. 2d 1042, 1043 (Fla. 1992). A trial court cannot enter a final judgment until it has "determine[d] the rights and liabilities of all parties with reference to the matters in controversy and le [ft] nothing of a judicial character to be done." *Id.* (quoting *Gore v. Hansen*, 59 So. 2d 538, 539 (Fla. 1952)). In particular, a final judgment cannot be entered if any "element of damages" in the case remains to be adjudicated, "regardless of how straight-forward and ministerial the calculation of those damages may be."  596 So. 2d at 1044.

In *Del Castillo v. Ralor Pharmacy, Inc.*, 512 So. 2d 315, 318-19 (Fla. 3d DCA 1987), this Court held that where, as here, plaintiffs seek both compensatory and punitive damages, *both* categories of damages must be fully determined before a final judgment can be entered. The trial court in *Del Castillo* had entered a "final" judgment for compensatory damages, even though punitive damages remained to be adjudicated. This Court held that because "compensatory and punitive damages claims are part

- 9 See also Barr, *Engle v. R.J. Reynolds: The Improper Assessment of Punitive Damages for an Entire Class of Injured Smokers*, 28 Fla. St. U. L. Rev. 787, 824 (2001) (the *Engle* trial plan violated “both Florida law and the [defendants'] due process rights” by awarding “punitive damages to an entire class of injured Florida smokers prior to any findings of individual liability and individual harm for each class member”).
- 10 See also Barr, 28 Fla. St. U. L. Rev. at 826-27 (the *Engle* trial plan violated due process because, when punitive damages were awarded, there was “no showing of actual damages to any individual class members” other than three individuals; thus, apart from “blatantly guessing at the total amount of damage caused to the class, the reviewing court simply has no way to compare the punitive damages award to compensatory damages”).
- 11 The verdict form asked only whether each defendant “conceal[ed] or omit[ted] material information, not otherwise known or available, knowing the material was false and misleading [sic], or failed to disclose a material fact concerning or proving the health effects and/or addictive nature of smoking cigarettes.” (R. 304: 69453-54, A. 1: 12.) As to both affirmative fraud and “concealment,” the only specificity in the verdict form was provided by a question asking “whether the conduct occurred during one of the following time periods”: before May 5, 1982, after May 5, 1982, or both before and after. (R. 304: 69452-53, A. 1: 12.) The purpose of this division was to reflect the 12-year statute of repose.
- 12 By dispensing with briefing and oral argument on this issue, the trial court ignored its previous assurance that defendants would have the opportunity to address the “legal problem” of entering a final judgment before the court took such a step. (T. 57835-37; R. 291: 65987-88, 65991-92, 66011-13.)
- 13 Under a similar trial plan in *Broin v. Philip Morris Co.*, No. 91-49738 CA 22 (Fla. Cir. Ct., 11th Jud. Cir.) (A. 1: 27), the same trial judge acknowledged that it would have been improper to enter a final judgment before all individual claims are adjudicated: “Even if the [*Broin*] class had prevailed at trial at Stage I, class members could not have received any award of damages at the end of the Stage I proceedings. Instead, to obtain damages, class members would have had to come to trial in Miami and present specific proof of causation, exposure levels, reliance and damages and, if successful, then wait until all of the Stage II proceedings were finished, a final judgment entered, and all appeals exhausted.” (Memorandum Opinion and Order, Feb. 5, 1998, at 6, A. 6: 28.)
- 14 Conceding its failure to prevent counsel's continuing references to “slavery, slavery, slavery” and other irrelevant matters, the court offered this inadequate justification: “I was waiting to see if he was going to drop it or develop it.” (T. 32279, 32281.) The court then gave the jury this patently ineffective “curative” instruction: “We've gone into the past as far as this subject is concerned, and there's a lot about the discussion that we've had up to this point that has no relevancy or materiality [to] the issues in the trial. We understand that. Some sensitive issues have been raised back in the 1800s that [have] nothing to do with this case. So we'll proceed with that concept in mind. Go ahead.” (T. 32283.) Plaintiffs' counsel continued to engage in the same misconduct immediately thereafter. Nevertheless, the court did nothing more than sustain defendants' further objection, out of the hearing of the jury. (T. 32287-302.)
- 15 Plaintiffs' racial pandering continued beyond Phase I. In Phase II-A, for example, plaintiffs' counsel again sought to paint defense experts as racists and as hostile to the jury's sympathies. He began his cross-examination of one expert by asking: “You've expressed [in your writings] opinions about everything under the sun. O.J. Simpson was guilty, according to you, the jury was wrong, Simpson was guilty, right?” (T. 44987.) He asked irrelevant questions or made speeches about the smoking history of Nat “King” Cole and his daughter, Natalie Cole; about cigarette consumption in Africa; and about “using blacks as guinea pigs” to test-market new cigarette brands. (T. 45070, 45147, 45173-76, 45204-10.) During cross-examination of another defense expert, plaintiffs' counsel asked whether the witness had written articles about “segmenting the Hispanic market.” (T. 45742.) These questions had no conceivable relevance in Phase II-A. Indeed, all three individual plaintiffs in that phase were non-Hispanic whites. (E.g., T. 45750.)
- 16 Defendants discovered the book after Phase I closing arguments and promptly brought it to the trial court's attention. (R. 234: 53307-20; R. 235: 53321-506.)
- 17 See also *Azriel v. La Marca*, 722 So. 2d 952, 953 (Fla. 3d DCA 1998);  *Fischman v. Suen*, 672 So. 2d 644, 645-46 (Fla. 4th DCA 1996);  *Ratley v. Batchelor*, 599 So. 2d 1298, 1301-02 (Fla. 1st DCA 1991).
- 18 Plaintiffs proposed three instructions on the issue. One proposed instruction included the following language: The first issue for you to consider is whether cigarette smoking cause[s] lung cancer and other diseases or medical conditions in some smokers (and former smokers). Cigarette smoking is a legal cause of lung cancer and other diseases

IN THE SUPREME COURT OF FLORIDA

No. SC03-1856

HOWARD A. ENGLE, M.D., et al.,

Petitioners,

v.

LIGGETT GROUP, INC., et al.,

Respondents.

RESPONDENTS' MOTION FOR REHEARING¹

Pursuant to Fla. R. App. P. 9.330(a), defendants move for rehearing of this Court's decision of July 6, 2006.

Summary

Point I: The Court's preservation of certain Phase I jury findings cannot be squared with its invalidation of other findings. To begin with, the Court's rejection of the misrepresentation finding (Finding 4, "fraud and misrepresentation") necessarily invalidates the derivative conspiracy finding as well (Finding 5, "civil conspiracy--misrepresentation"). The Court overlooked this inconsistency. More generally, in preserving certain Phase I findings while rejecting others, the Court overlooked the fact that the preserved findings have precisely the same defects as the rejected findings: all are "nonspecific" and "inadequate to allow a subsequent

¹ This motion is filed on behalf of all respondents except Liggett and Brooke (hereinafter, "defendants").

jury to consider individual questions of reliance and legal cause." (Op. at 4.)² The Court overlooked or misapprehended legal and constitutional principles that preclude giving conclusive effect to the preserved findings.

Although the Court characterizes its decision as "pragmatic," the decision leaves on the doorstep of Florida's judiciary an impossible task -- applying generalized Phase I findings in subsequent cases, with no way to link those findings legally to individual claimants' injuries. Applying the preserved findings will subject defendants to liability for conduct that no one can say the Phase I jury found to be unlawful. Doing so violates substantive tort law and denies defendants their rights to due process and a fair trial. Because the preserved findings are inadequate to support the necessary individualized determinations, judgments rendered in subsequent actions will inevitably fail to survive legal and constitutional scrutiny, resulting in additional years of wasted effort. The only course is to allow the parties to litigate individual claims on a clean slate, with the benefit of the Court's one-year grace period. Such actions can and should proceed under settled Florida law, as other individual actions have proceeded in the past.³

² This motion addresses Findings 3, 4a, 5, 5a, 6, and 8. Defendants are not challenging Findings 1 and 2, "generic causation" and generic "addiction/dependence." References to the "preserved" findings in this motion exclude those two findings.

³ Before any such actions can proceed, however, certain unresolved issues must be addressed. (See Point III below.)

Point II: The Court's retroactive "(d)(4)(A)" certification is unprecedented under class-action law and, in the absence of prior briefing and argument, violates defendants' rights to notice and an opportunity to be heard. The specific errors and consequences of the Court's ruling have never been briefed because "issue certification" under Fla. R. Civ. P. 1.220(d)(4)(A), which the Court now invokes, has never been litigated here or in the lower courts.

Point III: Before any further proceedings take place, unresolved issues remain to be addressed by the Third District (and potentially by this Court).

Point IV: The Court made an error in its treatment of the class definition, relying on mistaken assumptions that have never been briefed or argued.

I. Findings 3, 4a, 5, 5a, 6, And 8 Cannot Be Applied In Subsequent Actions To Determine Legal Causation And Other Essential Issues

The Court held unanimously that Findings 4, 7, and 9 -- "fraud and misrepresentation," "breach of express warranty," and "intentional infliction of emotional distress" -- cannot be applied in subsequent actions. The Court stated that such findings were "nonspecific" and therefore "inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause" (Op. at 4)⁴ or the "apportionment of fault" among defendants (Op. at 2).

⁴ Although this passage refers specifically to Findings 4 and 9, the rest of the Court's opinion indicates that Finding 7 was invalidated on the same basis. See Op. at 4, 52-53 (listing the preserved findings and omitting Finding 7). Defendants request express confirmation that Finding 7 has been invalidated.

A majority of the Court, however, went on to preserve Findings 3, 4a, 5, 5a, 6, and 8 -- "strict liability," "fraud by concealment," "civil conspiracy--misrepresentation," "civil conspiracy--concealment," "breach of implied warranty," and "negligence." (Op. at 4, 52-53.) The Court thus overlooked the fact that the preserved findings are just as "inadequate" as the invalidated findings -- and for the very same reasons. All are "nonspecific" and cannot be legally or constitutionally applied in subsequent actions to determine essential issues such as legal causation, reliance, comparative fault, and apportionment of fault among defendants. Indeed, the findings cannot even be applied to determine whether conduct that supposedly injured an individual claimant was found by the Phase I jury to be tortious.

A. The Court's Recognition That Findings 4, 7, And 9 Are "Nonspecific" And Inapplicable In Subsequent Actions Extends Equally To Findings 3, 4a, 5, 5a, 6, And 8

Nothing in the Phase I verdict identifies the misconduct that underlies the jury's findings. This is not a "mass tort" case in which all claimants were injured simultaneously by a single, discrete event such as a refinery explosion or a plane crash. Even the trial court observed that plaintiffs' assertions involved "hundreds of thousands" of acts, statements, and omissions concerning diverse products and marketing activities at different times over nearly half a century.⁵ Many if not

⁵ T35813. The Engle trial transcript is cited as "T___[page(s)]"; other portions of the record are cited as "R___[volume]:___[page(s)]." Cited record materials are collected in the accompanying Respondents' Rehearing Appendix

most of those assertions are irrelevant to any individual's claims. And no one can say now which assertions the Phase I jury accepted as the basis for its findings.

Findings 4a ("fraud by concealment"), 5 ("civil conspiracy--misrepresentation"), and 5a ("civil conspiracy--concealment"). One inconsistency in the Court's rulings must be noted at the outset. The Court rejected Finding 4 ("fraud and misrepresentation") because "fraud" is "individualized." (Op. at 36.) But that ruling automatically invalidates Finding 5 as well ("civil conspiracy--misrepresentation"). Conspiracy is not a free-standing cause of action; it requires proof of the completed underlying tort -- here, "misrepresentation."⁶ The Court's rejection of the "misrepresentation" finding because it was "individualized" requires rejection of the derivative conspiracy finding, too.

Furthermore, none of the preserved fraud-based findings identifies what was "misrepresented" or "concealed" -- a failing they share with invalidated Finding 4. Plaintiffs asserted a myriad of "misrepresentations" and "concealments" dating

(RRA); non-transcript items bear a parallel citation as "RRA__[tab]," and all Engle transcript pages are collected at RRA7. This Court's opinion and the Third District's opinion are reproduced at RRA1 and RRA6 respectively. The Third District's opinion is cited as "853 So. 2d at ____."

⁶ See, e.g., Loeb v. Geronemus, 66 So. 2d 241, 243 (Fla. 1953) ("The gist of a civil action for conspiracy is not the conspiracy itself but the civil wrong which is alleged to have been done pursuant to the conspiracy"); Blatt v. Green, Rose, Kahn & Piotrkowski, 456 So. 2d 949, 951 (Fla. 3d DCA 1984).

back to 1954.⁷ No judge or jury in a subsequent action can identify the "misrepresentation(s)" or "concealment(s)" found by the Phase I jury and then determine whether that conduct actually deceived and caused injury to an individual Engle claimant. A causal link between fraudulent conduct and the individual plaintiff's injury is an essential element of liability. Each plaintiff must show that he or she would have acted otherwise "but for" the alleged misrepresentation or concealment.⁸

The Phase I jury is the only jury that could apply Findings 4a, 5, and 5a to make those essential determinations. The Phase II-A jury instructions and verdict form confirm the point. In Phase II-A, the jurors were instructed to remember the basis for their Phase I findings and then apply that memory to the three named plaintiffs. For example, the judge told the jury: "The issues that you determined in Phase I were not relitigated in Phase II; therefore, you will now have to determine whether defendants' conduct upon which you based your Phase I verdict was the

⁷ See, e.g., T11235, 12592-94, 13475-77, 15423-24, 16470, 17265, 18225-27, 18746-57.

⁸ See, e.g., Soler v. Secondary Holdings, Inc., 771 So. 2d 62, 69 (Fla. 3d DCA 2000) (a claim of fraudulent misrepresentation or concealment "requires proof of detrimental reliance"); Humana, Inc. v. Castillo, 728 So. 2d 261, 264-65 (Fla. 2d DCA 1999) (fraud claims require proof that "but for the alleged misrepresentation or nondisclosure, the party would not have entered the transaction"); see also Blyden v. Mancusi, 186 F.3d 252, 268-69 (2d Cir. 1999) (liability and damages must be tied to identifiable misconduct); Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 344-45 (4th Cir. 1998) (due process requires that defendants have an opportunity to contest causation and other liability issues).

legal cause of injury to Mary Farnan, Frank Amodeo and Angie Della Vecchia."⁹

Similarly, the Phase II-A verdict form repeatedly reminded the jurors of what "you found" in Phase I and then asked them to apply their memory to the three individuals' specific claims of deception and reliance.¹⁰ Juries in subsequent actions, however, will have no way to retrace the Phase I jury's steps in addressing the claims of other Engle claimants. In short, Findings 4a, 5, and 5a are no more specific, and no more applicable in subsequent actions, than invalidated Finding 4.

⁹ T50236 (emphasis added). Likewise, on fraudulent concealment, the jury was instructed: "[I]n your earlier verdict you found that each of the defendants concealed or omitted material information The issue in Phase II as to the three class representatives is whether these concealments or omissions were a legal cause of injury [to the three individuals]." T50241 (emphasis added). See also T50235, 50249-52, 50262-63, 50265-66, 50271, 50275-76, 50279-81.

¹⁰ During Phase II-A, for example, Farnan and Amodeo testified that they were unaware of specific facts that defendants allegedly concealed -- e.g., that smoking could cause throat and laryngeal cancer, that cigarette smoke contained various chemicals and carcinogens, that cigarettes contained ammonia or other additives, that some individuals may inhale more frequently or deeply when smoking low-tar cigarettes, that nicotine levels were subject to adjustment, and that certain research was conducted overseas and not provided to public health officials. T40244-54, 41369, 41438-42. When their claims were submitted to the jury, the Phase II-A verdict form, Question 4, reminded the jury of its general Phase I finding that "each of the Defendants concealed or omitted material information"; it then asked the jury to decide whether each defendant's "concealment or omission" was "a legal cause of injury to [that individual]." R304:69466 (RRA5). Similarly, Question 5 reminded the jury of its general Phase I finding of "an agreement to misrepresent information relating to the health effects of cigarette smoking, or the addictive nature of smoking cigarettes"; it then asked the jury to decide whether the individuals' injuries were "legally caused by acts done in furtherance of an agreement among two or more defendants to commit an act of fraud or misrepresentation, as found in Phase One." R304:69469 (RRA5) (emphasis added).

Moreover, Florida law does not recognize fraud claims based on nondisclosure except in cases involving a sale of residential real estate, a fiduciary duty to disclose, or other circumstances not present here.¹¹ Defendants raised this point in the Third District and it remains unaddressed. (See Defendants' Merits Brief, Appendix Vol. 3, Tab 28, at 79-81; see also Point III below.)

Findings 3 ("strict liability"), 6 ("breach of implied warranty") and 8 ("negligence"). The same lack of specificity invalidates the other preserved findings. Findings 3 and 6 ("strict liability" and "breach of implied warranty") simply state that unspecified cigarettes were "defective," and Finding 8 ("negligence") simply states that defendants "failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances."¹² It is impossible to state what defect or negligence the jury found, or to identify the cigarette brands, types, or designs to which the findings apply.

At trial, to support their assertions of "defect," plaintiffs attacked scores of particular cigarette brands or types (many of which were modified during the nearly 50 years in issue). Plaintiffs attacked cigarettes with reference to particular features, e.g., cigarettes with high deliveries of tar and nicotine; cigarettes advertised as "light"; cigarettes with certain filters; cigarettes with ventilation

¹¹ See, e.g., TransPETROL, Ltd. v. Radulovic, 764 So. 2d 878, 879-80 (Fla. 4th DCA 2000); Don Slack Insurance, Inc. v. Fidelity & Casualty Co., 385 So. 2d 1061, 1064 (Fla. 5th DCA 1980).

¹² R304:69450, 69456, 69458 (RRA4).

holes; cigarettes with ventilation holes placed at varying distances from the tip; cigarettes with different leaf blends; cigarettes with different flavorings or other ingredients; and cigarettes processed with ammonia compounds (which allegedly increased addictiveness). This is only a partial list of the specific designs, ingredients, and manufacturing processes that plaintiffs challenged as involving various defects or failures to warn.¹³

Similarly, to support their assertions of "negligence," plaintiffs relied on the same broad spectrum of assertions, with added allegations concerning various methods of advertising, marketing, and promotion -- e.g., cigarette sampling, celebrity advertising, couponing, "youth marketing," "glamour advertising," and a host of other activities at different times over nearly half a century.¹⁴

Given the Phase I record and findings, no subsequent factfinder can identify the act(s) or omission(s) that created the "defect" or constituted the "negligence," and then determine whether that conduct caused an individual plaintiff's injury. But linking wrongful conduct to a particular plaintiff's injury is indispensable to a determination of liability.¹⁵

¹³ See, e.g., T13475-77, 25505-08, 25903, 25911, 26139-41, 26164-66, 26169, 26181-85, 26231, 26284-87, 26292-94, 36352, 36421, 36451, 36483-86, 36562-65, 36664-65, 36720-21, 36729-32.

¹⁴ See, e.g., T11235, 12592-94, 13475-77, 15423-24, 16470, 17265, 18225-27, 18750-57, 36480-83, 36492-95.

¹⁵ See, e.g., Edward M. Chadbourne, Inc. v. Vaughn, 491 So. 2d 551, 553 (Fla. 1986) (strict liability, negligence, and warranty); West v. Caterpillar Tractor Co.,

Identification of wrongful conduct linked to the plaintiff's injury is also necessary for determining comparative fault. Contrary to the Court's suggestion (Op. at 38), future juries cannot make that determination on the basis of the Phase I findings. A jury must have "complete information as to the quantity, quality, nature and degree of the defendant's conduct so that the jury knows just what to 'compare' with its assessment of the plaintiff's." Metropolitan Dade County v. Cox, 453 So. 2d 1171, 1173 (Fla. 3d DCA 1984). Because negligence and comparative negligence are inextricably intertwined, they must be considered together by a single jury. No subsequent jury can look at the Phase I findings to determine the nature and extent of a defendant's fault, then weigh that against the nature and extent of an Engle claimant's fault:

Comparative negligence means comparison. The trier of fact compares the negligence of plaintiff and defendant. Fault is compared to fault. Thus to determine the negligence of the parties, the trier of the facts must hear the totality of fault.

336 So. 2d 80, 86 (Fla. 1976) (strict liability); Sardell v. Malanio, 202 So. 2d 746, 747 (Fla. 1967) (a "direct" link must be established "between the negligent act and the injury" so that "it can reasonably be said that but for the act the injury would not have occurred"); see also State v. J.P., 907 So. 2d 1101, 1113 n.4 (Fla. 2004) ("a plaintiff must establish a causal connection between the injury and the conduct complained of" as a matter of constitutional standing); Royal v. Black & Decker Mfg. Co., 205 So. 2d 307, 309 (Fla. 3d DCA 1967) (in a products case, "the heart" of both negligence and strict-liability theories is a causal link between the defect and the plaintiff's injury); Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 628 (5th Cir. 1999) ("Our precedent limits a negligent party's liability to injuries that are caused by the same condition that rendered the party negligent").

Id. (quoting Amend v. Bell, 570 P.2d 138, 142 (Wash. 1977)).¹⁶

Finally, the generality of the Phase I findings precludes their use as a basis for determining punitive damages. Due process requires a linkage between punitive damages and the misconduct that harmed the particular plaintiff. Under State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003), the misconduct for which punitive damages are awarded "must have a nexus to the specific harm suffered by the plaintiff." Id. at 409-10. "A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." Id. at 422 (emphasis added). Here, however, individual Engle claimants cannot link a claim for punitive damages to "the acts upon which liability was premised," because the Phase I verdict fails to identify any such "acts."

The gamut of problems discussed above cannot be sidestepped simply by assuming that every cigarette was defective or negligently made or marketed; or that defendants concealed (or conspired to misrepresent or conceal) every supposed fact a claimant might choose as the gravamen of a fraud claim; or that the

¹⁶ See also Rowlands v. Signal Construction Co., 549 So. 2d 1380, 1383 (Fla. 1989) ("liability is inextricably bound up with the apportionment of damages under the doctrine of comparative negligence"); In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1302-03 (7th Cir. 1995) (comparative negligence "overlaps the issue of liability"); Rink v. Cheminova, Inc., 203 F.R.D. 648, 652 (M.D. Fla. 2001) ("juries in the hundreds or thousands or tens of thousands of 'mini-trials' on causation and damages would be required to reconsider the findings of the original jury in the liability case in order to compare and apportion fault").

assumed defect, assumed negligence, or assumed concealment caused every claimant's smoking-related injury. By stripping defendants of their right to contest legal causation and reliance, any such assumptions would violate settled law and due process.¹⁷

B. Findings 3, 4a, 5, 5a, 6, And 8 Cannot Be Given Conclusive Effect Under Principles Of Res Judicata, Collateral Estoppel, Or Any Other Preclusion Doctrine

In giving the Phase I findings "res judicata" effect, the Court overlooked or misapprehended legal and constitutional requirements that render res judicata -- or any other preclusion doctrine -- inapplicable here.

Judgment on a claim or cause of action. Res judicata requires a judgment on the merits that resolves a "claim" or "cause of action." See, e.g., Florida Dep't

¹⁷ See, e.g., West, 336 So. 2d at 86; Wyeth, Inc. v. Gottlieb, 930 So. 2d 635, 640 (Fla. 3d DCA 2006) (class certification cannot override requirement of individual causation); Volkswagen of America, Inc. v. Sugarman, 909 So. 2d 923, 924 (Fla. 3d DCA 2005) (same); Humana, 728 So. 2d at 265 (reliance requirement in an omissions case "cannot be satisfied by assumptions"); Lindsey v. Normet, 405 U.S. 56, 66 (1972) (due process guarantees defendants a chance to "present every available defense"); Agency for Health Care Administration v. Associated Industries, 678 So. 2d 1239, 1254 (Fla. 1996) (irrebuttable presumption violated due process); Broussard, 155 F.3d at 344-45 (due process requires opportunity to contest individual causation).

Furthermore, the requirements of substantive tort law and due process cannot be altered by class actions, which are a purely procedural device. See, e.g., State v. Domingo Garcia, 229 So. 2d 236, 237 (Fla. 1969) (Supreme Court rules "cannot abrogate or modify substantive law"); Hoyte v. Stauffer Chemical Co., 2002 WL 31892830, at *56 (Fla. 2d DCA Nov. 6, 2002) ("The class action device is procedural in nature only and cannot be used to change the substantive law"); see also Amchem Products, Inc. v. Windsor, 521 U.S. 591, 613 (1997) (federal class-action rules may not modify "any substantive right").

of Transportation v. Juliano, 801 So. 2d 101, 105 (Fla. 2001). In declining to give res judicata effect to the Florida Settlement Agreement and resulting judgment, the Court quoted Florida Dep't of Transportation's express requirement of a "judgment on the merits" that resolves a "cause of action." (Op. at 14, quoting 801 So. 2d at 105.) Under the same principle, however, the Phase I findings cannot be given res judicata effect. The findings do not constitute a "judgment" that resolves any "claim" or "cause of action."¹⁸ Indeed, the Court's opinion expressly recognizes that the Phase I findings did not adjudicate any claim: "the Phase I verdict did not constitute a finding of liability," and "the Phase I jury 'did not determine whether the defendants were liable to anyone.'" (Op. at 22, 22-23, quoting the Third District's opinion, 853 So. 2d at 450 (emphasis in original).)

The Court cited only two cases to support its conclusion that the Phase I findings can be treated as res judicata. (Op. at 36-37.) Both are inapposite. In Daenzer v. Wayland Ford, Inc., 210 F.R.D. 202, 205 (W.D. Mich. 2002), rev'd sub nom. Dykstra v. Wayland Ford, Inc., 34 Fed. Appx. 911 (6th Cir. 2005), the trial court granted summary judgment in plaintiffs' favor on liability; it then decertified

¹⁸ See, e.g., Lewis v. Connecticut General Insurance Co., 427 So. 2d 254, 254 (Fla. 5th DCA 1983) ("a jury verdict is not an adjudication, and a judgment is essential to the operation of res judicata and estoppel by judgment"). Collateral estoppel incorporates the same requirement. See, e.g., Hoechst Celanese Corp. v. Fry, 693 So. 2d 1003, 1006 n.9 (Fla. 3d DCA 1997) (neither res judicata nor collateral estoppel applies in the absence of a judgment); Weigh Less For Life, Inc. v. Barnett Bank, 399 So. 2d 88, 90 (Fla. 1st DCA 1981) (collateral estoppel is inapplicable without a "final adjudication of the rights of the parties").

the class with respect to damages but held that the liability determination would apply to class members' subsequent individual claims. Here, in contrast, this Court has expressly recognized that Phase I did not determine liability. Moreover, the Sixth Circuit reversed the liability judgment in Daenzer, thus negating any conclusive effect. And in McCormack v. Abbott Laboratories, Inc., 617 F. Supp. 1521, 1524 (D. Mass. 1985), the court entered summary judgment for the defendant on the issue of strict liability before decertifying the class, then held that the judgment would preclude corresponding claims by individual class members as res judicata. But, again, Phase I here did not determine liability.¹⁹

Moreover, research has failed to uncover any precedent, from any court, in which a class action was decertified after trial but findings produced by the trial were given preclusive effect for the benefit of individual class members. In fact, courts have repeatedly rejected such trial plans. For example, in In re Rhone-

¹⁹ For reasons stated elsewhere in this motion, no judgment can be entered in favor of Farnan and Della Vecchia, the two Phase II-A plaintiffs whose compensatory awards have been reinstated. (See Points III and IV below.) In any event, such a judgment could not provide the foundation for treating the preserved Phase I findings as conclusive with respect to other Engle claimants. Any such judgment would be based on the Phase II-A trial, during which Farnan and Della Vecchia did not even purport to stand in the shoes of other class members. Phase II-A focused entirely on the specific circumstances of three individuals (Farnan, Della Vecchia, and Amodeo); it did not address the circumstances of anyone else. See, e.g., Cooper v. Federal Reserve Bank, 467 U.S. 867, 873 (1984) (mere resolution of class representative's personal claim on individual basis had no preclusive effect on claims of absent class members). Nor can the void be filled by the Court's "issue certification" under Fla. R. Civ. P. 1.220(d)(4)(A) (see Point II below), because there still is no classwide liability judgment.

Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995), the trial court proposed a trial of classwide issues in which the jury would render "a special verdict that would answer a number of questions bearing, perhaps decisively, on whether the defendants are negligent"; if negligence was found, "individual members of the class would then file individual tort suits in state and federal district courts around the nation and would use the special verdict, in conjunction with the doctrine of collateral estoppel, to block relitigation of the issue of negligence." Id. at 1297. The Seventh Circuit rejected the plan, observing that "without a final judgment the special verdict would not even have collateral estoppel effect." Id.²⁰ Indeed, stretching res judicata, collateral estoppel, or any other doctrine to give preclusive effect to the preserved Phase I findings would violate not only applicable law but also due process.²¹

²⁰ See also Spitzfaden v. Dow Corning Corp., 833 So. 2d 512, 523 (La. App. 2002) (rejecting procedure in which trial court decertified class after trial but still sought to give trial findings conclusive effect in subsequent cases to be brought by individual members of decertified class); In re Methyl Tertiary Butyl Ether Products Liability Litigation, 209 F.R.D. 323, 351-52 (S.D.N.Y. 2002) (rejecting similar plan for certification to be followed by individual suits). In Spitzfaden, the court found that the procedure was especially unfair because "the status of the case as a class action allowed the admission of evidence that would otherwise have had marginal relevance to the case of the eight named plaintiffs." 833 So. 2d at 523.

²¹ See, e.g., Richards v. Jefferson County, Alabama, 517 U.S. 793, 804 (1996) ("extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is 'fundamental' in character"); Hansberry v. Lee, 311 U.S. 32, 40 (1940) (due process limits application of res judicata).

Specificity. In addition, the preserved Phase I findings cannot be treated as res judicata or collateral estoppel because they lack specificity. Even when a jury determines a complete cause of action, the resulting judgment lacks conclusive effect on a particular issue if the verdict fails to establish conclusively how the jury resolved that issue.²² As shown above, no one can even guess -- let alone conclusively determine -- what the Phase I jury found to be unlawful conduct.

Fair proceeding. Finally, preclusive effect cannot be given to findings produced by a skewed or unfair proceeding.²³ This Court has now held that the Phase I trial improperly included issues such as punitive "entitlement," "misrepresentation," and "emotional distress." (Op. at 3-4, 36.) Plaintiffs

²² See, e.g., Acadia Partners v. Tompkins, 673 So. 2d 487, 489 (Fla. 5th DCA 1996) (neither res judicata nor collateral estoppel was appropriate where verdict failed to show jury's reasoning "conclusive[ly]"; verdict might have rested on plaintiff's failure to prove an element of the claim or on defendant's proof of an affirmative defense); see also Krug v. Meros, 468 So. 2d 299, 302 (Fla. 2d DCA 1985) (prior judgment must have determined the "precise facts or questions" in issue; collateral estoppel was unavailable where basis for judgment could not be established "conclusively"); Sun State Roofing v. Cotton States Mutual Insurance Co., 400 So. 2d 842, 844 (Fla. 2d DCA 1981) (collateral estoppel was unavailable where basis for verdict could not be determined "conclusive[ly]"; general verdict made it "impossible to determine which theory the jury relied on").

²³ See, e.g., Kremer v. Chemical Construction Corp., 456 U.S. 461, 480 (1982) ("collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue"); Montana v. United States, 440 U.S. 147, 164 n.11 (1970) (preclusive effect is unjustified and "[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation"); State v. McBride, 848 So. 2d 287, 290 (Fla. 2003) (collateral estoppel cannot be applied when it would work a "manifest injustice").

presented an avalanche of evidence and argument on those issues.²⁴ The resulting "spillover" tainted the entire Phase I verdict and precludes giving conclusive effect to the preserved Phase I findings (and precludes reinstating any judgment for Farnan and Della Vecchia).²⁵

C. Application Of Findings 3, 4a, 5, 5a, 6, And 8 In Subsequent Actions Violates Constitutional Limits On Bifurcation And The Prohibition Against Jury "Re-Examination"

As shown above, the preserved Phase I findings cannot be applied in subsequent actions without limitless guesswork as to what the Phase I jury found to be unlawful conduct. Indeed, subsequent factfinders will be free to tie individual liability, compensatory damages, and punitive damages to alleged conduct that the Phase I jury may well have rejected as a basis for their findings. The result will be unconstitutional bifurcation and re-examination of the Phase I findings. The Court dismissed such concerns by relying on one inapposite case, Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620 (5th Cir. 1999), which was never cited by the

²⁴ See, e.g., T36341-747, 37424-523.

²⁵ For example, a new trial is required if a plaintiff presents evidence or argument that the defendant's conduct was punishable or reprehensible before punitive damages are in issue. See, e.g., Erie Insurance Co. v. Busby, 394 So. 2d 228, 229 (5th DCA 1981) (reversing award that might have been "the product of counsel's wrongful request for punitive damages"); see also Green v. Goldberg, 557 So. 2d 589, 590 (Fla. 4th DCA 1989) (granting new trial where erroneous directed verdict on wrongful death claim could have had a "spillover effect" on verdict regarding companion survivor claim); Ryko Manufacturing Co. v. Eden Services, 823 F.2d 1215, 1240 (8th Cir. 1987) (granting new trial where there was a "substantial likelihood" that verdict on one claim was "influenced" by evidence and argument on other claims that were wrongly submitted).

parties or by the court below. The Court thus overlooked or misapprehended settled principles under both the Florida and the U.S. Constitutions.

Article I, § 22 of the Florida Constitution guarantees the right to a jury trial, which "is not to be narrowly construed." In re Forfeiture of 1978 Chevrolet Van, 493 So. 2d 433, 435 (Fla. 1986). As the Court acknowledges, Florida's provision is to be construed by reference to its federal counterpart, the Seventh Amendment. (Op. at 37 n.13.) Under settled Seventh Amendment principles as well as due process, issues decided by one jury cannot be re-examined by other juries.²⁶

The Court based its position on Mullen, which has no possible relevance here. The case involved a tiny class -- 150 (or fewer) casino-boat employees who claimed that the boat's defective ventilation system exposed them to second-hand smoke. The class, certified solely under Fed. R. Civ. P. 23(b)(3), was limited to crew members "with occupational respiratory illness caused by or exacerbated by the defective ventilation system." 186 F.3d at 623, 624. A divided panel of the Fifth Circuit upheld certification and approved a bifurcated trial plan in which negligence and a few other issues (seaman status, vessel status, and seaworthiness)

²⁶ See Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 500 (1931); Castano v. American Tobacco Co., 84 F.3d 734, 750-51 (5th Cir. 1996); In re Rhone-Poulenc, 51 F.3d at 1302-03; cf. Rowlands, 549 So. 2d at 1383 (some issues are so intertwined that they have to be tried together); Lindenfield v. Dorazio, 606 So. 2d 1255, 1258 (Fla. 4th DCA 1992).

would be tried in Phase I, while individual causation and other issues would be tried in Phase II. Id. at 623.

In Mullen, the alleged negligence (improper ventilation) was clearly specified -- in contrast to this case, where it is impossible to specify the negligence (or any other unlawful conduct) underlying the Phase I findings. Furthermore, most cases that cite Mullen are careful to note its limiting facts (as was Mullen itself) -- e.g., the tiny class, the exposure of all class members under the same circumstances during a limited time period, and defendants' waiver of all constitutional and other objections to bifurcation (id. at 628). For example, in Neely v. Ethicon, Inc., 2001 WL 1090204, at *8-9 (E.D. Tex. Aug. 15, 2001), the court pointed out that the Mullen class was limited to individuals who were "injured on a single boat at a single location in Louisiana," and that a single court would handle both phases of the bifurcated trial -- in contrast to Neely, a massive products-liability class action, where "all the Court can do is cross its fingers and hope that the second phase judge and jury get it right." Id. at *8-9, 13. Mullen itself distinguished cases in which much larger numbers of individuals were exposed to "products from different sources over different time periods," and specifically distinguished the smokers' class action in Castano as involving greater "managerial complexities." 186 F.3d at 626-27.

Thus, Mullen has no bearing here. It says nothing that supports the notion that abstract, generalized findings can be applied by separate juries under the vastly different circumstances presented in this case. Other decisions that do address such circumstances in a variety of contexts clearly reject the procedure that the Court has now endorsed, either as improper jury re-examination or as a violation of due process in other respects.²⁷

II. Post-Trial Conversion Of This Case Into A "(d)(4)(A)" Class Action Is Legally And Constitutionally Improper

The Court correctly found that the class must be decertified because it fails to meet the "predominance" requirement of Fla. R. Civ. P. 1.220(b)(3). (Op. at 32.) But then, on its own initiative, the Court retroactively certified an "issues" class under Rule 1.220(d)(4)(A) as a vehicle for preserving some of the Phase I findings. The Court's action has no precedent under the class-action law of Florida or any other jurisdiction. Furthermore, defendants have been denied notice and an

²⁷ See, e.g., Blyden, 186 F.3d at 268-69 (generalized "liability" verdict was subject to improper re-examination by separate juries determining individual class members' damages); Broussard, 155 F.3d at 337 (trial plan that prevented defendants from contesting individual causation or other liability issues was fundamentally unfair and violated due process); In re Fibreboard Corp., 893 F.2d 706, 711-13 (5th Cir. 1990) (rejecting a trial plan that "lift[s] the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury," thus violating due process); see also Rollins, Inc. v. Butland, 2006 WL 1791705, at *10 (Fla. 2d DCA June 30, 2006) ("Although a trial court confronting a massive class action may find it tempting to allow proof of 'patterns' and 'common schemes' to paper over the dissimilarities attendant to individual claims, considerations of administrative convenience do not trump the class action defendant's right to due process of law").

opportunity to contest the propriety of the Court's action. The possibility of (d)(4)(A) certification was never litigated in the lower courts; this case was certified and proceeded through trial and appeal solely as a (b)(3) class action.²⁸ Indeed, the Court itself has emphasized the parties' supposed "reliance" on the lower courts' prior certification rulings, all of which were based on (b)(3). (See Op. at 30.) In short, the Court's decision overlooks or misapprehends Florida's class-action law and the requirements of due process.

A. The Court's Invocation Of (d)(4)(A) Is Unsupported By Class-Action Law In Florida Or Any Other Jurisdiction

No precedent in Florida or any other jurisdiction supports (d)(4)(A) certification after a case has been certified, tried, and reviewed by the lower courts solely as a (b)(3) class action. Indeed, a basic principle of class-action law throughout the country is that certification -- under any subdivision of the rules -- must be addressed and determined before there is a trial on the merits.²⁹

²⁸ Over the long history of this case, the parties have made passing references to subsection (d)(4) on a few occasions (along with other subsections of Rule 1.220), but never in any context remotely resembling the situation presented here -- i.e., post-trial certification under (d)(4)(A) to preserve selected Phase I jury findings on the Court's own initiative. Defendants' references to subdivision (d)(4) have always treated it as a subsidiary provision that may implement, but never override, the requirements of subdivision (b).

²⁹ E.g., Kerkhof v. MCI Worldcom Inc., 282 F.3d 44, 54-55 (1st Cir. 2002); Peritz v. Liberty Loan Corp., 523 F.2d 349, 353 (7th Cir. 1975); see also Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 275 (4th Cir. 1980) ("deliberate deferral of the [certification] determination until full trial on the merits . . . is fraught with serious problems of judicial economy, and of fairness to both sides").

Furthermore, no trial plan was ever proposed for (d)(4)(A) certification, much less considered and ruled upon by the lower courts. Class certification cannot be viewed in the abstract, without the consideration of a trial plan and other practical issues.³⁰

The Court overlooked or misapprehended these principles. To support its decision, the Court cited a handful of cases that refer to Fed. R. Civ. P. 23(c)(4)(A) -- Olden, Carnegie, In re Visa, Valentino, and Slaven. (Op. at 33-36.) But only one of those cases (Valentino) actually involved (c)(4)(A) certification, and the certification in that case was reversed; the rest merely cited (c)(4)(A) in passing. (See fn. 31 below.) Furthermore, none of the cited decisions even remotely supports an appellate court's sua sponte invocation of a class-certification provision when the applicability of that provision was never litigated below, and when the case was certified and tried to judgment under a different provision. Finally, none of the cited decisions actually resulted in a class-action trial; all have been or are in

³⁰ See, e.g., Feder v. Electronic Data Systems Corp., 429 F.3d 125, 139-40 (5th Cir. 2005) (trial plan must be developed before certification where there are "potential trial complications"); State Farm Mutual Automobile Insurance Co. v. Lopez, 156 S.W.3d 550, 555 (Tex. 2004) (a "certification order must indicate how the claims will likely be tried so that conformance with [the class-action rule] may be meaningfully evaluated") (emphasis omitted); In re IPO Securities Litigation, 227 F.R.D. 65, 73 (S.D.N.Y. 2004) (requiring submission of detailed trial plan before certification); Fed. R. Civ. P. 23(c)(1), Advisory Committee Note, 2003 Amendments ("An increasing number of courts require a party requesting class certification to present a 'trial plan' that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof").

the process of being settled. Thus, none of the decisions stands as precedent for applying findings from an "issues" trial to subsequent individual claims.³¹

³¹ In Olden v. Lafarge Corp., 383 F.3d 495 (6th Cir. 2004), the trial court certified the case solely under Federal Rule 23(b)(2) and (b)(3), not (c)(4)(A). Id. at 498, 507. On interlocutory review, the Sixth Circuit merely cited (c)(4)(A) in passing, noting the possibility that "liability" and "damages" might be bifurcated. Id. at 509. Here, of course, Phase I was not a "liability" trial, as the Court itself has recognized. (Op. at 22.) Moreover, Olden acknowledged that bifurcation poses constitutional problems and suggested that the trial court consider those problems on remand. Id. No trial ensued, and the case is in the process of being settled.

In Carnegie v. Household International, Inc., 376 F.3d 656 (7th Cir. 2004), cert. denied sub nom. H&R Block, Inc. v. Carnegie, 543 U.S. 1051 (2005), certification was affirmed on interlocutory appeal on grounds other than (c)(4)(A). Here, too, the court merely made a passing reference to (c)(4)(A). 376 F.3d at 661. There was no trial, and the case is on the verge of settlement.

In In re Visa Check/Mastermoney Antitrust Litigation, 280 F.3d 124 (2d Cir. 2001), the trial court certified the case under Rule 23(b)(2) and (b)(3), not (c)(4)(A), and on interlocutory review the Second Circuit affirmed (b)(3) certification only. Id. at 129, 147. Again, (c)(4)(A) was cited merely in passing, in a theoretical discussion of bifurcating "liability and damages" and other "management tools" (which also emphasized that any consideration of bifurcation was "premature"). Id. at 141 & n.9. The case was settled without a trial.

In Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996), where the claims involved a single specific drug sold over "a relatively short period of time," the trial court granted conditional (c)(4)(A) certification as to "issues of strict liability, negligence, failure to warn, breach of implied and express warranty, causation in fact, and liability for punitive damages." Id. at 1229. On interlocutory review, the Ninth Circuit reversed because Rule 23(b)(3)'s "predominance" and "superiority" requirements had not been satisfied and there had been no showing of "how the class trial could be conducted." Id. at 1234-35. The case was settled without a trial.

Finally, in Slaven v. BP America, Inc., 190 F.R.D. 649 (C.D. Cal. 2000), the trial court certified, and then partially decertified, a class under (b)(3), not (c)(4)(A). Id. at 654, 657-58. The court noted that liability had been "virtually conceded" by at least many defendants on some causes of action (involving a single oil spill), and therefore certification could be maintained on liability issues. Id. at 657-58. The court made a single passing reference to (c)(4)(A) in the course

In addition, application of (d)(4)(A) here conflicts with the Court's own recognition that this action fails to satisfy the (b)(3) "predominance" requirement. (Op. at 32.) Subdivision (b) of Rule 1.220 establishes the three basic categories of cases that are maintainable as class actions. Subdivision (d), on the other hand, deals with a variety of procedural matters (e.g., the timing of motions and orders, class notice) within the framework established by subdivision (b). Subdivision (d) does not establish an independent category of class actions, and it cannot override the "predominance" and "superiority" requirements of (b)(3). Yet that is the effect of the Court's decision. Henceforth (b)(3) certifications can be converted at any time -- even after trial -- into (d)(4)(A) certifications; individualized questions can be simply sliced away, and the rest can be treated as "superior" to individualized litigation, effectively nullifying the (b)(3) requirements.³²

of that discussion. Once again, no liability trial actually took place, and all claims have been or are in the process of being settled.

³² As noted, even Valentino -- the one case cited by this Court in which Federal Rule 23(c)(4)(A) was actually applied -- rejected certification because the necessary showings of "predominance" and "superiority" were lacking. 97 F.3d at 1234-35. See also Neely, 2001 WL 1090204, at *5 (a court "cannot manufacture predominance through the nimble use of subdivision (c)(4)"; instead, "a cause of action, as a whole, must satisfy the predominance requirement of (b)(3)," while (c)(4) is merely "a housekeeping rule that allows courts to sever the common issues for a class trial") (quoting Castano, 84 F.3d at 745 n.21); Hines, Challenging the Issue Class Action End-Run, 52 Emory L.J. 709, 712 (2003) (Federal Rule 23(c)(4)(A) does not allow an "end-run around the predominance requirement for class actions that otherwise would fail to satisfy that requirement").

The potential effects of the Court's decision are sweeping and radical. Despite the Court's comment in a footnote that "the procedural posture of this case is unique and unlikely to be repeated" (Op. at 37 n.12), some litigants and courts are likely to treat the decision as permitting "issue" certification in class actions generally, with few, if any, restrictions. Furthermore, if and when trial courts take that position, appellate review will be virtually meaningless because the mere presence of a "common issue" will preclude a finding of "abuse of discretion." (And, under the Court's interpretation of "law of the case" (Op. at 27-32), interlocutory affirmance will effectively immunize such certifications from post-judgment review.) Moreover, appellate courts on their own initiative may feel free to convert class actions that were certified and tried under other provisions into (d)(4)(A) class actions, without prior notice to the litigants, retroactively picking and choosing the "issues" to be given classwide effect. Neither Florida law nor the law of any other jurisdiction supports such results.

B. The Court's Invocation Of (d)(4)(A) On Its Own Initiative Violates Due Process By Denying Defendants Notice And An Opportunity To Be Heard

In addition to violating Florida's class-action law, post-judgment creation of a (d)(4)(A) class action, on the Court's own initiative, violates due process by

denying defendants the most elementary prerequisites of fairness -- notice and an opportunity to be heard.³³

A class action cannot be shifted from one basic form to another after the action has been tried.³⁴ The unfairness of a post-trial change is compounded when the change is made by an appellate court without briefing or argument.

Certification under (d)(4)(A) was never litigated in the lower courts. This Court's creation of an entirely different theory of class certification for the first time on post-trial appeal cannot be squared with justice and fair play.³⁵

³³ See, e.g., Jones v. Flowers, 126 S. Ct. 1708, 1713-15 (2006); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); N.C. v. Anderson, 882 So. 2d 990, 993 (Fla. 2004) ("Procedural due process requires both reasonable notice and a meaningful opportunity to be heard").

³⁴ See, e.g., EEOC v. Detroit Edison Co., 515 F.2d 301, 310 (6th Cir. 1975) (where "parties proceed to trial" based on a class-certification order, "fairness" prohibits a court from altering that order "at the time of its decision on the merits"), vacated on other grounds, 431 U.S. 951 (1977); Garrett v. City of Hamtramck, 503 F.2d 1236, 1246 (6th Cir. 1974) (attempt to alter class certification at time of merits decision was improper); Brown v. Delta Air Lines, Inc., 522 F. Supp. 1218, 1221 n.1 (S.D. Tex. 1980) (rejecting class re-definition after trial), aff'd, 673 F.2d 1325 (5th Cir. 1982) (table).

³⁵ See, e.g., Carroll & Associates, P.A. v. Galindo, 864 So. 2d 24, 29 (Fla. 3d DCA 2003) ("To allow a court to rule on a matter without proper pleadings and notice is violative of a party's due process rights"); Winddancer v. Stein, 765 So. 2d 747, 748 (Fla. 1st DCA 2000) ("an order adjudicating issues not presented by the pleadings, noticed to the parties, or litigated below denies fundamental due process"); Hancock v. Tipton, 732 So. 2d 369, 372 (Fla. 2d DCA 1999) (same); see also Lee County Branch of NAACP v. City of Opelika, 748 F.2d 1473, 1480 n.12 (11th Cir. 1984) ("due process and precedent mandate that when the rules of the game are changed, the players must be afforded a full and fair opportunity to play by the new regulations") (internal quotation marks omitted).

III. Unresolved Appellate Issues Remain To Be Addressed By The Third District (And Potentially By This Court)

Defendants raised numerous issues on appeal that were left unresolved by the Third District because that court reversed the judgment on other grounds. (See Defendants' Merits Brief at 49-50 & n.35; *id.* Appendix Vol. 3, Tab 28, at 53-55, 69-86, 104-06, 125-49; *id.* Appendix Vol. 3, Tab 30, at 33-34, 41-49, 64-65, 70-73, 75-80.) Those issues stand as independent reasons why the preserved Phase I findings cannot be applied (and, in addition, why judgment cannot be entered for Farnan and Della Vecchia). Defendants submit that the Court may have overlooked or misapprehended those issues. For example, defendants argued in the Third District that the trial violated federal preemption, which, among other things, forecloses the possibility of interpreting the "defect" findings as meaning that all cigarettes are defective. Defendants ask the Court to clarify that on remand the Third District may consider and decide all remaining unresolved issues.³⁶

³⁶ See, e.g., Commission on Ethics v. Barker, 677 So. 2d 254, 257 (Fla. 1996) ("we remand the case for the determination of [an unaddressed issue]"); State v. Nordstrom, 613 So. 2d 437, 441 (Fla. 1993) (remanding to the district court "with directions to consider the other issues raised in the initial appeal"); see also Rosen v. FIGA, 802 So. 2d 291, 295 n.6, 298 (Fla. 2001) ("On remand, any issues previously raised by the parties before the First District but left unresolved by our decision may be addressed"); Lexington Insurance Co. v. Simkins, 704 So. 2d 1384, 1386 (Fla. 1998) ("On remand, any issues previously raised but left unresolved can be addressed"); Provident Management Corp. v. City of Treasure Island, 718 So. 2d 738, 740 (Fla. 1998) ("On remand, any issues previously raised but left unresolved can be addressed").

Alternatively, if this Court has itself considered and rejected defendants' arguments on those issues, defendants respectfully ask the Court to state that it has done so.

IV. The Court's Ruling On Della Vecchia's Class Membership Erroneously Expands The Class Definition On Grounds Never Previously Addressed

In ruling that Della Vecchia was a member of the Engle class, the Court relied on erroneous assumptions that have never been briefed or argued. The Court's ruling may be interpreted as expanding the Engle class and therefore the universe of individuals who can take advantage of any preserved Phase I findings.

The Court stated:

As for Angie Della Vecchia, she was diagnosed with lung cancer in early 1997. However, at that time, it was also noted by her doctors that she had a past history of chronic obstructive pulmonary disease ("COPD") and significant hypertension. Because two of the diseases at issue in this case are coronary heart disease and COPD, Della Vecchia's medical records indicate that she had been suffering from a tobacco related disease prior to the time of [re-]certification [i.e., November 21, 1996] and is therefore properly included as a class member. The jury specifically found that her conditions were caused by smoking.

(Op. at 5-6; see also id. at 50.)

The Court thus overlooked the following facts: (1) the jury made no finding as to the cause of Della Vecchia's COPD or hypertension; (2) the jury made no finding, and there was no evidence, that Della Vecchia had COPD or hypertension before November 21, 1996 (the record indicates only that she had those conditions at some unspecified time before she was diagnosed with lung cancer in 1997); (3)

lung cancer was the only injury on which Della Vecchia's claims were based; and (4) plaintiffs' counsel stipulated that there was no causal connection between Della Vecchia's COPD and lung cancer.³⁷

Thus, the Court's suggestion that the facts recited in its opinion are "essentially undisputed" (Op. at 46) is erroneous. In addition, the Court's ruling overlooks governing law and principles of due process. The Court based Della Vecchia's class membership on hypertension and COPD -- conditions that were not the basis of her claims (and are causally unrelated to her claims). No precedent in Florida or elsewhere allows an individual's class membership to be divorced in this manner from the injury for which he or she seeks damages.

Furthermore, plaintiffs have never suggested that Della Vecchia's COPD or hypertension supported her class membership or her claims, and thus defendants had no reason to anticipate and challenge such a suggestion. By engaging in its own appellate factfinding, the Court has retroactively denied defendants any opportunity to dispute the Court's erroneous findings.

Conclusion

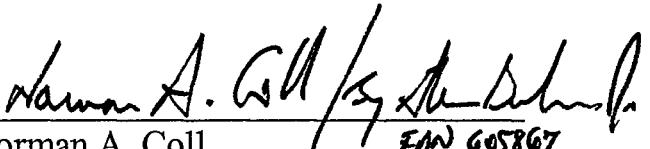
The Court should grant rehearing and (a) hold that Findings 3, 4a, 5, 5a, 6, and 8 -- like Findings 4, 7, and 9 -- can have no conclusive effect on subsequent actions; (b) withdraw its (d)(4)(A) certification; (c) hold that no judgments can be

³⁷ See T43010-11, 43017-18; R161:37550-55 (RRA2); R229:52299-303 (RRA3); R304:69449-50, 69461 (RRA5).

entered (at least at this time) for Farnan and Della Vecchia; and (d) hold that Della Vecchia was not a member of the Engle class.

Alternatively, the Court should (a) clarify that on remand the Third District may consider and decide the unresolved issues defendants have raised on appeal; or (b) if this Court has itself considered and rejected defendants' arguments on those issues, state that it has done so.

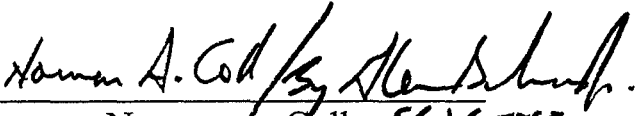
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Respondents' Motion for Rehearing was served by U.S. Mail on all counsel on the attached Service List this 7th day of August, 2006.


Norman A. Coll F&W 405807

Engle, M.D., et al. v. Liggett Group, Inc. et al.

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Supreme Court of Florida

THURSDAY, DECEMBER 21, 2006

CASE NOS.: SC03-1856

Lower Tribunal Nos.: 3D00-3400

3D00-3206

3D00-3207

3D00-3208

3D00-3210

3D00-3212

3D00-3215

HOWARD A. ENGLE, M.D.,
ET AL.

vs. LIGGETT GROUP, INC.,
ET AL.

Petitioner(s)

Respondent(s)

The motions for rehearing filed by the petitioners and Liggett Group, LLC., are hereby denied. Respondents' motion for rehearing is hereby granted in part and denied in part, and the opinion issued July 6, 2006, is hereby withdrawn. The opinion dated December 21, 2006, is issued in lieu thereof and has been revised as follows: The Court upholds the Phase I finding in favor of the Engle Class on Question 7 (breach of express warranty). However, the Court's determination that the fraud and misrepresentation finding in Question 4 cannot stand, necessarily invalidates the conspiracy to misrepresent finding in Question 5. The Court also corrects a misstatement regarding one of the jury's findings as to class representative Della Vecchia. The opinion has been revised on pages 4, 6, and 52-53, and these revisions are set forth in bold and strike-through below:

This same majority concludes that it was proper to allow the jury to make findings in Phase I on Questions 1 (general causation), 2(addiction of cigarettes), 3 (strict liability), 4(a) (fraud by concealment), ~~5(civil conspiracy-misrepresentation)~~, 5(a) (civil-conspiracy-concealment), 6 (breach of implied warranty), 7 (**breach of express warranty**), and 8 (negligence). Therefore, these findings in favor of the Engle Class can stand. The Court unanimously agrees that the nonspecific findings in favor

of the plaintiffs on Questions 4 (fraud and misrepresentation) and 9 (intentional infliction of emotional distress) are inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause. Therefore, these findings cannot stand. **Because the finding in favor of the plaintiffs on Question 5 (civil conspiracy-misrepresentation) relies on the underlying tort of misrepresentation, this finding also cannot stand.**

....

... The jury specifically found that her ~~conditions were~~ **lung disease** was caused by smoking. ...

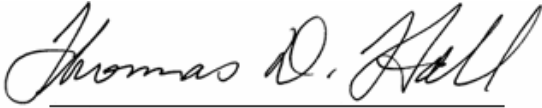
....

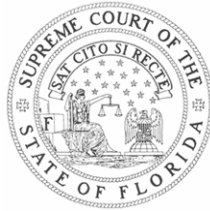
We approve the Phase I findings for the class as to Questions 1 (that smoking cigarettes causes aortic aneurysm, bladder cancer, cerebrovascular disease, cervical cancer, chronic obstructive pulmonary disease, coronary heart disease, esophageal cancer, kidney cancer, laryngeal cancer, lung cancer (specifically, adenocarcinoma, large cell carcinoma, small cell carcinoma, and squamous cell carcinoma), complications of pregnancy, oral cavity/tongue cancer, pancreatic cancer, peripheral vascular disease, pharyngeal cancer, and stomach cancer), 2 (that nicotine in cigarettes is addictive), 3 (that the defendants placed cigarettes on the market that were defective and unreasonably dangerous), 4(a) (that the defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both), ~~5 (that all of the defendants agreed to misrepresent information relating to the health effects of cigarettes or the addictive nature of cigarettes with the intention that smokers and the public would rely on this information to their detriment)~~, 5(a) (that the defendants agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment), 6 (that all of the defendants sold or supplied cigarettes that were defective), (7) **(that all of the defendants sold or supplied cigarettes that, at the time of sale or supply, did not conform to representations of fact made by said defendants)**, and 8 (that all of the defendants were negligent). Therefore, these findings in favor of the Engle Class can stand.

NO FURTHER MOTIONS FOR REHEARING WILL BE ENTERTAINED BY THIS COURT.

LEWIS, C.J., and ANSTEAD, PARIENTE, and QUINCE, JJ., concur.
WELLS and BELL, JJ., would grant the motion of Liggett Group LLC and would
grant the motion of the other respondents on all points.
CANTERO, J., recused.

A True Copy
Test:


Thomas D. Hall
Clerk, Supreme Court



jn
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IN THE FLORIDA FOURTH DISTRICT COURT OF APPEAL

PHILIP MORRIS USA INC., R.J. REYNOLDS TOBACCO COMPANY, and
LORILLARD TOBACCO COMPANY,

Defendants/Appellants,

v.

JERRY WEINGART, as personal representative of the Estate of
CLAIRE WEINGART, deceased,

Plaintiff/Appellee.

Appeal from the Circuit Court in and for Palm Beach County, Florida
Case No. 2008-CA-38878
Hon. Glenn D. Kelley, Circuit Judge

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FEBRUARY 8, 2012

to quit—even after she was diagnosed with lung cancer. *Id.* at 2303, 2306-08, 2408, 2424-26, 2442.

On July 19, 2011, the jury returned its Phase I verdict. The jury found that Ms. Weingart was an *Engle* class member, and found in plaintiff's favor on his claim for strict liability. T. 3167-68 [App. G]. The jury found in favor of defendants on plaintiff's claims for negligence, fraudulent concealment, and conspiracy to commit fraudulent concealment. *Id.* at 3167-69. The jury allocated 91% of the fault to Ms. Weingart, 3% to PM USA, 3% to R.J. Reynolds, and 3% to Lorillard. *Id.* at 3169. The jury awarded plaintiff no compensatory damages. *Id.* The jury also found that plaintiff was not entitled to punitive damages. *Id.*

Defendants moved to set aside the verdict based on the trial court's ruling regarding the preclusive effect of the *Engle* Phase I findings. The trial court denied that motion. R. 33:6515-6516 [App. D]. The court granted plaintiff's motion for additur, awarding him \$150,000 in compensatory damages. R. 33:6508-6514 [App. E]. In entering final judgment, the trial court reduced that award to a total of \$13,500 based on Ms. Weingart's comparative fault. SR. 3:536-38 [App. F].

SUMMARY OF ARGUMENT

In *R.J. Reynolds Tobacco Co. v. Jimmie Lee Brown*, 70 So. 3d 707 (Fla. 4th DCA 2011), *notice to invoke discretionary jurisdiction filed*, No. SC11-2201 (Fla. Nov. 7, 2011), this Court held that it was “constrained by the Florida Supreme

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

KAREN WHITNEY

Plaintiff,

v.

CASE NO.: 01-2011-CA-000286

DIVISION: J

R.J. REYNOLDS TOBACCO
COMPANY, et al.,

Defendants. _____/

PLAINTIFF'S NOTICE OF FILING SUCCESSOR LETTERS OF ADMINISTRATION

Plaintiff Karen Whitney, by and through her undersigned attorneys, hereby gives notice of the filing with the Court of the Letters of Administration issued on June 19, 2017. (Exhibit "A")

Respectfully submitted this 26th day of June, 2017.

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I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court by using the Florida Courts E-Filing Portal, this 26th day of July, 2017.

I HEREBY FURTHER CERTIFY that a true and correct copy of the foregoing was served by electronic mail to Counsel of Record listed on the attached Service List, this 26th day of July, 2017.

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EXHIBIT A

IN THE CIRCUIT COURT FOR ALACHUA COUNTY,
FLORIDA PROBATE DIVISION

IN RE: ESTATE OF

Karen Baldwin Whitney,

File No.: 2017-CP-001087

Division:

Deceased.

LETTERS OF ADMINISTRATION
(single personal representative)

TO ALL WHOM IT MAY CONCERN

WHEREAS, Karen Baldwin Whitney, a resident of Alachua County, Florida, died on April 22, 2017, owning assets in the State of Florida, and

WHEREAS, John K. Whitney has been appointed personal representative of the estate of the decedent and has performed all acts prerequisite to issuance of Letters of Administration in the estate,

NOW, THEREFORE, I, the undersigned circuit judge, declare John K. Whitney duly qualified under the laws of the State of Florida to act as personal representative of the estate of Karen Baldwin Whitney, deceased, with full power to administer the estate according to law; to ask, demand, sue for, recover and receive the property of the decedent; to pay the debts of the decedent as far as the assets of the estate will permit and the law directs; and to make distribution of the estate according to law.

ORDERED on June 19 2017.


CIRCUIT JUDGE

MARY E. SHEFFIELD vs. R. J. REYNOLDS TOBACCO COMPANY, ET AL.
Trial- Vol. 21 on 05/09/2017

1 IN THE CIRCUIT COURT FOR THE
2 NINTH JUDICIAL CIRCUIT IN AND
3 FOR ORANGE COUNTY, FLORIDA
4 CIVIL DIVISION 43
5 CASE NO. 2013-CA-009469-0
6 COMPLEX BUSINESS LITIGATION

7 MARY E. SHEFFIELD, Personal
8 Representative of the Estate of
9 VALTON SHEFFIELD,

10 Plaintiff,

11 vs.

12 R. J. REYNOLDS TOBACCO COMPANY,
13 PHILIP MORRIS USA INC., LORILLARD
14 TOBACCO COMPANY, LORILLARD, INC.,
15 LIGGETT GROUP LLC, F/K/A LIGGETT
16 GROUP, INC., F/K/A LIGGETT & MYERS
17 TOBACCO COMPANY, VECTOR GROUP, LTD.,
18 INC., F/K/A BROOKE GROUP, LTD.,

19 Defendants.

20 - - -

21 TRIAL PROCEEDINGS
22 BEFORE THE HONORABLE
23 JUDGE JULIE H. O'KANE
24 MAY 9, 2017
25 1:00 P.M.

VOLUME 21

ORANGE COUNTY COURTHOUSE
425 N. ORANGE AVENUE
ORLANDO, FLORIDA

REPORTED BY:
STEVEN S. HUSEBY, RPR
CCR-B-1372

1 cause or some other cause if the negligence
2 contributes substantially to producing such loss,
3 injury or damage.

4 The next issue for your determination is whether
5 Valton Sheffield reasonably relied to his detriment
6 on the concealment or omission by R. J. Reynolds
7 Tobacco Company of material information concerning
8 the health effects or addictive nature of cigarettes
9 or both, and if so, whether such reliance was a
10 legal cause of Valton Sheffield's 1994 lung cancer.

11 Valton Sheffield's reliance to his detriment on
12 the concealment or omission of material information
13 was a legal cause of his lung cancer if it directly
14 and in natural and continuous sequence produced or
15 contributed substantially to producing such lung
16 cancer so that it can reasonably be said that but
17 for reliance lung cancer would not have occurred.

18 In order to be regarded as a legal cause of
19 injury, such reliance need not be the only cause.
20 Such reliance may be a legal cause of lung cancer
21 even though it operates in combination with the act
22 of another, some natural cause or some other cause
23 if such reliance contributes substantially to
24 producing such lung cancer.

25 Material information is that which is of such

1 importance that Mr. Sheffield would not have acted
2 as he did but for the concealment or omission of
3 that information. If the greater weight of the
4 evidence does not support the plaintiff's claim on
5 this issue, then your verdict should be for the
6 defendant on this claim.

7 The next issue for your determination is whether
8 Valton Sheffield reasonably relied to his detriment
9 on any concealment or omission of material
10 information in furtherance of the agreement to
11 conceal or omit material information concerning the
12 health effects or addictive nature of cigarettes or
13 both, and if so whether such reliance was a legal
14 cause of Mr. Sheffield's 1994 lung cancer.

15 A conspiracy is an agreement between two or more
16 parties to do an unlawful act or to do a lawful act
17 by unlawful means while taking overt acts in
18 furtherance of the agreement. R. J. Reynolds
19 Tobacco Company is responsible for their own acts
20 and for the acts of the other tobacco companies and
21 organizations that were members of the conspiracy so
22 long as those acts were in furtherance of the
23 agreement.

24 Valton Sheffield's reliance to his detriment on
25 any concealment or omission of material information

1 in furtherance of the agreement to conceal or omit
2 material information was a legal cause of his lung
3 cancer if it directly and in a natural and
4 continuous sequence produced or contributed
5 substantially to producing such lung cancer so that
6 it can reasonably when said that but for the
7 reliance the lung cancer would not have occurred.

8 In order to be regarded as a legal cause of
9 injury, such reliance need not be the only cause.
10 Such reliance may be a legal cause of lung cancer
11 even though it operates in combination with the act
12 of another, some natural cause or some other cause,
13 if such reliance contributes substantially to
14 producing such lung cancer.

15 Material information is that which is of such
16 importance that Mr. Sheffield would not have acted
17 as he did but for the concealment or omission of
18 that information.

19 If the greater weight of the evidence does not
20 support the plaintiff's claim on this issue, then
21 your verdict should be for the defendant on this
22 claim.

23 I instruct you that the warning labels placed on
24 cigarette packs and advertisements by the defendant
25 comply with federal law and that after July 1, 1969,

ENGLE-PROGENY PLAINTIFF VERDICTS

	PLAINTIFF	VERDICT DATE	PUNITIVE DAMAGES?
1.	AYCOCK , Thelma	4/18/2013	No
2.	BALLARD , Ralph	10/19/2012	No
3.	BARBANELL , Leon	8/13/2009	No
4.	BERGER , Judith	9/16/2014	No
5.	BOULTER , Cynthia	12/13/2018	No
6.	BOWDEN , Gloria	3/26/2014	No
7.	BOWMAN , Patricia	9/23/2011	No
8.	BROWN , Jimmie	5/22/2009	No
9.	BROWN , Mary	5/1/2015	No
10.	BUCHANAN , Nan Kathryn	12/7/2012	No
11.	BURGESS , Jacqueline	6/20/2018	No
12.	CAMPBELL , Franklin D. Sr.	8/19/2009	No
13.	CHADWELL , Brenda	9/26/2018	No
14.	CLAYTON , Gloria	3/17/2014	No
15.	COHEN , David	5/2/2013	No
16.	COOPER , Mary	9/8/2015	No
17.	CUCULINO , Antonio	1/17/2014	No
18.	CUDDIHEE , Sabrina	1/22/2020	No
19.	DOUGLAS , James	3/10/2010	No
20.	DOUGLAS , Robert	11/2/2017	No
21.	DUKE , George	4/10/2012	No
22.	EWING , Doris	1/28/2016	No
23.	FORD , Minnie	11/16/2016	No
24.	FOX , Blanche	2/23/2017	No
25.	FREEMAN , Jo	3/14/2018	No
26.	FROGEL , Shan	3/8/2019	No
27.	GAFNEY , Kathleen	3/7/2019	No
28.	GAFNEY , Kathleen	9/20/2013	No
29.	GIDDENS , Roger, Jr.	3/20/2013	No
30.	GORDON , John	10/5/2015	No
31.	GORE , Robert	3/26/2015	No
32.	GRAHAM , Earl E.	5/23/2013	No

33.	GRAY , Ellen	1/29/2015	No
34.	GRIFFIN , Patrick O.	6/25/2014	No
35.	GROSSMAN , Jan	4/29/2010	No
36.	HARDIN , Joyce	6/19/2015	No
37.	HAREWOOD , Hanifah	9/18/2018	No
38.	HARRIS , Patricia	7/31/2014	No
39.	HATZIYANNAKIS , Despina	2/15/2011	No
40.	HIOTT , Carolyn	8/1/2012	No
41.	HOLLIMAN , Ruby	3/10/2019	No
42.	IRIMI , Heather	8/28/2014	No
43.	JEWETT , Thomas	5/20/2011	No
44.	KELLEY , Daniel	1/24/2019	No
45.	KOBALLA , Stella	4/7/2011	No
46.	LAWRENCE , Joy	5/10/2017	No
47.	LEDO , Mirtha	11/1/2016	No
48.	LEWIS , James	9/1/2015	No
49.	LOCK , Richard S. and wife	10/25/2012	No
50.	LOURIE , James Harris	10/10/2014	No
51.	MACK , Peter Jr.	3/18/2011	No
52.	MACK , Peter Jr.	12/14/2012	No
53.	MALONEY , John	7/18/2017	No
54.	MAROTTA , Phil	3/20/2013	No
55.	MATHIS , Hazel	8/15/2016	No
56.	McCALL , Bernice	3/2/2016	No
57.	MONROE , Florence	12/9/2015	No
58.	ODUM , Sharon	6/7/2013	No
59.	PERROTTO , Debra	11/21/2014	No
60.	PRENTICE , Linda	9/29/2016	No
61.	REESE , Julie A.	5/20/2011	No
62.	RIZZUTO , John J.	8/23/2013	No
63.	ROZAR , Myra	4/19/2018	No
64.	RUFFO , Dorothy	5/9/2013	No
65.	RUSS , Lue	4/24/2019	No
66.	SAMMARCO , John	3/28/2014	No
67.	SCHLEIDER , Diane	11/18/2014	No
68.	SHERMAN , Melba	5/8/2009	No

69.	SIMON, Marc	9/18/2018	No
70.	SKOLNICK, Beatrice	6/14/2013	No
71.	SMITH, Sherry	9/23/2016	No
72.	SNYDER, Diane	2/19/2020	No
73.	SOFFER, Lucille	6/17/2011	No
74.	SOMMERS, Stefanny	4/6/2017	No
75.	SOWERS, Mary	2/11/2015	No
76.	STARR-BLUNDELL, Teresa	6/4/2013	No
77.	SULCER, Betty	4/18/2011	No
78.	SURY, Robert	11/28/2011	No
79.	THOMAS, Bertie	7/28/2017	No
80.	TOGNOLI, Stephen	11/18/2015	No
81.	TULLO, Mary	4/13/2011	No
82.	VARNER, Joseph	7/19/2016	No
83.	WALKER, Alvin	5/21/2012	No
84.	WEINGART, Jerry	7/19/2011	No
85.	WHITMIRE, James	3/28/2017	No
86.	WILLIAMS, Virginia	12/12/2012	No
87.	ZAMBONI, Merle	2/26/2015	No
88.	ZINGARO, Karla	5/30/2019	No
89.	AHRENS, Ina	1/28/2016	Yes
90.	ALEXANDER, Dorothy	3/6/2012	Yes
91.	ALEXANDER, Earline	6/18/2010	Yes
92.	ALLEN, Andy R. Sr.	11/26/2014	Yes
93.	ALLEN, Andy R. Sr.	4/26/2011	Yes
94.	ALVAREZ del REAL, Jorge	9/24/2019	Yes
95.	BARBOSE, Phyllis	11/18/2015	Yes
96.	BESSENT-DIXON, Frances	2/19/2019	Yes
97.	BLOCK, Sharon	8/7/2015	Yes
98.	BOATRIGHT, Richard and wife	11/12/2014	Yes
99.	BROWN, Donna	1/23/2015	Yes
100.	BROWN, John	2/17/2017	Yes
101.	BROWN, Margaret	3/23/2018	Yes
102.	BRYANT, Veda	12/6/2017	Yes

103.	BUONOMO , Connie	5/20/2010	Yes
104.	BURKHART , Pauline	5/16/2014	Yes
105.	BUSH , Charles	7/25/2018	Yes
106.	CALLOWAY , Marvin	5/31/2012	Yes
107.	CHEELEY , Willie James	1/31/2014	Yes
108.	CICCONE , Pamela	7/21/2011	Yes
109.	CLAY , Finna A.	4/14/2010	Yes
110.	COHEN , Robin	3/24/2010	Yes
111.	CRAWFORD , William	9/30/2013	Yes
112.	DANIELSON , Micah	9/7/2018	Yes
113.	DION , George	5/12/2016	Yes
114.	DUIGNAN , Kevin	9/11/2015	Yes
115.	DUIGNAN , Kevin	2/18/2020	Yes
116.	DURRANCE JONES , Janice	5/22/2019	Yes
117.	EVERS , Cindy	2/12/2013	Yes
118.	FARICY PARDUE , Mary	12/19/2016	Yes
119.	GLOGER , Kenneth	2/6/2018	Yes
120.	GLOGER , Kenneth	11/13/2019	Yes
121.	GOVEIA , John R.	2/18/2014	Yes
122.	GRAFFEO , Rosemary	2/20/2018	Yes
123.	GRAY , Carolyn	2/8/2010	Yes
124.	GROSSMAN , Jan	7/31/2013	Yes
125.	HALL , Amanda Jean	3/12/2010	Yes
126.	HALLGREN , Theodore	1/26/2012	Yes
127.	HAMILTON , Robert	7/9/2019	Yes
128.	HARRIS , Margaret	3/1/2019	Yes
129.	HESS , Elaine	2/18/2009	Yes
130.	HOWLES , Mary	11/15/2016	Yes
131.	HUBBIRD , Sherri	8/29/2014	Yes
132.	HUIH , Anna Louise	2/24/2011	Yes
133.	JOHNSTON , Barbara	11/3/2016	Yes
134.	JORDAN , Elaine	8/3/2015	Yes
135.	KAPLAN , Myron	7/16/2018	Yes
136.	KERRIVAN , Kenneth	10/22/2014	Yes
137.	KIRKLAND , Leroy	2/11/2011	Yes
138.	KONZELMAN , Alan	10/25/2016	Yes
139.	LAMBERT , Cydne Ann	10/3/2014	Yes

140.	LANDI , Herbert	6/8/2018	Yes
141.	LEDOUX , Roland	12/22/2015	Yes
142.	LIMA , Mary	4/21/2017	Yes
143.	MAHFUZ , Richard	3/1/2019	Yes
144.	MARCHESE , Gertrude	10/6/2015	Yes
145.	MAROTTA , Phil	7/30/2018	Yes
146.	MARTIN , Linda	5/19/2017	Yes
147.	MARTIN , Mathilde	6/1/2009	Yes
148.	MARTIN , Stanley	11/18/2016	Yes
149.	McCABE , James	5/20/2016	Yes
150.	McCOY , John	7/17/2015	Yes
151.	McKEEVER , Vicki	2/20/2015	Yes
152.	MERINO , Carmenza	7/23/2015	Yes
153.	MOORE , Robert	5/17/2019	Yes
154.	MROZEK , Michelle	3/2/2011	Yes
155.	NALLY , Marlene	5/17/2016	Yes
156.	NAUGLE , Lucinda	10/17/2013	Yes
157.	NAUGLE , Lucinda	11/19/2009	Yes
158.	NEFF , Deborah	3/22/2019	Yes
159.	ODOM , Gwendolyn	6/23/2014	Yes
160.	O'HARA , Colette	9/11/2015	Yes
161.	OLSON , Lorraine	8/27/2018	Yes
162.	PERROTTO , Debra	6/15/2018	Yes
163.	PIENDLE , Margaret	8/19/2010	Yes
164.	POLLARI , Rose	3/25/2015	Yes
165.	PURDO , Linda	4/28/2016	Yes
166.	PUTNEY , Sharon	4/26/2010	Yes
167.	RINTOUL , Bryan	11/15/2019	Yes
168.	ROBINSON , Cynthia	7/19/2014	Yes
169.	ROUSE , Paul	2/5/2018	Yes
170.	RYAN , Thomas John and wife	4/22/2015	Yes
171.	SANTORO , Charles	3/31/2017	Yes
172.	SCHLEFSTEIN , Leslie	2/5/2018	Yes
173.	SCHLENTHER , Harry	10/19/2012	Yes
174.	SCHOEFF , Joan	2/14/2013	Yes
175.	SEARCY , Cheryl	4/1/2013	Yes
176.	SERMONS , Michael	7/6/2016	Yes

177.	SHEFFIELD , Mary	5/12/2017	Yes
178.	SIKES , Janice L.	9/21/2012	Yes
179.	SMITH , Emmon	3/26/2012	Yes
180.	SMITH , James L.	10/18/2012	Yes
181.	TATE , Ellen	7/8/2010	Yes
182.	TAYLOR , Helen	11/7/2014	Yes
183.	THEIS , Faye	5/23/2018	Yes
184.	THIBAUT , Robert	6/21/2013	Yes
185.	TOWNSEND , Lyantie	4/21/2010	Yes
186.	TURNER , Vivian	4/22/2016	Yes
187.	WALLACE , Fontaine	10/20/2017	Yes
188.	WARD , Erskin Donald	1/26/2012	Yes
189.	WEBB , Dianne	11/12/2014	Yes
190.	WEBB , Dianne	11/15/2010	Yes
191.	WILCOX , Robert A.	8/28/2014	Yes

ENGLE-PROGENY DEFENSE VERDICTS

	PLAINTIFF	VERDICT DATE
1.	ADAMSON , Julie	8/1/2019
2.	ANDERSON , Kathleen	1/24/2014
3.	BAKER , Shirley	9/19/2012
4.	BANKS , Yvonne	2/27/2014
5.	BAUM , Rachel	9/5/2014
6.	BISHOP , Annie R.	11/5/2014
7.	BLASCO , Elba	12/4/2013
8.	BLITCH , Josephine	3/23/2011
9.	BROWN , Hildegard	10/4/2013
10.	BRYANT , Doris	9/26/2014
11.	BUDNICK , Jason	8/26/2010
12.	CAMPBELL , Claudette	10/15/2010
13.	CAMPBELL , John R.	5/22/2013
14.	CHACON , Elsa	9/22/2016
15.	CHAMBERLAIN , Lawrence and wife	11/14/2013
16.	CLARK , Mildred	4/5/2019
17.	COHEN , Mark	6/22/2018
18.	COLLAR , Fannie	7/30/2015
19.	COURSEY , Debra	8/25/2016
20.	COX , Rose Marie	12/16/2011
21.	CUMBESS , Linda	12/12/2012
22.	DANIELSON , Micah	11/5/2015
23.	DAVIS , Evonne	6/25/2014
24.	DAVIS , Patsy	4/11/2016
25.	DELANCY , Helene	10/24/2019
26.	DENTON , Robert	8/1/2012
27.	DESHAIES , Dennis	2/3/2014
28.	DOMBEY , Alicia	8/20/2013
29.	DUBINSKY , Abigail	12/16/2016
30.	DUPRE , Madonna	4/12/2016
31.	DURRANCE , Angela	2/8/2017
32.	ELLIS , Betty Jean	2/28/2014
33.	ELLIS , George	12/7/2018
34.	ELLIS , Ken	9/11/2014
35.	ESPINOSA , Luis	11/12/2010

36.	FANALI , Donna	11/20/2015
37.	FAZEKAS , Linda	3/29/2013
38.	FIELDS , Violette	8/23/2019
39.	FRAILEY , Ellen	6/28/2012
40.	FRAZIER , Phyllis	10/15/2010
41.	GABOURY , Denise	1/28/2019
42.	GAMBLE , Jessie	3/8/2016
43.	GAY , Alvin	3/28/2018
44.	GELEP , Mary	3/24/2009
45.	GIL DE RUBIO , Elsie	5/19/2010
46.	GOLLIHUE , Virginia	2/16/2012
47.	GONZALEZ , Juana	2/6/2014
48.	GRAY , Ethel	5/21/2015
49.	GREEN , Cynthia	11/24/2015
50.	HACKIMER , John	9/6/2016
51.	HALDEMAN , Kathryn E.	9/24/2013
52.	HALIBURTON , Dorothy	12/19/2014
53.	HANCOCK , John	8/10/2012
54.	HARDIN , Joyce	2/15/2018
55.	HARFORD , William	1/27/2014
56.	HAUSNER , Christina	6/24/2013
57.	HECHT , William	2/10/2015
58.	HOCHREITER , Stephanie	11/15/2018
59.	JACOBSON , Ronnie	10/29/2013
60.	JENSEN , Diane	5/23/2018
61.	JONES , Phyllis	8/23/2017
62.	JUNIOUS , Toni	10/20/2011
63.	KALYVAS , Cathy	4/29/2009
64.	KELSEY , Dorothy	1/24/2018
65.	KLOPPENBURG , Patricia	11/15/2016
66.	KOGAN , Steve	6/2/2017
67.	LAMOTTE , Robert	5/2/2013
68.	LENNOX , Karen	2/11/2015
69.	LOPEZ , Eulalia	6/6/2018
70.	McCALL , Bernice	3/19/2019
71.	McCRAV , Anita Young	3/19/2012
72.	McMANNIS , Donald	2/19/2015
73.	MEEKER , Wilmer	1/13/2014

74.	MILLER , Robert	9/24/2019
75.	MOBLEY , Jewell	3/1/2018
76.	MOONEY , Lesia	6/21/2016
77.	MORALES , Barbara	8/21/2018
78.	OJEDA , Reinaldo	9/15/2011
79.	OLIVA , Allen	3/28/2011
80.	ORTIZ , Carlos	10/11/2018
81.	OSHINSKY-BLACKER , Marilyn	9/23/2016
82.	PEARSON , Judith	7/26/2017
83.	PICKETT , Oliver Jr.	3/26/2012
84.	POLLARI , Rose	1/29/2019
85.	REIDER , Barbara	2/25/2014
86.	RICHTER , Theresa	2/12/2020
87.	RIDLEY , Cynthia	10/17/2018
88.	ROBERTSON , Irene	10/26/2015
89.	ROBINSON , Cynthia	6/24/2019
90.	ROHR , Arthur	10/28/2010
91.	ROUNDS , Janice	1/26/2016
92.	RUIZ , Narjol	7/19/2019
93.	RUSSELL , Garold	1/25/2019
94.	RUSSO , Tina	4/23/2015
95.	SANTOS , Rebecca	8/18/2015
96.	SHADD , Doris	4/24/2017
97.	SHULMAN , Robert	11/23/2015
98.	SMITH , Elizabeth Ann	2/22/2016
99.	STARBUCK , Eddie	11/7/2018
100.	STARBUCK , William	12/16/2014
101.	STARR-BLUNDELL , Teresa	2/27/2018
102.	SUAREZ , Alicia	9/22/2015
103.	SURICO , Joseph Conrad	6/6/2014
104.	SYZMANSKI , John	10/20/2011
105.	VASKO , Loretta M.	11/4/2010
106.	VILA , Jose	1/23/2015
107.	WARRICK , Norma	10/4/2010
108.	WEICK , Florence	4/4/2011
109.	WEINSTEIN , Sheila	6/12/2013
110.	WENDEL , Charles G.	2/20/2014
111.	WILDER , Edna	2/5/2013

112.	WILKINS , William	8/18/2016
113.	WILLIS , Jimmie P.	10/6/2010

ENGLE-PROGENY MISTRIALS

	PLAINTIFF	MISTRIAL DATE
1.	ADAMSON , Julie	11/22/2017
2.	ALLEN , Betty Faye	4/19/2011
3.	ANDERSON , Kathleen	4/18/2013
4.	BESSENT-DIXON , Frances	8/17/2018
5.	BROWN , Mary	6/29/2012
6.	BROWN , Mary	1/31/2013
7.	BROWN , Mary	9/13/2013
8.	BRYANT , Veda	9/28/2017
9.	BUSH , Charles	1/6/2014
10.	CAPRIO , Edward	2/24/2015
11.	CHADWELL , Brenda	12/6/2017
12.	COLLAR , Fannie	5/13/2019
13.	COOPER , Mary	8/29/2014
14.	DION , George J.	3/18/2015
15.	DUPRE , Madonna	4/29/2014
16.	DUPRE , Madonna	5/5/2015
17.	DURRANCE , Angela	5/31/2016
18.	FARICY PARDUE , Mary	5/3/2016
19.	FRAZIER , Phyllis	5/10/2010
20.	FREEMAN , Jo	6/15/2017
21.	GARCIA , Odaima	11/20/2019
22.	GAY , Alvin	6/7/2017
23.	GORE , Robert	8/27/2014
24.	GROSSMAN , Jan	2/25/2010
25.	HARDIN , Joyce	8/31/2017
26.	HESS , Elaine	12/5/2008
27.	HOCHREITER , Stephanie	10/25/2017
28.	HOWLES , Mary	1/25/2016
29.	JOHNSON , Mildred	10/31/2017
30.	JONES , Charles	8/25/2016
31.	KAPLAN , Lillian	9/9/2011
32.	KAPLAN , Lillian	2/21/2012
33.	KAPLAN , Myron	4/13/2018
34.	KOBALLA , Stella	10/29/2010
35.	MALONEY , John	11/1/2016

36.	MAROTTA , Phil J.	2/29/2012
37.	MARTIN , Linda	2/13/2017
38.	MORALES , Barbara	8/5/2016
39.	MORSE , Pearl	5/29/2018
40.	MORSE , Pearl	2/28/2012
41.	MORSE , Pearl	9/26/2014
42.	NIXON , Robert	2/23/2017
43.	OLSEN , Rosemary	4/16/2019
44.	OLSON , Lorraine	5/23/2017
45.	REDBURN , Brian and Shelly	3/14/2016
46.	REIDER , Barbara	8/27/2013
47.	RUSSO , Tina	10/22/2014
48.	RYAN , Thomas John and wife	4/2/2015
49.	SAMMARCO , John	2/28/2011
50.	SCHLEFSTEIN , Leslie	4/19/2017
51.	SHIFRIN , Rita	3/10/2020
52.	SICKEL , Eileen	2/5/2019
53.	SOFFER , Lucille	6/7/2010
54.	STARBUCK , William	5/19/2014
55.	STARR-BLUNDELL , Teresa	8/22/2012
56.	TALENFELD MARRAFINO , Ellen	4/20/2011
57.	WALLACE , Fontaine	10/7/2016
58.	WARRICK , Norma	8/4/2010
59.	WILLIS , Jimmie P.	5/12/2010
60.	YOUNT , Lois	1/24/2020

ENGLE-PROGENY PLAINTIFF JUDGMENTS UNDER \$1 MILLION

	PLAINTIFF	VERDICT DATE	TOTAL JUDGMENT
1.	GORDON , John	10/5/2015	\$100.00
2.	DOUGLAS , Robert	11/2/2017	\$5,254.85
3.	GIDDENS , Roger, Jr.	3/20/2013	\$5,600.00
4.	DUKE , George	4/10/2012	\$7,676.25
5.	SULCER , Betty	4/18/2011	\$11,250.00
6.	WEINGART , Jerry	7/19/2011	\$13,500.00
7.	FROGEL , Shan	3/8/2019	\$25,000.00
8.	WALKER , Alvin	5/21/2012	\$27,500.00
9.	ROZAR , Myra	4/19/2018	\$56,612.10
10.	SERMONS , Michael	7/6/2016	\$81,300.00
11.	HATZIYANNAKIS , Despina	2/15/2011	\$86,274.88
12.	McCALL , Bernice	3/2/2016	\$87,500.00
13.	ODUM , Sharon	6/7/2013	\$100,000.00
14.	RUSS , Lue	4/24/2019	\$100,000.00
15.	STARR-BLUNDELL , Teresa	6/4/2013	\$100,000.00
16.	HARDIN , Joyce	6/19/2015	\$100,880.00
17.	ZAMBONI , Merle	2/26/2015	\$136,000.00
18.	FORD , Minnie	11/16/2016	\$153,426.00
19.	TOGNOLI , Stephen	11/18/2015	\$157,500.00
20.	LEWIS , James	9/1/2015	\$187,500.00
21.	LOCK , Richard S. and wife	10/25/2012	\$207,000.00
22.	BOULTER , Cynthia	12/13/2018	\$225,000.00
23.	RUFFO , Dorothy	5/9/2013	\$225,000.00
24.	EWING , Doris	1/28/2016	\$240,000.00
25.	KIRKLAND , Leroy	2/11/2011	\$260,000.00
26.	ZINGARO , Karla	5/30/2019	\$262,055.61
27.	KOBALLA , Stella	4/7/2011	\$300,000.00
28.	JEWETT , Thomas	5/20/2011	\$327,894.30
29.	VARNER , Joseph	7/19/2016	\$375,000.00
30.	BOWMAN , Patricia	9/23/2011	\$450,000.00
31.	SIMON , Marc	9/18/2018	\$450,000.00
32.	GROSSMAN , Jan	4/29/2010	\$483,681.00
33.	ALVAREZ del REAL , Jorge	9/24/2019	\$510,000.00
34.	MACK , Peter Jr.	3/18/2011	\$510,000.00

ENGLE-PROGENY PLAINTIFF PERCENTAGE OF LIABILITY

	PLAINTIFF	VERDICT DATE	LIABILITY
1.	GORDON , John	10/5/2015	98%
2.	EWING , Doris	1/28/2016	98%
3.	SULCER , Betty	4/18/2011	95%
4.	GIDDENS , Roger, Jr.	3/20/2013	93%
5.	WEINGART , Jerry	7/19/2011	91%
6.	DOUGLAS , Robert	11/2/2017	90%
7.	WALKER , Alvin	5/21/2012	90%
8.	ROZAR , Myra	4/19/2018	90%
9.	KIRKLAND , Leroy	2/11/2011	90%
10.	CLAYTON , Gloria	3/17/2014	90%
11.	HARDIN , Joyce	6/19/2015	87%
12.	FORD , Minnie	11/16/2016	85%
13.	TOGNOLI , Stephen	11/18/2015	85%
14.	RUFFO , Dorothy	5/9/2013	85%
15.	MOORE , Robert	5/17/2019	85%
16.	ZINGARO , Karla	5/30/2019	84%
17.	LOCK , Richard S. and wife	10/25/2012	82%
18.	FROGEL , Shan	3/8/2019	80%
19.	SERMONS , Michael	7/6/2016	80%
20.	STARR-BLUNDELL , Teresa	6/4/2013	80%
21.	DUKE , George	4/10/2012	75%
22.	McCALL , Bernice	3/2/2016	75%
23.	RUSS , Lue	4/24/2019	75%
24.	LEWIS , James	9/1/2015	75%
25.	VARNER , Joseph	7/19/2016	75%
26.	GROSSMAN , Jan	4/29/2010	75%
27.	GAFNEY , Kathleen	3/7/2019	75%
28.	HAREWOOD , Hanifah	9/18/2018	75%
29.	BOULTER , Cynthia	12/13/2018	70%
30.	KOBALLA , Stella	4/7/2011	70%
31.	JEWETT , Thomas	5/20/2011	70%
32.	BOWMAN , Patricia	9/23/2011	70%
33.	ALVAREZ del REAL , Jorge	9/24/2019	70%
34.	GRAHAM , Earl E.	5/23/2013	70%

35.	IRIMI , Heather	8/28/2014	70%
36.	CICCONE , Pamela	7/21/2011	70%
37.	REESE , Julie A.	5/20/2011	70%
38.	McCABE , James	5/20/2016	70%
39.	LAMBERT , Cydne Ann	10/3/2014	70%
40.	WILCOX , Robert A.	8/28/2014	70%
41.	ALLEN , Andy R. Sr.	11/26/2014	70%
42.	HATZIYANNAKIS , Despina	2/15/2011	68%
43.	LAWRENCE , Joy	5/10/2017	65%
44.	BARBANELL , Leon	8/13/2009	64%
45.	LOURIE , James Harris	10/10/2014	63%
46.	ZAMBONI , Merle	2/26/2015	60%
47.	HIOTT , Carolyn	8/1/2012	60%
48.	SOMMERS , Stefanny	4/6/2017	60%
49.	SURY , Robert	11/28/2011	60%
50.	HARRIS , Patricia	7/31/2014	60%
51.	SOFFER , Lucille	6/17/2011	60%
52.	DURRANCE JONES , Janice	5/22/2019	60%
53.	FREEMAN , Jo	3/14/2018	60%
54.	CUCULINO , Antonio	1/17/2014	60%
55.	PRENTICE , Linda	9/29/2016	60%
56.	SHEFFIELD , Mary	5/12/2017	60%
57.	HESS , Elaine	2/18/2009	58%
58.	CAMPBELL , Franklin D. Sr.	8/19/2009	57%
59.	SAMMARCO , John	3/28/2014	55%
60.	MARCHESE , Gertrude	10/6/2015	55%
61.	GORE , Robert	3/26/2015	54%
62.	DANIELSON , Micah	9/7/2018	51%
63.	LEDO , Mirtha	11/1/2016	51%
64.	ODUM , Sharon	6/7/2013	50%
65.	BROWN , Jimmie	5/22/2009	50%
66.	GRIFFIN , Patrick O.	6/25/2014	50%
67.	SHERMAN , Melba	5/8/2009	50%
68.	BRYANT , Veda	12/6/2017	50%
69.	COOPER , Mary	9/8/2015	50%
70.	MALONEY , John	7/18/2017	50%
71.	BLOCK , Sharon	8/7/2015	50%
72.	SOWERS , Mary	2/11/2015	50%

73.	WARD , Erskin Donald	1/26/2012	50%
74.	DOUGLAS , James	3/10/2010	50%
75.	HOLLIMAN , Ruby	3/10/2019	50%
76.	HALLGREN , Theodore	1/26/2012	50%
77.	FOX , Blanche	2/23/2017	50%
78.	GRAY , Ellen	1/29/2015	50%
79.	HUISH , Anna Louise	2/24/2011	50%
80.	CHEELEY , Willie James	1/31/2014	50%
81.	ROUSE , Paul	2/5/2018	50%
82.	BURKHART , Pauline	5/16/2014	50%
83.	SCHLENTHER , Harry	10/19/2012	50%
84.	HUBBIRD , Sherri	8/29/2014	50%
85.	MACK , Peter Jr.	3/18/2011	49%
86.	PERROTTO , Debra	6/15/2018	49%
87.	PERROTTO , Debra	11/21/2014	49%
88.	ALEXANDER , Earline	6/18/2010	49%
89.	SIKES , Janice L.	9/21/2012	49%
90.	TOWNSEND , Lyantie	4/21/2010	49%
91.	SMITH , James L.	10/18/2012	45%
92.	MARTIN , Linda	5/19/2017	45%
93.	PIENDLE , Margaret	8/19/2010	45%
94.	TULLO , Mary	4/13/2011	45%
95.	THOMAS , Bertie	7/28/2017	45%
96.	BALLARD , Ralph	10/19/2012	45%
97.	MATHIS , Hazel	8/15/2016	45%
98.	BROWN , Donna	1/23/2015	45%
99.	MAROTTA , Phil	3/20/2013	42%
100.	MAROTTA , Phil	7/30/2018	42%
101.	TAYLOR , Helen	11/7/2014	42%
102.	MONROE , Florence	12/9/2015	42%
103.	BESSENT-DIXON , Frances	2/19/2019	42%
104.	COHEN , David	5/2/2013	40%
105.	SKOLNICK , Beatrice	6/14/2013	40%
106.	BOWDEN , Gloria	3/26/2014	40%
107.	BERGER , Judith	9/16/2014	40%
108.	GRAY , Carolyn	2/8/2010	40%
109.	OLSON , Lorraine	8/27/2018	40%
110.	JORDAN , Elaine	8/3/2015	40%

111.	LIMA , Mary	4/21/2017	40%
112.	McKEEVER , Vicki	2/20/2015	40%
113.	SEARCY , Cheryl	4/1/2013	40%
114.	ALLEN , Andy R. Sr.	4/26/2011	40%
115.	SANTORO , Charles	3/31/2017	36%
116.	TATE , Ellen	7/8/2010	36%
117.	SIMON , Marc	9/18/2018	35%
118.	MACK , Peter Jr.	12/14/2012	35%
119.	KELLEY , Daniel	1/24/2019	35%
120.	CUDDIHEE , Sabrina	1/22/2020	35%
121.	SMITH , Sherry	9/23/2016	35%
122.	BUSH , Charles	7/25/2018	35%
123.	McCOY , John	7/17/2015	35%
124.	BROWN , Margaret	3/23/2018	35%
125.	PUTNEY , Sharon	4/26/2010	35%
126.	MROZEK , Michelle	3/2/2011	35%
127.	HALL , Amanda Jean	3/12/2010	35%
128.	RYAN , Thomas John and wife	4/22/2015	35%
129.	GAFNEY , Kathleen	9/20/2013	34%
130.	MARTIN , Mathilde	6/1/2009	34%
131.	COHEN , Robin	3/24/2010	33%
132.	WHITMIRE , James	3/28/2017	33%
133.	DUIGNAN , Kevin	9/11/2015	33%
134.	MARTIN , Stanley	11/18/2016	32%
135.	AHRENS , Ina	1/28/2016	32%
136.	EVERS , Cindy	2/12/2013	31%
137.	CHADWELL , Brenda	9/26/2018	30%
138.	THIBAUT , Robert	6/21/2013	30%
139.	GOVEIA , John R.	2/18/2014	30%
140.	BROWN , John	2/17/2017	30%
141.	CRAWFORD , William	9/30/2013	30%
142.	SNYDER , Diane	2/19/2020	30%
143.	MERINO , Carmenza	7/23/2015	30%
144.	SCHLEIDER , Diane	11/18/2014	30%
145.	GRAFFEO , Rosemary	2/20/2018	30%
146.	LANDI , Herbert	6/8/2018	30%
147.	CLAY , Finna A.	4/14/2010	30%

148.	DUIGNAN , Kevin	2/18/2020	30%
149.	SMITH , Emmon	3/26/2012	30%
150.	ROBINSON , Cynthia	7/19/2014	30%
151.	AYCOCK , Thelma	4/18/2013	28%
152.	BUCHANAN , Nan Kathryn	12/7/2012	26%
153.	HARRIS , Margaret	3/1/2019	25%
154.	DION , George	5/12/2016	25%
155.	NALLY , Marlene	5/17/2016	25%
156.	ODOM , Gwendolyn	6/23/2014	25%
157.	FARICY PARDUE , Mary	12/19/2016	25%
158.	THEIS , Faye	5/23/2018	25%
159.	GROSSMAN , Jan	7/31/2013	25%
160.	SCHOEFF , Joan	2/14/2013	25%
161.	HAMILTON , Robert	7/9/2019	23%
162.	BUONOMO , Connie	5/20/2010	23%
163.	PURDO , Linda	4/28/2016	22%
164.	CALLOWAY , Marvine	5/31/2012	21%
165.	BURGESS , Jacqueline	6/20/2018	20%
166.	NEFF , Deborah	3/22/2019	20%
167.	RIZZUTO , John J.	8/23/2013	20%
168.	TURNER , Vivian	4/22/2016	20%
169.	GLOGER , Kenneth	2/6/2018	20%
170.	ALEXANDER , Dorothy	3/6/2012	20%
171.	KERRIVAN , Kenneth	10/22/2014	19%
172.	WILLIAMS , Virginia	12/12/2012	15%
173.	BARBOSE , Phyllis	11/18/2015	15%
174.	POLLARI , Rose	3/25/2015	15%
175.	KONZELMAN , Alan	10/25/2016	15%
176.	BOATRIGHT , Richard and wife	11/12/2014	15%
177.	O'HARA , Colette	9/11/2015	15%
178.	WEBB , Dianne	11/12/2014	10%
179.	NAUGLE , Lucinda	10/17/2013	10%
180.	JOHNSTON , Barbara	11/3/2016	10%
181.	WEBB , Dianne	11/15/2010	10%
182.	MAHFUZ , Richard	3/1/2019	10%
183.	NAUGLE , Lucinda	11/19/2009	10%
184.	GLOGER , Kenneth	11/13/2019	10%

185.	LEDOUX , Roland	12/22/2015	6%
186.	RINTOUL , Bryan	11/15/2019	2%
187.	WALLACE , Fontaine	10/20/2017	1%
188.	KAPLAN , Myron	7/16/2018	0%
189.	BROWN , Mary	5/1/2015	0%
190.	HOWLES , Mary	11/15/2016	0%
191.	SCHLEFSTEIN , Leslie	2/5/2018	0%

A Frank Statement to Cigarette Smokers

RECENT REPORTS on experiments with mice have given wide publicity to a theory that cigarette smoking is in some way linked with lung cancer in human beings.

Although conducted by doctors of professional standing, these experiments are not regarded as conclusive in the field of cancer research. However, we do not believe that any serious medical research, even though its results are inconclusive should be disregarded or lightly dismissed.

At the same time, we feel it is in the public interest to call attention to the fact that eminent doctors and research scientists have publicly questioned the claimed significance of these experiments.

Distinguished authorities point out:

1. That medical research of recent years indicates many possible causes of lung cancer.
2. That there is no agreement among the authorities regarding what the cause is.
3. That there is no proof that cigarette smoking is one of the causes.
4. That statistics purporting to link cigarette smoking with the disease could apply with equal force to any one of many other aspects of modern life. Indeed the validity of the statistics themselves is questioned by numerous scientists.

We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business.

We believe the products we make are not injurious to health.

We always have and always will cooperate closely with those whose task it is to safeguard the public health.

For more than 300 years tobacco has given solace, relaxation, and enjoyment to mankind. At one time or another during those years critics have held it responsible for practically every disease of the human body. One by one these charges have been abandoned for lack of evidence.

Regardless of the record of the past, the fact that cigarette smoking today should even be suspected as a cause of a serious disease is a matter of deep concern to us.

Many people have asked us what we are doing to meet the public's concern aroused by the recent reports. Here is the answer:

1. We are pledging aid and assistance to the research effort into all phases of tobacco use and health. This joint financial aid will of course be in addition to what is already being contributed by individual companies.
2. For this purpose we are establishing a joint industry group consisting initially of the undersigned. This group will be known as TOBACCO INDUSTRY RESEARCH COMMITTEE.
3. In charge of the research activities of the Committee will be a scientist of unimpeachable integrity and national repute. In addition there will be an Advisory Board of scientists disinterested in the cigarette industry. A group of distinguished men from medicine, science, and education will be invited to serve on this Board. These scientists will advise the Committee on its research activities.

This statement is being issued because we believe the people are entitled to know where we stand on this matter and what we intend to do about it.

TOBACCO INDUSTRY RESEARCH COMMITTEE

5400 EMPIRE STATE BUILDING, NEW YORK 1, N. Y.

SPONSORS:

THE AMERICAN TOBACCO COMPANY, INC.
Paul M. Hahn, President

BENSON & HEDGES
Joseph F. Callman, Jr., President

BRIGHT BELL WAREHOUSE ASSOCIATION
F. S. Royter, President

BROWN & WILKINSON TOBACCO CORPORATION
Timothy V. Hartnett, President

BURLY AUCTION WAREHOUSE ASSOCIATION
Albert Clay, President

BURLY TOBACCO GROWERS COOPERATIVE
ASSOCIATION
John W. Jones, President

LARUE & BROTHER COMPANY, INC.
W. T. Reed, Jr., President

P. LORELLARD COMPANY
Herbert A. Kent, Chairman

MARYLAND TOBACCO GROWERS ASSOCIATION
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R. J. REYNOLDS TOBACCO COMPANY
E. A. Darr, President

STEPHANO BROTHERS, INC.
C. S. Stephano, D.Sc., Director of Research

TOBACCO ASSOCIATES, INC.
(An organization of like-minded tobacco growers)
J. R. Hutson, President

UNITED STATES TOBACCO COMPANY
J. W. Prierston, President

Filed in Evidence
as

Plaintiff's

PT

Exhibit 307 Date 9/27/16

Case 07-CA-11551-D

SA192 PT00307

STRICTLY PRIVATE AND CONFIDENTIAL

July 17, 1963

IMPLICATIONS OF BATTELLE HIPPO I & II
AND
THE GRIFFITH FILTER

The determination by Battelle of the "tranquilizing" function of nicotine, as received by the human system in the delivered smoke of cigarettes, together with nicotine's possible effect on obesity, delivers to the industry what will may be its first effective instrument of propaganda counter to that of the American Cancer Society, et al, damning cigarettes as having a causal relationship to cancer of the lung. The Battelle work is not in any degree responsive to that indictment nor to the Report expected to be returned by the Surgeon General's Committee on Smoking and Health. I would submit, however, that the Griffith filter offers the bridge over which the industry might pass from its present terrain of defense to a field for effective counter attack using the Battelle study as the basic weapon. I will assume for purposes of this note that the "Griffith filter" is one which permits filtration to specification; it filters selectively, both qualitatively and quantitatively. It can deliver taste and nicotine (and nicotine in even more effective form) free of constituent #1 to infinity, selectively. I grossly overstate and oversimplify Dr. Griffith's claims deliberately.

The problem is simple, if the answers are complex. Assume the Surgeon General's Committee concludes (whatever the jargon of scientific analysis and to whatever degree specific) that there is real and compelling evidence of a causal - or even a strongly "predisposing" relation between smoking and cancer. Cardiovascular disorders will, in all probability, also be found related to smoking. Upon that event, it would seem clear to me the industry must do two things.

Whatever qualifications we may assert to minimize the impact of the Report, we must face the fact that a responsible and qualified group of previously non-committed scientists and medical authorities have spoken. One would suppose we would not repeat Dr. Little's oft reiterated "not proven". One would hope the industry would act affirmatively and not merely react defensively. We must, I think, recognize that in defense of the industry and in preservation of its present earnings position, we must either a) disprove the theory of causal relationship or b) discover the carcinogen or carcinogens, co-carcinogens, or whatever, and demonstrate our ability to remove or neutralize them. This means that we must embark - in whatever form of organization - on massive and impressively financed research into the etiology of cancer as it relates to the use of tobacco; what constituents or combination of constituents in cigarette smoke cause or are conducive to cancer of the lung. Certainly one would hope to prove there is no etiological factor in smoke but the odds are greatly against success in that effort. At the best, the probabilities are that some combination of constituents of smoke will be found conducive to the onset of cancer or to create an environment in which cancer is more likely to occur.

ENGLE
PLAINTIFFS EXHIBIT NO.

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5069

The TIRC cannot, in my opinion, provide the vehicle for such research. It was conceived as a public relations gesture and (however undeified the Scientific Advisory Board and its grants may be) it has functioned as a public relations operation. Moreover its organization, certainly in its present form, does not allow the breadth of research - cancer, emphysema, cardiovascular disorders, etc. - essential to the protection of the tobacco industry. I suggest that for the new research effort we enlist the cooperation of the Surgeon General, the Public Health Service, the American Cancer Society, the American Heart Association, American Medical Association and any and all other responsible health agencies or medical or scientific associations concerned with the question of tobacco and health. The new effort should be conducted by a new organization lavishly financed, autonomous, self-perpetuating, and uncontrolled save that its efforts be confined to the single problem of the relation of tobacco to human health.

Thus to accept its responsibility would, I suggest, free the industry to take a much more aggressive posture to meet attack. It would in particular free the industry to attack the Surgeon General's Report itself by pointing out its gaps and omissions, its reliance on statistics, its lack of clinical evidence, etc., etc. True we might worsen our situation in litigation, but that I would risk in contemplation of the greater benefits to be derived from going on the offensive. My record of advice in this area may well justify the charge of inconsistency, but let me say that so long as the industry does not assume its research responsibility my long-held position would remain unchanged and I would oppose either outright attacks on the Surgeon General's Report or the giving of assurance to the smoking public not supported by research evidence.

There is however the problem of what to do until the doctor comes and this leads me to the second of the two measures I would urge the industry to take:

The Surgeon General's Report will, of course, set off attacks all along the line. Our harsher critics - Senators Moss and Neuberger, the American Cancer Society, et al - will immediately press for all sorts of restrictive and repressive programs:

- a) Public education directed particularly at the young.
- b) Much harsher FTC rules in respect of cigarette advertising, with restriction of the scope and control of content thereof. One might anticipate rules seeking to prevent the use of "glamour situations", endorsements including those of athletes, prominent entertainment figures, etc., and quite likely an effort to bar tobacco advertising from television and radio.

- c) "Content" labeling or cautionary legends.

- d) FTC to be given power of preliminary injunction in respect of cigarette advertising.

- e) Repressive taxation.

To meet these threats, which will arise not merely at the Federal but at the state level as well, the Tobacco Institute is available but it can be effective only if the industry abandons its timorous approach to the Institute as a functioning trade association. It should be noted that current activities in the Institute indicate, indeed, that that attitude is beginning to change and it is to be hoped that our present dangers may further that progress.

Even to outline the possible defensive and offensive programs the Institute might engage in to meet the dangers I have prophesied is far beyond the scope of this note. I must confess that I have heretofore rather opposed the idea of attempting to make forward plans before the Surgeon General's Report is issued, but I am beginning to believe that perhaps a session of company presidents to consider the possibilities of such pre-planning might be desirable.

To accomplish anything effective, the Institute needs the leadership of a strong tobacco figure, e.g., Albert Clay, Paul Hahn, etc., a highly expert trade association staff including experienced and respected lobbyists and, lastly, such adornments of public figures as appearance and occasion warrant.

The question immediately arises: how would such aggressive posture affect litigation? With one exception (*Green v. American Tobacco Co.*), those actions which have gone to judgment were won by the defendants on the defense of assumption of risk. The issuance of the Surgeon General's Report will, in my opinion, insure the success of that defense as to causes of action arising in the future if the industry can steel itself to issuing a warning. I have no wish to be tarred and feathered, but I would suggest the industry might serve itself on several fronts if it voluntarily adopted a package legend such as "excessive use of this product may be injurious to health of susceptible persons" and would embody such a legend in pictorial print advertising. This is so controversial a suggestion - indeed shocking - that I would rather not try to anticipate the arguments against it in this note but reserve my defense.

It is difficult to assess the effect of the Report on causes of action arising prior to its issuance. Logically, it would be argued the Report does no more than to collate pre-existing knowledge, knowledge as available to the buyer as the seller. But logic might in the minds of a jury - yield to the emotional reaction that if this knowledge was available to the seller it was up to him, having the means to do so, to make the product safe. A jury might, whether instructed or not, operate on the theory of comparative negligence: "True the buyer was negligent in smoking a product he knew was dangerous, but he was lulled by the seller and the seller's negligence was the greater in failing to make his product safe."

All one can say is that the Report will in all probability greatly complicate the litigation problem.

Now at long last I come back to the Battelle report and the Griffith filter. If Dr. Griffith is no more than on the trail of effective controlled filtration, we should conduct our planning on the assumption of success.

Battelle says:

"The reasons for the 'pleasure of smoking' must be found partly in the relief of anxiety that cigarette smoking brings so constantly, and in such a very short time.

"This sedative - or soothing - effect of cigarette smoking and of nicotine is however very different from the 'tranquillizing' effect as it was defined by pharmacologists after the discovery of the Rauwolfia alkaloids. Tranquillizers are highly effective in the management of overactive psychotic patients and, as such, are largely used in psychiatry; nicotine is certainly devoid of such effects.

* * *

"Our investigation definitely shows that both kinds of drugs (Rauwolfia alkaloids and nicotine) act quite differently, and that nicotine may be considered (its cardiovascular effects not being contemplated here) as more 'beneficial' - or less noxious - than the new tranquillizers, from some very important points of view.

"The so-called 'beneficial' effects of nicotine are of two kinds:

- "1. Enhancing effect on the pituitary-adrenal response to stress;
- "2. Regulation of body weight.

"These effects do not seem to be shared by reserpine, which on the contrary shows undesirable side-actions that are not given by nicotine, i.e. a nearly complete blockade of gonadic and thyroid activities, reflecting most probably a general blockade of the hypothalamo-pituitary system, which normally controls all the endocrine activities.

Moreover, nicotine is addictive.

We are, then, in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms. But cigarettes - we will assume the Surgeon General's Committee to say - despite the beneficent effect of nicotine, have certain unattractive side effects:

- 1) They cause, or predispose to, lung cancer.
- 2) They contribute to certain cardiovascular disorders.
- 3) They may well be truly causative in emphysema, etc., etc.

We challenge those charges and we have assumed our obligation to determine their truth or falsity by creating the new Tobacco Research Foundation. In the meantime (we say) here is our triple, or quadruple or quintuple filter, capable of removing whatever constituent of smoke

- 5 -
is currently suspect while delivering full flavor - and incidentally - a nice jolt of nicotine. And if we are the first to be able to make and sustain that claim, what price Kent?

Dare we as a matter of policy make such claims? If they are true and if we make no claim of freedom from danger - indeed, if we cry caution - why should we not? I would submit that the FTC in the face of 1) the industry's research effort, 2) the truth of our claims, and 3) the "public interest" in our filter, cannot successfully deny us the right to inform the public.

As for litigation, it would be my opinion that we would not put ourselves in substantially worsened position and in any event a successful Avalon could be expected to satisfy a number of judgments for damages.

Have we an obligation to make our knowledge available to our competitors? If the Griffith claims stand up and when we have perfected the Griffith filter and stocked the necessary machinery, etc., then I suggest there is strong moral obligation on us to make our knowledge public and free. And think of the imdos. I will be vastly surprised if such disclosure markedly adds to our competitors' knowledge but that is beside the point.

The point is: On this new terrain, permitting strong offensive action, we get there fastest with the mostest.

A.Y.

RJR

CONFIDENTIAL

RESEARCH PLANNING MEMORANDUM

ON

THE NATURE OF THE TOBACCO BUSINESS AND THE CRUCIAL

ROLE OF NICOTINE THEREIN

Filed in Evidence
as

Plaintiff's

PT
Exhibit 4791 Date 9/27/16

Case 07-CA-11551-D

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PT04791

SA198

MEMORANDUM:

In a sense, the tobacco industry may be thought of as being a specialized, highly ritualized and stylized segment of the pharmaceutical industry. Tobacco products, uniquely, contain and deliver nicotine, a potent drug with a variety of physiological effects. Related alkaloids, and probably other compounds, with desired physiological effects are also present in tobacco and/or its smoke.

Nicotine is known to be a habit-forming alkaloid, hence the confirmed user of tobacco products is primarily seeking the physiological "satisfaction" derived from nicotine -- and perhaps other active compounds. His choice of product and pattern of usage are primarily determined by his individual nicotine dosage requirements and secondarily by a variety of other considerations including flavor and irritancy of the product, social patterns and needs, physical and manipulative gratifications, convenience, cost, health considerations and the like. Thus a tobacco product is, in essence, a vehicle for delivery of nicotine, designed to deliver the nicotine in a generally acceptable and attractive form. Our Industry is then based upon design, manufacture and sale of attractive dosage forms of nicotine, and our Company's position in our Industry is determined by our ability to produce dosage forms of nicotine which have more overall value, tangible or intangible, to the consumer than those of our competitors.

The habituated user of tobacco products is said to derive "satisfaction" from nicotine. Although much studied, the physiological actions of nicotine are still poorly understood and appear to be many and varied. For example, in different situations and at different dose levels, nicotine appears to act as a stimulant, depressant, tranquilizer, psychic energizer, appetite reducer, anti-fatigue agent, or energizer, to name but a few of the varied and often

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contradictory effects attributed to it. Many of these same effects may be achieved with other physiologically active materials such as caffeine, alcohol, tranquilizers, sedatives, euphorics, and the like. Therefore, in addition to competing with products of the tobacco industry, our products may, in a sense, compete with a variety of other products with certain types of drug action. All of these products, tobacco and other, appear to have certain common attributes in that they are used largely to relieve, in one way or another, the fatigues and stresses which arise in the course of existence in a complex society.

Happily for the tobacco industry, nicotine is both habituating and unique in its variety of physiological actions, hence no other active material or combination of materials provides equivalent "satisfaction". Whether nicotine will, over the long term, maintain its unique position is subject to some reasonable doubt. With increased sophistication of knowledge in the biological and pharmaceutical areas, a superior or at least equivalent product or product mixture may emerge. For this reason, it would be a mistake to assume that the tobacco industry, as we now know it, is immortal or that no direct competition from organizations outside of the tobacco industry will ever occur. It is safe to assume, however, that nicotine will retain its unique position throughout the present ten year planning period, and probably for a much longer span of time.

If nicotine is the sine qua non of tobacco products and tobacco products are recognized as being attractive dosage forms of nicotine, then it is logical to design our products -- and where possible, our advertising -- around nicotine delivery rather than "tar" delivery or flavor. To do this we need to

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develop new data on such things as the physiological effects of nicotine, the rate of absorption and elimination of nicotine delivered in different doses at different frequencies and by different routes, and ways of enhancing or diminishing nicotine effects and "satisfactions". In the absence of such data, we may survey the market and conclude that current cigarette products delivering about 1.3 mg. of nicotine appear to "satisfy" the typical smoker. This, somewhat crudely, establishes a target dosage level for design of new products. An accompanying Research Planning Proposal describes that approach in some detail. However, if we knew more about nicotine absorption, action, elimination, enhancement and the like, it should, in theory, be possible to more precisely specify, and deliver, the optimum amounts of nicotine activity in sophisticated products which would be more satisfying and desirable to the user. This area merits consideration and activity.

Before proceeding too far in the direction of design of dosage forms for nicotine, it may be well to consider another aspect of our business; that is, the factors which induce a pre-smoker or non-smoker to become a habituated smoker. Paradoxically, the things which keep a confirmed smoker habituated and "satisfied", i.e., nicotine and secondary physical and manipulative gratifications, are unknown and/or largely unexplained to the non-smoker. He does not start smoking to obtain undefined physiological gratifications or reliefs, and certainly he does not start to smoke to satisfy a non-existent craving for nicotine. Rather, he appears to start to smoke for purely psychological reasons -- to emulate a valued image, to conform, to experiment, to defy, to be daring, to have something to do with his hands, and the like. Only after experiencing smoking for some period of time do the physiological "satisfactions" and habituation become apparent and needed. Indeed, the first

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smoking experiences are often unpleasant until a tolerance for nicotine has been developed. This leaves us, then, in the position of attempting to design and promote the same product to two different types of market with two different sets of motivations, needs and expectations. The same situation is encountered in some industries, but the problem is usually not as severe.

If what we have said about the habituated smoker is true, then products designed for him should emphasize nicotine, nicotine delivery efficiency, nicotine satisfaction, and the like. What we should really make and sell would be the proper dosage form of nicotine with as many other built-in attractions and gratifications as possible -- that is, an efficient nicotine delivery system with satisfactory flavor, mildness, convenience, cost, etc. On the other hand, if we are to attract the non-smoker or pre-smoker, there is nothing in this type of product that he would currently understand or desire. We have deliberately played down the role of nicotine, hence the non-smoker has little or no knowledge of what satisfactions it may offer him, and no desire to try it. Instead, we somehow must convince him with wholly irrational reasons that he should try smoking, in the hope that he will for himself then discover the real "satisfactions" obtainable. And, of course, in the present advertising climate, our opportunities to talk to the pre-smoker are increasingly limited, and therefore, increasingly ineffective. Would it not be better, in the long run, to identify in our own minds and in the minds of our customers what we are really selling, i.e., nicotine satisfaction? This would enable us to speak directly of the virtues of our product to the confirmed smoker, and would educate the pre-smoker, perhaps indirectly but effectively, in what we have to offer and what it would be expected to do for him.

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But again, the picture is not quite all that clear. Critics of tobacco products increasingly allege that smoking is dangerous to the health of the smoker. Part of this alleged danger is claimed to arise from ingestion of nicotine and part is claimed to arise from smoke components or smoke "tar". If, as proposed above, nicotine is the sine qua non of smoking, and if we meekly accept the allegations of our critics and move toward reduction or elimination of nicotine from our products, then we shall eventually liquidate our business. If we intend to remain in business and our business is the manufacture and sale of dosage forms of nicotine, then at some point we must make a stand. We should know more, rather than less, than our critics about the physiological effects of nicotine, and we should in all ways scientifically validate and speak to the beneficial effects and "satisfactions" derived from use of nicotine. Essentially all commercial drugs give rise to some undesirable side effects, but we continue to use them with great benefit to humanity because of their overriding beneficial effects. Might we not take a leaf from that book in our approach to nicotine? Unless we do, our long-term prospects become unattractive.

Our critics have lumped "tar" and nicotine together in their allegations about health hazards, perhaps because "tar" and nicotine are generated together in varying proportions when tobacco is smoked. An accompanying Research Planning Memorandum suggests an approach to reducing the amount of "tar" in cigarette smoke per unit of nicotine. That is probably the most realistic approach in today's market for conventional cigarette products. However, another more futuristic approach is possible which goes more directly to the fundamentals of the alleged problem.

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If our business is fundamentally that of supplying nicotine in useful dosage form, why is it really necessary that allegedly harmful "tar" accompany that nicotine? There should be some simpler, "cleaner", more efficient and direct way to provide the desired nicotine dosage than the present system involving combustion of tobacco or even chewing of tobacco. A conventional 1000-mg. tobacco rod containing about 20 mg. of nicotine is smoked to produce only about 1.3 mg of smoke nicotine, accompanied by about 20 mg. of "tar" and 20 mg. of gas phase matter; and a substantial part of the 1.3 mg of smoke nicotine is lost to the smoker via exhaled smoke -- surely an inefficient nicotine delivery system. It should be possible to obtain pure nicotine by synthesis or from high-nicotine tobacco. It should then be possible, using modifications of techniques developed by the pharmaceutical and other industries, to deliver that nicotine to the user in efficient, effective, attractive dosage form, accompanied by no "tar", gas phase, or other allegedly harmful substances. The dosage form could incorporate various flavorants, enhancers, and like desirable additives, and would be designed to deliver the minimum effective amount of nicotine at the desired release-rate to supply the "satisfaction" desired by the user. Such a product would maximize the benefits derived from nicotine, minimize allegedly undesirable over-dosage side effects from nicotine, and eliminate exposure to other materials alleged to be harmful to the user. For the long term, we should be working toward development of such products -- if we do not, inevitably someone else will, and there are strong indications that others are already moving in this direction.

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In the present real situation, where nothing has been done to counteract the adverse allegations about nicotine and where conventional products delivering adequate amounts of nicotine dominate the marketplace, no abrupt change in our posture or strategy would be appropriate or reasonable. The approaches advocated above are aimed at stopping and eventually reversing a trend that may in the long term put us out of business, and are intended to lay a framework of philosophy around which research efforts may now begin. Hopefully, some day we will rejoice rather than despair when a new crop of tobacco shows an unusually high content of nicotine, our primary product. Hopefully, with time we will be able to develop sophisticated and improved minimum dosage forms for nicotine which will be more satisfying to the user and free of alleged health hazards. And hopefully, by that time, we will have been able to establish and use information showing that use of nicotine fills real, demonstrable human needs, the beneficial effects overriding the allegedly harmful side effects.

INDICATED RESEARCH DEPARTMENT ACTIVITIES AND APPROACHES:

If the above is a valid line of reasoning, then our long-term future courses of action should be as follow:

1. Recognize the key role of nicotine in consumer satisfaction, and design and promote our products with this in mind.
2. More precisely define the minimum amount of nicotine required for "satisfaction" in terms of dose levels, dose frequency, dosage form, and the like. This would involve biological and other experiments.
3. Sponsor in-depth studies of the physiological, psychological and other effects of nicotine, aimed at demonstrating the beneficial effects of nicotine and at disproving allegations that nicotine produces major adverse effects.

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4. Study, design and evaluate new or improved systems for delivery of nicotine which will provide the minimum satisfying amount of nicotine in attractive form, free of allegedly harmful combustion products.
5. Study means for enhancing nicotine satisfaction via synergists, alteration of pH, or other means, to minimize dose level and maximize desired effects.
6. Monitor developments in materials and products which may compete with nicotine products or which might be combined with nicotine products to provide added advantages or satisfactions.
7. Monitor work by others which might be aimed at improved nicotine delivery systems of the type proposed here.
8. Search for and evaluate other physiologically active components of tobacco or its smoke which may provide desired effects to the smoker.


Claude E. Teague, Jr.
April 14, 1972

:jhb

50091 5691

September 9, 1980

MEMORANDUM

TO : Mr. Kloepper
FROM: Mr. ^{PK}Knopick

Filed in Evidence
as

Plaintiff's

PT
Exhibit 2184 Date 9/21/16
Case 07-CA-11551-D

Attached please find the technical review of the conference which led to Victor Cohn's "surprise" story of 8/30 that the National Institute of Drug Abuse wants "addictive" added to the cigarette warning.

Also, the tiny item in the ADAMEA newsletter which brought on Cohn's story. I do not receive that publication.

I wonder if The Institute was caught unaware on this matter.

I have spoken previously with Pollin, current head of the National Institute on Drug Abuse. In July 1980, he sent me--and I made available throughout TI and reported in the NL--a monograph on "Cigarette Smoking as a Dependence Process." In its foreword, Pollin says: "Smoking is addictive."

Other hints: In NL 233, we quoted Pollin saying that cigarette smoking is the nation's leading drug problem among youths, despite the rise in marijuana use.

In NL 188, we quoted Pollin's predecessor, Dr. Robert DuPont: "Cigarette smoking is more addictive than using heroin, hooking two-thirds of the people who ever smoke."

Isn't the question twofold?

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Did TI miss a chance to attend and present information at NIDA's 1979 meeting which developed the "addictive" language?

Did TI see ADAMHA's newsletter and was it therefore better prepared to respond when this matter became public?

PT02184A

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I feel badly about my own lack of intelligence-gathering in this situation. But I don't think the questions I now raise are academic. Shook, Hardy reminds us, I'm told, that the entire matter of addiction is the most potent weapon a prosecuting attorney can have in a lung cancer/cigarette case. We can't defend continued smoking as "free choice" if the person was "addicted."

000135336

ATTORNEY WORK PRODUCT
CONFIDENTIAL/PRIVILEGED

MEMORANDUM

TO: S&H ATTORNEYS
FROM: MIKE JORDAN
DATE: APRIL 29, 1988
SUBJ: JOHN ROBINSON'S CALIFORNIA CASES

Although it is not confirmed in writing at this point, during the week of April 25 John Robinson agreed to dismiss his cases against the tobacco industry. Presently I am unsure as to the mechanics of the dismissal, but I suspect that we will receive orders of dismissal in cases filed by John solely, whether served or unserved. I do not know whether this agreement extends to cases filed jointly by John Robinson and George Kilbourne: Brown and Sutton.

Thus Fleming I and II, Monthei, Quandt, Shrum, Whitner, Chidester, Daffron, Dever and Gillespie should be officially ending soon.

This agreement seems to be the result of two factors. First, the California Supreme Court recently ruled that Proposition 51, the proposition that affected joint and several liability, was not retroactive. This meant that asbestos plaintiffs' lawyers could satisfy their entire judgment from any solvent asbestos company, thus eliminating the need to have tobacco as a party to bear a pro rata share. Secondly, 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.

JMJ:jp

cc: Control Central

"S & H" = Smoking & Health

J. Michael Jordan = Mike Jordan
(RJReynolds outside lawyer in charge
of Calif. cases)

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SA209

Press Releases - Altria

[Back to previous page](#)

Philip Morris USA Wins First Engle Trial Held in Federal Court

RICHMOND, Va.--(BUSINESS WIRE)--Feb. 16, 2012--

A federal jury in Duval County today decided in favor of Philip Morris USA and another tobacco company in the first federal *Engle* case to go to trial. After deliberating for less than an hour, the jury determined that smoking was not the medical cause of the injury. This is the 12th win for the company in the last 17 *Engle* trials.

"This verdict demonstrates that Philip Morris USA is aggressive in defending itself and will assert all available defenses," said Murray Garnick, Altria Client Services senior vice president and associate general counsel, speaking on behalf of Philip Morris USA. "Despite today's decision and other recent wins, we believe that state and federal courts have put in place a trial system that fundamentally violates our due process because plaintiffs don't have to prove their claims."

Philip Morris USA has won or mistried approximately two-thirds of its *Engle* cases to go to trial since the beginning of 2011.

Today's verdict came in a trial of a so-called *Engle* progeny case following a 2006 Florida Supreme Court decision that decertified a class action but allowed former class action members to file individual lawsuits and rely on general findings from the first class action. Prior to today's trial, all *Engle* trials have occurred in state courts.

The case is *Gollihue v. R.J. Reynolds Tobacco Company, et al.* case number 3:09-cv-10530-RBD-JBT. The trial was held in the United States District Court Middle District of Florida Jacksonville Division.

Source: Philip Morris USA

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Reynolds American Inc. in 2012: “Progress” in tobacco litigation is alleged five weeks after U.S. Supreme Court leaves the company with “massive liability...with no end in sight.”

May 25th, 2012



By Edward L. Sweda, Jr.

Three key issues were taken up at the 2012 Reynolds American Inc. (RAI) Annual Shareholders Meeting in Winston-Salem, North Carolina on May 3rd.

First, the issue drawing the most public attention was the company’s dealings with groups representing farm workers who toil under dangerous conditions and provide the tobacco that brings prosperity to the company and its key executives. At least 20 individuals who attended the meeting dominated the question-and-answer session, urging the company to meet directly with the [Farm Labor Organizing Committee](#) (FLOC) after many years of failing to achieve such a meeting. Reynolds American CEO Daniel M. Delen publicly pledged that he would be willing to participate in such a meeting. Dozens of protestors outside the building underscored the message of the supporters of the human rights of tobacco farm workers.

Delen also touted an April 2012 “multilateral” meeting in Raleigh as a first step in addressing issues of inadequate worker safety in the tobacco fields of North Carolina. [See Oxfam America’s report: “[A State of Fear: Human Rights Abuses in North Carolina’s Tobacco Industry](#)”]

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Tobacco workers demonstrate

far as is possible, not undermine efforts of governments at any level to adopt laws and practices that will free Americans from the negative consequences of use of our tobacco products.”

In addition to commenting on the text of the resolution, Father Michael Crosby denounced RAI's heavy-handed campaign to oppose California's Proposition 29, which would raise that state's cigarette excise tax by \$1 per pack and increase taxes on cigars and pipe tobacco from 31.73 percent to 54.89 percent. If passed by the voters, the proposal would raise about \$735 million annually, most of which would go toward cancer research.

Fr. Crosby also cited the company's support of the right-wing political organization ALEC, the American Legislative Exchange Council, whose stealth activities have come under increased scrutiny following [public disclosures](#) of ALEC's drafting of and advocacy for Florida "Stand Your Ground" law and several states' anti-immigrant legislation.

The shareholder resolution was defeated, according to the preliminary tally reported at the meeting, with 6.4 million shares in favor, 418 million shares opposed and 6.3 shares abstaining.

The third key issue was litigation, specifically RAI's "litigation progress" – or lack thereof – in dealing with the Engle Progeny cases in Florida. During the business presentation by Mr. Delen, RAI's CEO stated that, since 2010, RAI had been "successful" in two-thirds of the Engle Progeny trials. Such "successes" included not only defense verdicts but also – for the first time publicly stated in this author's memory at any tobacco company's shareholders meeting – mistrials (such as when a jury is deadlocked without being able to reach a verdict).

In 2009, a Florida jury awarded \$3.3 million in compensatory damages and \$25 million in punitive damages against Reynolds American in a case involving the death of Benny Ray Martin, the husband of Mathilde Martin. Her case is one of thousands of "Engle Progeny" lawsuits in Florida, cases that followed the landmark 2006 [ruling](#) by the Florida Supreme court in Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006). After losing on appeal at every stage in the Florida's state court system, RAI filed a petition for certiorari with the Supreme Court of the United States.

In arguing in December 2011 that its petition for a writ of certiorari should be granted, Reynolds' attorneys (Paul D. Clement of Bancroft PLLC, Gregory G. Katsas of Jones Day and Eric E. Murphy of Jones Day) claimed that in "their conduct of Engle progeny litigation, the Florida state courts are engaged in serial due-process violations that **threaten the defendants with literally billions of dollars of liability.**" (emphasis added) Moreover, "the **massive liability** imposed on the Engle defendants – which currently stands at over \$375 million in adverse judgments – will... steadily increase as **Engle progeny trials continue with no end in sight.**" (emphasis added).

RAI's attorneys' description of doomsday for the company became reality on March 26, 2012 when the Supreme Court announced that it would not consider RAI's appeal in the Martin case. [As I described at the time](#), "At long last, Reynolds American and the other major tobacco companies will be held accountable for

A second issue was contained in the shareholder resolution that called on RAI to establish a special ethics committee to examine the company's marketing practices. The purpose of this special committee is "to ensure shareholders that its products and product promotions, as

protection corporate social responsibility CTP Daily Fantasy Sports Digital Marketing doj DraftKings e-cigarettes enforcement Engle Progeny FanDuel FDA food marketing Happy Meal litigation Lorillard Lottery Marketing Massachusetts McDonald's MSA nicotine obesity Pepsi Philip Morris RAI Reynolds self-regulation Shareholder Meeting soda sugary drinks the coca-cola company Tobacco TPLP

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Jenny M Gormley
@jennymgormley

Excellent speakers sharing expertise and passion for public health approaches to protecting youth from gun violence, including: [@peter_masiakos](#) [@ChanaSacks](#) [@MAhealthforkids](#) for part 2 [@RobinCogan](#) [@Kew2_u](#) [@jamesalanfox](#) and part 1 [@TJamesMD](#) [@NUBouve](#) [@MisterGottlieb](#) <https://twitter.com/NEUSHA2021/status/1354841695461011458>

Jan 28, 2021



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Today from 4-5:30 EST, we will hold a conference on Zoom addressing [#gun](#) violence and youth in the time of [#COVID-19](#). It's a 3-part series for public health clinicians and researchers. For more info and to register, please see: bouve.northeastern.edu/protecting-you...

Protecting Youth fro...
bouve.northeastern.edu

Jan 14, 2021



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Reducing Digital Marketing of

their massive and reprehensible misconduct that harmed thousands of Florida smokers. As Reynolds' own lawyers have concluded, denial of its cert petition is a very big deal indeed."

Citing [the question I asked](#) at the 2011 Reynolds American Shareholders Meeting about the Martin case, the response I received from Mark Holton, RAI's Executive Vice President and General Counsel, that he was "confident that the Engle process violates due process" and that the company's legal arguments were strong and would ultimately prevail, and the fact that on March 26, 2012 the U.S. Supreme Court refused to consider RAI's appeal of the \$28 million verdict, this RAI shareholder from Massachusetts asked the following question:

"Given how Mr. Holton got it wrong last year about this important case, why shouldn't investors and shareholders be skeptical when they hear pronouncements by Reynolds American management about tobacco litigation?"

In response, Mr. Holton acknowledged what the Supreme Court had done regarding the Martin case, but cited what he called "encouraging" developments with two appeals of plaintiff verdicts in the state court system in Florida. This included a March 30th ruling by Florida's Second District Court of Appeal affirming a \$2.5 million wrongful death verdict against Reynolds American and Philip Morris USA. In that appeal of the Douglas case, the Court of Appeal also certified the following question to the Supreme Court of Florida: "Does accepting as res judicata the eight Phase I findings approved in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) violate the tobacco companies' due process rights guaranteed by the Fourteenth Amendment of the United States Constitution?"

Mr. Holton notably did not address the doomsday scenario outlined by his company's attorneys who filed the writ for certiorari. So, in a span of just five months, this RAI shareholder received from the company diametrically polar opposite predictions concerning the future of tobacco litigation, depending on which side of the Reynolds American corporate mouth was talking.



Demonstrators at RAI Shareholder Meeting

Print or E-mail

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The 2013 Reynolds American, Inc. Annual Shareholders Meeting: orders, points of order, "out of order" and ordered out!
By Edward L. Sweda, J.D. As the hour of 9:00 A.M. approached on May 9,

Reynolds American, Inc. "takes step" and remains rigid at shareholder meeting
By Edward L. Sweda, Jr., Senior Attorney WINSTON-SALEM, N.C. -- On Thursday, May 5, 2011, I May 17, 2011

Report from the Reynolds American, Inc. Annual Shareholders Meeting -- May 7, 2010 -- Winston-Salem, North Carolina
By Edward L. Sweda, Jr., Senior Attorney - PHAI NEW RULES REGARDING

Infant Formulas

[phaionline.org/2020/11/16/red...](#)

Nov 16, 2020

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Micah Berman

@MicahLBerman

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Oct 21, 2020



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PHAI Takes Action Against Puff Bar for Violating Massachusetts' Ban on Flavored e-Cigarettes
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May 14, 2013
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One Response to “Reynolds American Inc. in 2012: “Progress” in tobacco litigation is alleged five weeks after U.S. Supreme Court leaves the company with “massive liability...with no end in sight.””

1. Jon says:

[May 25, 2012 at 1:27 pm](#)

<http://www.twainquotes.com/TruthFence.jpg>

Twain’s point, of course, was that if you tell the truth, you don’t have to remember who you told what.

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⌵

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

(Mark One)

- ☒ ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934
For the fiscal year ended December 31, 2011
- OR
- ☐ TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934
Commission file number: 1-32258

Reynolds American Inc.
(Exact name of registrant as specified in its charter)

North Carolina
(State or other jurisdiction of
incorporation or organization)

20-0546644
(I.R.S. Employer
Identification Number)

401 North Main Street
Winston-Salem, NC 27101
(Address of principal executive offices) (Zip Code)
(336) 741-2000
(Registrant's telephone number, including area code)

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Name of each exchange on which registered	Title of each class	Name of each exchange on which registered
Common stock, par value \$.0001 per share	New York	Rights to Purchase Series A Junior Participating Preferred Stock	New York

Securities registered pursuant to Section 12(g) of the Act: None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes ☒ No ☐

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or 15(d) of the Act. Yes ☐ No ☒

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No ☐

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). Yes ☒ No ☐

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. ☒

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer ☒ Accelerated filer ☐ Non-accelerated filer ☐ Smaller reporting company ☐

(Do not check if a smaller reporting company)

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). Yes ☐ No ☒

The aggregate market value of common stock held by non-affiliates of Reynolds American Inc. on June 30, 2011, was approximately \$12.5 billion, based on the closing price of \$37.05. Directors, executive officers and a significant shareholder of Reynolds American Inc. are considered affiliates for purposes of this calculation, but should not necessarily be deemed affiliates for any other purpose.

Indicate the number of shares outstanding of each of the registrant's classes of common stock, as of the latest practicable date: January 27, 2012: 576,142,238 shares of common stock, par value \$.0001 per share.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

An accrual of \$64 million has been recorded in RAI's consolidated balance sheet as of December 31, 2011 for the four *Engle* Progeny cases, described below, that have proceeded through the appellate process in the state of Florida. RJR Tobacco is seeking further review of these four cases by the U.S. Supreme Court. This amount includes \$53 million for compensatory and punitive damages and \$11 million for attorneys' fees and statutory interest through December 31, 2011. No other liabilities for pending smoking and health litigation have been recorded as of December 31, 2011.

Generally, RJR Tobacco and its affiliates and indemnitees have not settled, and currently RJR Tobacco and its affiliates do not intend to settle, any smoking and health tobacco litigation claims. It is the policy of RJR Tobacco and its affiliates to vigorously defend all tobacco-related litigation claims.

The only material settlements of smoking and health tobacco litigation claims reached by RJR Tobacco and B&W involved:

- the State Settlement Agreements and the funding by various tobacco companies of a \$5.2 billion trust fund contemplated by the MSA to benefit tobacco growers; and
- the original *Broin* flight attendant case discussed below under “— Litigation Affecting the Cigarette Industry — *Broin II* Cases.”

The circumstances surrounding the State Settlement Agreements and the funding of a trust fund to benefit the tobacco growers are readily distinguishable from the current categories of smoking and health cases involving RJR Tobacco or its affiliates and indemnitees. The claims underlying the State Settlement Agreements were brought on behalf of the states to recover funds paid for health care and medical and other assistance to state citizens suffering from diseases and conditions allegedly related to tobacco use. The State Settlement Agreements settled all the health-care cost recovery actions brought by, or on behalf of, the settling jurisdictions and contain releases of various additional present and future claims. In accordance with the MSA, various tobacco companies agreed to fund a \$5.2 billion trust fund to be used to address the possible adverse economic impact of the MSA on tobacco growers. A discussion of the State Settlement Agreements, and a table depicting the related payment schedule, is set forth below under “— Litigation Affecting the Cigarette Industry — Health-Care Cost Recovery Cases — State Settlement Agreements.”

The states were a unique set of plaintiffs and are not involved in any of the smoking and health cases remaining against RJR Tobacco or its affiliates and indemnitees. Although RJR Tobacco and certain of its affiliates and indemnitees continue to be defendants in health-care cost recovery cases similar in theory to the state cases but involving other plaintiffs, such as Native American tribes and foreign governments, the vast majority of such cases have been dismissed on legal grounds. RJR Tobacco and its affiliates, including RAI, believe that the same legal principles that have resulted in dismissal of health-care cost recovery cases either at the trial court level or on appeal should compel dismissal of the similar pending cases.

As with claims that were resolved by the State Settlement Agreements, the other cases settled by RJR Tobacco can be distinguished from existing cases pending against RJR Tobacco and its affiliates and indemnitees. The original *Broin* case, discussed below under “— Litigation Affecting the Cigarette Industry — *Broin II* Cases,” was settled in the middle of trial during negotiations concerning a possible nation-wide settlement of claims similar to those underlying the State Settlement Agreements.

RJR Tobacco's Comprehensive Agreement with the Canadian federal, provincial and territorial governments resolved all civil claims related to the movement of contraband tobacco products in Canada during the period 1985 through 1999 that the Canadian governments could assert against RJR Tobacco and its affiliates. These claims were separate from any smoking and health tobacco litigation. A discussion of the Canadian matters and the related settlement are set forth in note 6.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

(Mark One)

☒ ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934
For the fiscal year ended December 31, 2012

OR

☐ TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934
Commission file number: 1-32258

Reynolds American Inc.
(Exact name of registrant as specified in its charter)

North Carolina
(State or other jurisdiction of
incorporation or organization)

20-0546644
(I.R.S. Employer
Identification Number)

401 North Main Street
Winston-Salem, NC 27101
(Address of principal executive offices) (Zip Code)
(336) 741-2000
(Registrant's telephone number, including area code)

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Name of each exchange on which registered	Title of each class	Name of each exchange on which registered
Common stock, par value \$.0001 per share	New York	Rights to Purchase Series A Junior Participating Preferred Stock	New York

Securities registered pursuant to Section 12(g) of the Act: None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes ☒ No ☐

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or 15(d) of the Act. Yes ☐ No ☒

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No ☐

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). Yes ☒ No ☐

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. ☒

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer ☒ Accelerated filer ☐ Non-accelerated filer ☐ Smaller reporting company ☐

(Do not check if a smaller reporting company)

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). Yes ☐ No ☒

The aggregate market value of common stock held by non-affiliates of Reynolds American Inc. on June 29, 2012, was approximately \$15 billion, based on the closing price of \$44.87. Directors, executive officers and a significant shareholder of Reynolds American Inc. are considered affiliates for purposes of this calculation, but should not necessarily be deemed affiliates for any other purpose.

Indicate the number of shares outstanding of each of the registrant's classes of common stock, as of the latest practicable date: January 28, 2013: 552,948,192 shares of common stock, par value \$.0001 per share.

Documents Incorporated by Reference:

Portions of the Definitive Proxy Statement of Reynolds American Inc. to be filed with the Securities and Exchange Commission pursuant to Regulation 14A of the Securities Exchange Act of 1934 on or about March 22, 2013, are incorporated by reference into Part III of this report.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

pending smoking and health tobacco litigation that set forth and discuss a number of grounds and defenses that they and their counsel believe have a valid basis in law and fact. With the exception of *Engle* Progeny cases, described below, RJR Tobacco and its affiliates and indemnitees continue to win the majority of smoking and health tobacco litigation claims that reach trial, and a very high percentage of the tobacco-related litigation claims brought against them continue to be dismissed at or before trial. Based on their experience in the smoking and health tobacco litigation against them and the strength of the defenses available to them in such litigation, RJR Tobacco and its affiliates believe that their successful defense of smoking and health tobacco litigation in the past will continue in the future.

No liabilities for pending smoking and health litigation have been recorded in RAI's consolidated balance sheet as of December 31, 2012. During the fourth quarter of 2012, an aggregate payment of \$25.7 million (\$20.4 million for compensatory and punitive damages and \$5.3 million for attorneys' fees) was made in satisfaction of the adverse judgments in two *Engle* Progeny cases (as hereinafter defined), *Piendle* and *Clay*, described below. As other cases proceed through the appellate process, RAI will consider making further accruals on an individual case-by-case basis if an unfavorable outcome becomes probable and the amount can be reasonably estimated.

It is the policy of RJR Tobacco and its affiliates to vigorously defend all tobacco-related litigation claims. Generally, RJR Tobacco and its affiliates and indemnitees have not settled any smoking and health litigation claims. Other than actions taken pursuant to "offer of judgment" statutes, as described below in "— Litigation Affecting the Cigarette Industry," RJR Tobacco and its affiliates do not intend to settle such claims.

With respect to smoking and health tobacco litigation claims, the only significant settlements reached by RJR Tobacco and B&W involved:

- the State Settlement Agreements and the funding by various tobacco companies of a \$5.2 billion trust fund contemplated by the MSA to benefit tobacco growers; and
- the original *Broin* flight attendant case discussed below under "— Litigation Affecting the Cigarette Industry — *Broin II* Cases."

The circumstances surrounding the State Settlement Agreements and the funding of a trust fund to benefit the tobacco growers are readily distinguishable from the current categories of smoking and health cases involving RJR Tobacco or its affiliates and indemnitees. The claims underlying the State Settlement Agreements were brought on behalf of the states to recover funds paid for health care and medical and other assistance to state citizens suffering from diseases and conditions allegedly related to tobacco use. The State Settlement Agreements settled all the health-care cost recovery actions brought by, or on behalf of, the settling jurisdictions and contain releases of various additional present and future claims. In accordance with the MSA, various tobacco companies agreed to fund a \$5.2 billion trust fund to be used to address the possible adverse economic impact of the MSA on tobacco growers. A discussion of the State Settlement Agreements, and a table depicting the related payment schedule, is set forth below under "— Litigation Affecting the Cigarette Industry — Health-Care Cost Recovery Cases — State Settlement Agreements."

The states were a unique set of plaintiffs and are not involved in any of the smoking and health cases remaining against RJR Tobacco or its affiliates and indemnitees. Although RJR Tobacco and certain of its affiliates and indemnitees continue to be defendants in health-care cost recovery cases similar in theory to the state cases but involving other plaintiffs, such as Native American tribes and foreign governments, the vast majority of such cases have been dismissed on legal grounds. RJR Tobacco and its affiliates, including RAI, believe that the same legal principles that have resulted in dismissal of health-care cost recovery cases either at the trial court level or on appeal should compel dismissal of the similar pending cases.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

(Mark One)

☒ **ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the fiscal year ended December 31, 2015

OR

☐ **TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

Commission file number: 1-32258

Reynolds American Inc.

(Exact name of registrant as specified in its charter)

North Carolina
(State or other jurisdiction of
incorporation or organization)

20-0546644
(I.R.S. Employer
Identification Number)

401 North Main Street
Winston-Salem, NC 27101
(Address of principal executive offices) (Zip Code)

(336) 741-2000
(Registrant's telephone number, including area code)

Securities registered pursuant to Section 12(b) of the Act:

Title of each class

Name of each exchange on which registered

Common stock, par value \$.0001 per share

New York

Securities registered pursuant to Section 12(g) of the Act: None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes ☒ No ☐

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or 15(d) of the Act. Yes ☐ No ☒

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No ☐

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). Yes ☒ No ☐

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer ☒ Accelerated filer ☐

Non-accelerated filer ☐ (Do not check if a smaller reporting company) Smaller reporting company ☐

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). Yes ☐ No ☒

The aggregate market value of common stock held by non-affiliates of Reynolds American Inc. on June 30, 2015, was approximately \$31 billion, based on the closing price of \$37.33. Directors, executive officers and a significant shareholder of Reynolds American Inc. are considered affiliates for purposes of this calculation, but should not necessarily be deemed affiliates for any other purpose.

Indicate the number of shares outstanding of each of the registrant's classes of common stock, as of the latest practicable date: January 25, 2016: 1,427,341,341 shares of common stock, par value \$.0001 per share.

Documents Incorporated by Reference:

Portions of the Definitive Proxy Statement of Reynolds American Inc. to be filed with the Securities and Exchange Commission pursuant to Regulation 14A of the Securities Exchange Act of 1934 on or about March 23, 2016, are incorporated by reference into Part III of this report.

assumption of the risk, contributory or comparative fault, lack of proximate cause, remoteness, lack of standing, statutes of limitations or repose and others. RAI, RJR and Lorillard have asserted additional defenses, including jurisdictional defenses, in many of the cases in which they are named.

Accounting for Tobacco-Related Litigation Contingencies

In accordance with GAAP, RAI and its subsidiaries record any loss concerning litigation at such time as an unfavorable outcome becomes probable and the amount can be reasonably estimated on an individual case-by-case basis. For the reasons set forth below, RAI's management continues to conclude that the loss of any particular pending smoking and health tobacco litigation claim against RJR Tobacco, Lorillard Tobacco or their affiliates or indemnitees, or the loss of any particular claim concerning the use of smokeless tobacco products against American Snuff Co., when viewed on an individual basis, is not probable, except for certain *Engle* Progeny cases noted below.

Reynolds Defendants believe that they have valid defenses to the smoking and health tobacco litigation claims against them, as well as valid bases for appeal of adverse verdicts against them. Reynolds Defendants have, through their counsel, filed pleadings and memoranda in pending smoking and health tobacco litigation that set forth and discuss a number of grounds and defenses that they and their counsel believe have a valid basis in law and fact. With the exception of the *Engle* Progeny cases described below, Reynolds Defendants continue to win the majority of smoking and health tobacco litigation claims that reach trial, and a very high percentage of the tobacco-related litigation claims brought against them, including *Engle* Progeny cases, continue to be dismissed at or before trial. Based on their experience in smoking and health tobacco litigation and the strength of the defenses available to them in such litigation, RJR Tobacco and its affiliates believe that their successful defense of smoking and health tobacco litigation in the past will continue in the future.

RAI's consolidated balance sheet as of December 31, 2015, contains accruals for the following *Engle* Progeny cases: *Hiott*, *Starr-Blundell*, *Clayton*, *Ward*, *Hallgren*, *Cohen*, *Sikes*, *Thibault*, *Buonomo*, *Taylor* and *Ballard*. RJR Tobacco paid approximately \$4.9 million in satisfaction of the judgment in *Taylor* on January 19, 2016. Other accruals include an amount for the estimated costs of the corrective communications in the *U.S. Department of Justice* case and an amount for the settlement of the *Sateriale* case, discussed below. As other cases proceed through the appellate process, RAI will evaluate the need for further accruals on an individual case-by-case basis if an unfavorable outcome becomes probable and the amount can be reasonably estimated.

It is the policy of RJR Tobacco and its affiliates to defend tobacco-related litigation claims vigorously; generally, RJR Tobacco and its affiliates and indemnitees do not settle such claims. However, RJR Tobacco and its affiliates may enter into settlement discussions in some cases, if they believe it is in their best interests to do so. Exceptions to this general approach include actions taken pursuant to "offer of judgment" statutes, as described below in "— Litigation Affecting the Cigarette Industry—Overview," and Filter Cases, as described below in "— Litigation Affecting the Cigarette Industry—Filter Cases," as well as other historical examples discussed below.

With respect to smoking and health tobacco litigation claims, the only significant settlements reached by RJR Tobacco, Lorillard Tobacco and B&W involved:

- the State Settlement Agreements and the funding by various tobacco companies of a \$5.2 billion trust fund contemplated by the MSA to benefit tobacco growers;
- the original *Broin* flight attendant case discussed below under "— Litigation Affecting the Cigarette Industry — *Broin II* Cases," and
- most of the *Engle* Progeny cases pending in federal court, after the initial docket of over 4,000 such cases was reduced to approximately 400 cases.

The circumstances surrounding the State Settlement Agreements and the funding of a trust fund to benefit the tobacco growers are readily distinguishable from the current categories of smoking and health cases involving Reynolds Defendants. The claims underlying the State Settlement Agreements were brought on behalf of the states to recover funds paid for health care and medical and other assistance to state citizens suffering from diseases and conditions allegedly related to tobacco use. The State Settlement Agreements settled all the health-care cost recovery actions brought by, or on behalf of, the settling jurisdictions and contain releases of various additional present and future claims. In accordance with the MSA, various tobacco companies agreed to fund a \$5.2 billion trust fund to be used to address the possible adverse economic impact of the MSA on tobacco growers. A discussion of the State Settlement Agreements, and a table depicting the related payment schedule, is set forth below under "— Litigation Affecting the Cigarette Industry — Health-Care Cost Recovery Cases."

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549
FORM 10-K**

☒ **ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**
For the fiscal year ended December 31, 2015

☐ **TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**
For the transition period from _____ to _____

Commission File Number 1-08940
ALTRIA GROUP, INC.
(Exact name of registrant as specified in its charter)

Virginia
(State or other jurisdiction of
incorporation or organization)

6601 West Broad Street, Richmond, Virginia
(Address of principal executive offices)

13-3260245
(I.R.S. Employer
Identification No.)

23230
(Zip Code)

804-274-2200
(Registrant's telephone number, including area code)
Securities registered pursuant to Section 12(b) of the Act:

Title of each class

Name of each exchange on which registered

Common Stock, \$0.33 ¹/₃ par value

New York Stock Exchange

Securities registered pursuant to Section 12(g) of the Act: None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. ☒ Yes ☐ No

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. ☐ Yes ☒ No

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days ☒ Yes ☐ No

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Website, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files) ☒ Yes ☐ No

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K (§229.405 of this chapter) is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K ☒

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer or a smaller reporting company. See the definitions of "large accelerated filer", "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act.

Large accelerated filer ☒

Accelerated filer ☐

Non-accelerated filer ☐ (Do not check if smaller reporting company) Smaller operating company ☐

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Act). ☐ Yes ☒ No

As of June 30, 2015, the aggregate market value of the registrant's common stock held by non-affiliates of the registrant was approximately \$96 billion based on the closing sale price of the common stock as reported on the New York Stock Exchange.

Class

Outstanding at February 12, 2016

Common Stock, \$0.33 ¹/₃ par value

1,957,931,815 shares

DOCUMENTS INCORPORATED BY REFERENCE

Portions of the registrant's definitive proxy statement for use in connection with its annual meeting of shareholders to be held on May 19, 2016, to be filed with the Securities and Exchange Commission on or about April 7, 2016, are incorporated by reference into Part III hereof.

may not be obtainable in all cases. This risk has been substantially reduced given that 47 states and Puerto Rico limit the dollar amount of bonds or require no bond at all. As discussed below, however, tobacco litigation plaintiffs have challenged the constitutionality of Florida's bond cap statute in several cases and plaintiffs may challenge state bond cap statutes in other jurisdictions as well. Such challenges may include the applicability of state bond caps in federal court. Although Altria Group, Inc. cannot predict the outcome of such challenges, it is possible that the consolidated results of operations, cash flows or financial position of Altria Group, Inc., or one or more of its subsidiaries, could be materially affected in a particular fiscal quarter or fiscal year by an unfavorable outcome of one or more such challenges.

Altria Group, Inc. and its subsidiaries record provisions in the consolidated financial statements for pending litigation when they determine that an unfavorable outcome is probable and the amount of the loss can be reasonably estimated. At the present time, while it is reasonably possible that an unfavorable outcome in a case may occur, except to the extent discussed elsewhere in this Note 18. *Contingencies*: (i) management has concluded that it is not probable that a loss has been incurred in any of the pending tobacco-related cases; (ii) management is unable to estimate the possible loss or range of loss that could result from an unfavorable outcome in any of the pending tobacco-related cases; and (iii) accordingly, management has not provided any amounts in the consolidated financial statements for unfavorable outcomes, if any. Litigation defense costs are expensed as incurred.

Altria Group, Inc. and its subsidiaries have achieved substantial success in managing litigation. Nevertheless, litigation is subject to uncertainty and significant challenges remain. It is possible that the consolidated results of operations, cash flows or financial position of Altria Group, Inc., or one or more of its subsidiaries, could be materially affected in a particular fiscal quarter or fiscal year by an unfavorable outcome or settlement of certain pending litigation. Altria Group, Inc. and each of its subsidiaries named as a defendant believe, and each has been so advised by counsel handling the respective cases, that it has valid defenses to the litigation pending against it, as well as valid bases for appeal of adverse verdicts. **Each of the companies has defended, and will continue to defend, vigorously against litigation challenges.** However, Altria Group, Inc. and its subsidiaries may enter into settlement discussions in particular cases if they believe it is in the best interests of Altria Group, Inc. to do so.

Overview of Altria Group, Inc. and/or PM USA Tobacco-Related Litigation

▪ **Types and Number of Cases:** Claims related to tobacco products generally fall within the following categories: (i) smoking and health cases alleging personal injury brought on behalf of individual plaintiffs; (ii) smoking and health cases primarily alleging personal injury or seeking court-supervised programs for ongoing medical monitoring and purporting to be brought on behalf of a class of individual plaintiffs, including cases in which the aggregated claims of a number of individual

plaintiffs are to be tried in a single proceeding; (iii) health care cost recovery cases brought by governmental (both domestic and foreign) plaintiffs seeking reimbursement for health care expenditures allegedly caused by cigarette smoking and/or disgorgement of profits; (iv) class action suits alleging that the uses of the terms "Lights" and "Ultra Lights" constitute deceptive and unfair trade practices, common law or statutory fraud, unjust enrichment, breach of warranty or violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"); and (v) other tobacco-related litigation described below. Plaintiffs' theories of recovery and the defenses raised in pending smoking and health, health care cost recovery and "Lights/ Ultra Lights" cases are discussed below.

The table below lists the number of certain tobacco-related cases pending in the United States against PM USA and, in some instances, Altria Group, Inc. as of December 31, 2015, 2014 and 2013:

	2015	2014	2013
Individual Smoking and Health Cases ⁽¹⁾	65	67	67
Smoking and Health Class Actions and Aggregated Claims Litigation ⁽²⁾	5	5	6
Health Care Cost Recovery Actions ⁽³⁾	1	1	1
"Lights/ Ultra Lights" Class Actions	11	12	15

⁽¹⁾ Does not include 2,499 cases brought by flight attendants seeking compensatory damages for personal injuries allegedly caused by exposure to environmental tobacco smoke ("ETS"). The flight attendants allege that they are members of an ETS smoking and health class action in Florida, which was settled in 1997 (*Broin*). The terms of the court-approved settlement in that case allowed class members to file individual lawsuits seeking compensatory damages, but prohibited them from seeking punitive damages. Also, does not include individual smoking and health cases brought by or on behalf of plaintiffs in Florida state and federal courts following the decertification of the *Engle* case (discussed below in *Smoking and Health Litigation - Engle Class Action*).

⁽²⁾ Includes as one case the 600 civil actions (of which 344 were actions against PM USA) that were to be tried in a single proceeding in West Virginia (*In re: Tobacco Litigation*). The West Virginia Supreme Court of Appeals has ruled that the United States Constitution did not preclude a trial in two phases in this case. Issues related to defendants' conduct and whether punitive damages are permissible were tried in the first phase. Trial in the first phase of this case began in April 2013. In May 2013, the jury returned a verdict in favor of defendants on the claims for design defect, negligence, failure to warn, breach of warranty, and concealment and declined to find that the defendants' conduct warranted punitive damages. Plaintiffs prevailed on their claim that ventilated filter cigarettes should have included use instructions for the period 1964 - 1969. The second phase will consist of trials to determine liability and compensatory damages. In November 2014, the West Virginia Supreme Court of Appeals affirmed the final judgment. In July 2015, the trial court entered an order that will result in the entry of final judgment in favor of defendants and against all but 30 plaintiffs who potentially have a claim against one or more defendants that may be pursued in a second phase of trial. The court intends to try the claims of these 30 plaintiffs in six consolidated trials, each with a group of five plaintiffs. The first trial is currently scheduled to begin May 1, 2017. Dates for the five remaining consolidated trials have not been scheduled.

⁽³⁾ See *Health Care Cost Recovery Litigation - Federal Government's Lawsuit* below.

▪ **International Tobacco-Related Cases:** As of January 26, 2016, PM USA is a named defendant in ten health care cost recovery actions in Canada, eight of which also name Altria Group, Inc. as a defendant. PM USA and Altria Group, Inc. are

SMOKING AND HEALTH PROPOSAL

JV13
C.M.
What we want to do this morning is to take a summary look at the smoking and health question and then make a proposal to you for a B&W project to counter the anti-cigarette forces. T

JV13
This is a chronological table of smoking and health activities. Not all the activities by any means. We have been selective in making up this chart -- just picked those events that caused headlines to be made and probably left strong impressions with the public. As we look at it I believe we can see how we became an harassed and restricted industry and how we came to conflict with the awesome forces of the federal government.

It is also a sort of key to the characteristics and processes involved in the smoking and health question. Looking at the individual elements we see ... (comment).

To summarize the anti-cigarette activities I think we can say that:

First - They have managed to bring us from a simple conflict of attitudes to a state of condemnation and severe restriction.

Second - Their efforts have been aggressive while ours have been defensive.

Third - The anti activities are rather orderly -- almost as if they had a plan working for them.

690010951

Filed in Evidence
as

Plaintiff's

PT
Exhibit 719 Date 9/27/16

Case 07-LA-11551-D

Fourth -- Their activities are accelerating and becoming more damaging to us all the time.

Over the past three weeks I have been reading vast amounts of material from Mr. Yeaman's and John Blalock's files and it has given me a picture of what the anti-cigarette forces are like and what the pro-cigarette forces are like. I think the anti-cigarette forces can be characterized as dedicated opportunists. They are quick to act and seem to be totally unprincipled in the type of information they use to attack the industry.

The pro forces, on the other hand, and I'm speaking primarily of the Tobacco Institute, seem to be slow to act, mainly defensive, and rather narrow in the area of defense. The Tobacco Institute has probably done a good job for us in the area of politics and as an industry we also seem to have done very well in turning out scientific information to counter the anti-smoking claims. There is no question, though, that we have been inept in getting our side of the story, good though it may be, across to the news media and to the public. I am convinced that the nature of the institute, the way it is organized and the way it operates, makes it practically impossible for the Tobacco Institute to speak effectively to the news media. It has no personality and is not famous. It just can't compete with the anti-cigarette forces who can make their pronouncements through Emerson Foote or the Surgeon General. Those men have news value just on the basis of their names.

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This whole problem of getting our story across to the mass public provokes this question: "Should B&W take some independent and unilateral action to counter the anti-cigarette forces?" And "Can we afford it?"

What is the justification for taking unilateral action? Here is a chart that I think justifies such a program. It says we are losing our commercial freedom. We are restricted in terms of ability to sell -- in colleges and in vending machines. Our products are branded with a warning label. Our ability to advertise has been attacked on all fronts and has consistently deteriorated. First there were restrictions on health advertising imposed by the Cigarette Advertising Code and the N. A. B. Code. These codes also included restrictions regarding television time and program selection. We have been classified as a public menace by the F. C. C. and are obliged to suffer public condemnation along with litter bugs and forest fires. In the near future we will withdraw from the broadcast medium and already pressures are growing to limit our advertising activities in print. Additionally, nearly every state in the Union is ready to pounce on us with restrictive legislation as soon as Congress opens the door on this possibility.

In thinking over what we might do to improve the case for cigarettes, I have looked at the problem somewhat like the marketing of a new brand. Here is a chart where I have defined the basic marketing elements which I see in the smoking and health problem. Our consumer I have defined

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as the mass public, our product as doubt, our message as truth --
well stated, and our competition as the body of anti-cigarette fact that
exists in the public mind.

We have chosen the mass public as our consumer for several reasons:

- This is where the misinformation about smoking
and health has been focused.
- The Congress and federal agencies are already
being dealt with -- and perhaps as effectively as
possible -- by the Tobacco Institute.
- It is a group with little exposure to the positive
side of smoking and health.
- It is the prime force in influencing Congress and
federal agencies -- without public support little
effort would be given to a crusade against cigarettes.

Doubt is our product since it is the best means of competing with the
"body of fact" that exists in the mind of the general public. It is also
the means of establishing a controversy. Within the business we
recognize that a controversy exists. However, with the general public
the consensus is that cigarettes are in some way harmful to the health.
If we are successful in establishing a controversy at the public level,
then there is an opportunity to put across the real facts about smoking
and health. Doubt is also the limit of our "product". Unfortunately,

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we cannot take a position directly opposing the anti-cigarette forces and say that cigarettes are a contributor to good health. No information that we have supports such a claim.

Truth is our message because of its power to withstand a conflict and sustain a controversy. If in our pro-cigarette efforts we stick to well documented fact, we can dominate a controversy and operate with the confidence of justifiable self-interest.

Now, how can we get started on an independent program of action? Here is one idea. It is tentative and sketchy but it is a starting place. I don't even have a time element in this but that comes later when a thorough study of this subject is made and a detailed plan developed around this idea ... (comment on plan).

We have seen research this morning which indicates that there is at least a potential for using our own ads to communicate the other side of the cigarette story. Before putting this type effort into practice, however, we would want to be absolutely certain that there is no damage to our advertising or to the consumer acceptance of our brands. So the first step for the immediate future would be research. We are recommending basic research to unearth specific problems in smoking and health that we can deal directly with.

Corny Muije will describe the type of research we think is needed ...
(Corny Muije).

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What was shown today specifically demonstrates what happened when a certain type of information was supplied with the KOOL Adios II ad.

Indications are that the KOOL copy effectiveness was enhanced. We need more evidence that this is true. Furthermore, we need to establish whether this solely hinges on the Adios II ad and the specific body copy used.

Also, is this an effective approach when the information is supplied with ads for VICEROY, RALEIGH, and BELAIR?

For these reasons we are proposing what I will call Phase I of this research program ... (Chart I and comment).

Since we, at this time, do not know which RALEIGH and BELAIR advertising copy will be in future use -- KOOL and VICEROY testing should precede RALEIGH and BELAIR testing.

The testing cost of Phase I should not exceed \$60,000. It would be substantially less if results on KOOL and VICEROY were unfavorable and we therefore cancelled the RALEIGH and BELAIR portion.

Success in Phase I should lead to Phase II ... (Chart II and comment).

It is essential that we ascertain which type of anti-cigarette information has most affected the smoking public. What claimed health hazards are currently accepted by the general public.

A general survey with detailed questioning should establish this.

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During Phase II we should also investigate consumer reaction to at least three distinct anti-cigarette approaches. In addition, consumer reactions to maybe a dozen specific anti-cigarette claims could be probed.

The purpose of Phase II is to establish which past information and which current anti-cigarette claims are most damaging. From this we should learn which information should be of greatest interest to the public. We could then tailor our efforts more precisely to achieve the greatest effect.

Without specific detail the cost of Phase II cannot be estimated accurately. But, assuming a general survey of 1,000 respondents, copy research on three commercials and copy claim research on twelve claims, the costs for Phase II should not exceed \$40,000.

Successful completion of Phases I and II leads us to Phase III -- test market or test markets ... (Chart III and comment).

None of the research, up to this point, will have let us know the effect of sustained repeated exposure of B&W cigarette ads with body copy of different content.

Prior to a nation-wide commitment, one or more test markets would be called for.

At this point it is impossible to say whether one or more test markets would be desirable.

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Regardless, in each instance we recommend that a consumer survey be conducted prior to the start of the test market and another one at the end of the test market.

A comparison of the pre and post surveys will enable us to evaluate the effect of the total campaign.

We would like to have the Executive Committee's approval to initiate the research program that Corny has just explained and at the same time to start a task force study of the smoking and health question and develop a detailed plan of action for B&W.

Such a plan would cover:

- Sources of information about smoking and health.
- The selection and clearance of information to be used by B&W.
- The development of new information about smoking and health.
- Means of anticipating and countering the release of misinformation.
- Channels other than our own advertising for getting messages to the public.
- Ways to use and perhaps focus industry efforts in support of our own program.

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- Agency participation in the program.
- Internal administration and implementation of the program.
- Thorough evaluation of potential advantages and disadvantages of public action on B&W and its brands.

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MAY 08 1996

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION

CASE NO. 94-08273 CA 20

HOWARD A. ENGLE, M.D.,)
et al.,)
)
Plaintiffs,)
)
-vs-)
)
RJR REYNOLDS TOBACCO,)
COMPANY, et al.,)
)
Defendants.)

Dade County Courthouse
Miami, Florida
Monday, 9:35 a.m.
May 6, 1996

The above-styled cause came on for hearing before the Honorable Alan L. Postman, Circuit Judge, in chambers, pursuant to notice.

APPEARANCES:

STANLEY ROSENBLATT, Esq.
and SUSAN ROSENBLATT, Esq.
Attorney for the Plaintiffs

COLL, DAVIDSON, CARTER, SMITH,
SALTER & BARKETT
BY: Norman A. Coll, Esq.

DECHERT, PRICE & RHOADS
BY: Robert C. Heim, Esq.
and Sean P. Wajert, Esq.
Attorneys for the Defendant,
Philip Morris

— — — — —

TAYLOR, JONOVIC & WHITE
(305) 358-9047 Miami, Florida

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1 THE COURT: Obviously he's going to
2 need time to respond. That's no problem.

3 MR. HEIM: All right. As I said,
4 having taken a quick look at it, it's a better plan.
5 It is progress in what I know Your Honor considers
6 to be one of the most important things that we will
7 do in this whole class action.

8 Again, the reason that I was frustrated and
9 the reason that it is so important, among other
10 things, is that if the defendants win, we want as
11 many people as possible bound; and further, even
12 perhaps for the Court, just as salient is this
13 proposition: Once this notice goes out and it's
14 done, anytime anybody in the state of Florida brings
15 an individual smoking and health case, the
16 defendants are going to say, "You can't do that.
17 You are part of the Engle case. You cannot bring an
18 individual case." If those people are going to come
19 in and say, "But the notice was inadequate, and I
20 didn't get notice," then we have created a big
21 problem for judges all over the state. You don't
22 want that, and I don't want that. I don't think
23 Mr. Rosenblatt wants that either. So, having a good
24 solid record on the effectiveness of notice is
25 absolutely important in this case.

TAYLOR, JONOVIC & WHITE
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WM08E97293

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO
COMPANY, et al.,

Defendants.

_____ /

Miami-Dade County Courthouse
Miami, Florida
Monday, 9:35 a.m.
October 26, 1998

TRIAL - VOLUME 107

The above-styled cause came on for trial
before the Honorable Robert Paul Kaye, Circuit Judge,
pursuant to notice.

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22 drug-delivery device?

23 A. Yes.

24 Q. And the drug you were referring to was what?

25 A. That, of course, is nicotine, which is why

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1 people smoke cigarettes.

2 Q. Then there's an article, Doctor, which
3 appeared in the New England Journal of Medicine in
4 1994, the title of which is: Establishing a Nicotine
5 Threshold for Addiction. I would like you to explain
6 that as well as generally the concept of what you mean
7 by a nicotine threshold.

8 A. Well, it's very clear from a lot of
9 research -- a lot of this is talked about in the 1988
10 Surgeon General's Report, a lot of scientists have
11 written about it since then -- that people only smoke
12 cigarettes if there's nicotine in the cigarettes.

13 And in this article, we reasoned that it
14 might be possible to have a cigarette that had nicotine
15 in it because some people might -- some taste
16 characteristics that people might like.

17 So you could have nicotine in the cigarette,
18 but you could get to a level such that it would not
19 sustain addiction.

20 Now, what this level is is not known at this
21 moment. But we argued -- from people who are not
22 addicted, who are only occasional smokers, we argued
23 from results of animal studies, that there is a level
24 of nicotine in the cigarette that would be

25 nonaddictive.

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1 And if cigarettes were made with that level
2 of nicotine, then smokers could really be free to
3 choose whether to smoke or not, because they wouldn't
4 be driven to deal with the nicotine pharmacologic
5 effects or nicotine withdrawal.

6 What we proposed is all cigarettes gradually
7 have the nicotine level lowered. It's well-known that
8 the technology for this is available. The industry can
9 take nicotine out of cigarettes.

10 So, if you gradually lowered the nicotine
11 level outside of cigarettes over, say, ten or 15 years,
12 people would gradually get used to lower and lower
13 nicotine levels. They would gradually become
14 detoxified from nicotine, and at some point in time the
15 only cigarettes that would be available would be these
16 nonaddictive cigarettes, and kids could start smoking
17 to be cool, and if they got pregnant they could stop.
18 Adults could stop or not stop if they wanted to and
19 they wouldn't be driven by nicotine addiction.

20 That was our proposal as a way to reduce the
21 health hazards of smoking, which, really, the health
22 hazards are not nicotine; the health hazards are the
23 carcinogens and tar and cyanide and chemicals. But
24 what keeps people smoking is nicotine. So if
25 cigarettes could become nonaddictive, the health

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1 hazards could become much less.

2 Q. Are you saying it is now currently
3 technologically feasible that if the tobacco industry
4 chose to, they could make a cigarette with a level of
5 nicotine sufficiently low that it would not be
6 addictive?

7 A. Yes. They could make a cigarette with any
8 level of nicotine.

9 Q. Have you ever had discussions with tobacco
10 industry representatives about this idea?

11 A. Informally at scientific conferences I've had
12 several try to discourage me from this idea.
13 Obviously, it's something that the industry does not
14 like. In fact, they've written extensively in their
15 documents about a threshold from another point of view.

16 MR. HEIM: Objection, Your Honor.

17 THE COURT: Overruled. This is his
18 conversation.

19 MR. HEIM: Well, that's not how he ended the
20 sentence, so I move to strike the last part of his
21 answer.

22 THE COURT: Information received from your
23 contact with the tobacco companies. Go ahead.

24 THE WITNESS: Well, actually, my last comment
25 has to do with documents, so it was not from

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO
COMPANY, et al.,

Defendants.

_____ /

Miami-Dade County Courthouse
Miami, Florida
12:08 p.m.
November 5, 1998

TRIAL - VOLUME 123

The above-styled cause came on for trial
before the Honorable Robert Paul Kaye, Circuit Judge,
pursuant to notice.

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123. Trial Testimony Michael B. Siegel, MD 11.5.98

14 he didn't identify any of these documents.

15 He's not said that he's relying on any of
16 these documents. And Your Honor, I would expressly
17 urge you that this gentleman just said these are the
18 things that were not disclosed. That is preempted.

19 THE COURT: You can cross-examine him on it,
20 and if you win on appeal, so be it.

21 (The sidebar conference was concluded, and
22 the following proceedings were held in open court:)

23 (The record was read back by the court
24 reporter.)

25 BY MR. ROSENBLATT:

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1 Q. Had you completed --

2 A. No.

3 Q. Okay. Then continue.

4 A. I was talking about the information that --
5 you had asked me what information the cigarette
6 companies had that they didn't disclose --

7 Q. To the public health --

8 A. -- to the public health community related to
9 cigarette addiction and the health risks of smoking.
10 And I already mentioned -- the beginning part of my
11 answer was they knew cigarettes were addictive and they
12 knew the specific mechanism by which cigarettes were
13 addictive.

14 what I was trying to say is that they also
15 knew that they could tightly control the level of
16 nicotine in cigarettes delivered to the smoker in order
Page 68

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123. Trial Testimony Michael B. Siegel, MD 11.5.98

17 to enhance the addiction.

18 They knew, for example, in 1963 that they
19 could tightly regulate the dose of nicotine delivered
20 by the cigarette.

21 They knew in 1964 that there were two
22 different forms of nicotine. There was a bound form
23 and a free form that we sometimes called the freebase
24 nicotine form. They knew that it was the freebase
25 nicotine form that most rapidly entered the brain

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1 creating a much stronger addictive effect.

2 They knew in 1966 that, by controlling the
3 pH, by controlling the acidity of the cigarette, they
4 could increase the amount of nicotine that was present
5 in that free form in order to enhance the nicotine
6 delivery to the smoker.

7 And they knew in the mid 1960s, at least one
8 of the companies was using that technology to, again,
9 manipulate the nicotine level in the cigarette. They
10 were adding ammonia to cigarettes to enhance the
11 addictive -- to enhance the amount of nicotine in the
12 free form and enhance the addictive nature of the
13 cigarette.

14 The companies also knew back in 1953 that
15 cigarettes were carcinogenic, that they caused cancer.
16 They clearly knew this in 1953. That information was
17 never disclosed to the public.

18 They also knew that cigarette smokers
19 compensate for the amount of nicotine in a cigarette by

123. Trial Testimony Michael B. Siegel, MD 11.5.98

20 inhaling more or less.

21 So, in other words, a smoker who smokes a low
22 nicotine cigarette actually inhales the same amount of
23 nicotine as a smoker who inhales a high nicotine
24 cigarette because the smoker actually puffs deeper to
25 bring more nicotine into the body. They knew that in

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1 1974.

2 The public health community, on the other
3 hand, didn't know that until the 1980s when research
4 showed that. The cigarette companies knew that low
5 nicotine cigarettes were not any safer because the
6 cigarette smokers were compensating to make up for the
7 behavior. They knew that low nicotine cigarettes
8 really didn't do anything for health because the smoker
9 is going to smoke the same amount, get the same
10 nicotine in the system.

11 The public health community didn't know that
12 until the late 1980s, and, in fact, most doctors would
13 actually advise their patients to switch to low
14 nicotine cigarettes because the doctors -- and if you
15 look at medical textbooks, medical textbooks advised
16 doctors that that was a way to --

17 MR. KIRBY: Objection.

18 THE WITNESS: The general consensus or the
19 general feeling of the scientific community was that
20 low nicotine cigarettes were safer. The companies knew
21 this wasn't the case in 1974, continued to market and
22 advertise the low nicotine cigarettes.

123. Trial Testimony Michael B. Siegel, MD 11.5.98

23 So there has been four decades, I believe, in
24 which the cigarette companies, as early as 1953 in the
25 case with the health effects and as early as 1962 with

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1 regard to addictive qualities of tobacco, that tobacco
2 companies have known cigarettes are harmful but have
3 not disclosed the information to the public and have
4 known that cigarettes are addictive and --

5 MR. KIRBY: Objection, Your Honor.

6 THE COURT: To the public health community?

7 THE WITNESS: Yes, not disclosed it to the
8 public health community.

9 THE COURT: All right. Overrule the
10 objection.

11 BY MR. ROSENBLATT:

12 Q. Based on your research in this area, had the
13 members of the public health community -- and I'm not
14 limiting this to the Surgeon General of the United
15 States, but various agencies under, you know, the old
16 Health, Education and Welfare and then Health and Human
17 Services, does your research on the subject reflect
18 that requests were made by the public health community,
19 one way or the other, asking for the current research
20 of the tobacco companies?

21 MR. KIRBY: Objection, leading.

22 THE COURT: That's not leading. Overruled.

23 THE WITNESS: The public health community has
24 made a request to the cigarette companies for the
25 information that they have on both the health effects

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IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO
COMPANY, et al.,

Defendants.

_____ /

Miami-Dade County Courthouse
Miami, Florida
9:35 a.m.
June 10, 1999

TRIAL - VOLUME 335

The above-styled cause came on for trial
before the Honorable Robert Paul Kaye, Circuit Judge,
pursuant to notice.

TAYLOR, JONOVIC, WHITE & GENDRON
Miami, Florida (305 358-9047)

35925

APPEARANCES:

18 MR. KIRBY: Your Honor, consistent with the
19 discussion that we had yesterday about the need for a
20 verdict form in Phase I that we can carry into Phase II
21 and Phase III, so that it has meaning, we believe that
22 there has to be some degree of specificity.

23 If you merely ask this jury whether the
24 defendants made a misstatement of a material fact, and
25 they are not required to identify what it is, when you

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Miami, Florida (305 358-9047)

35954

1 go into the Phase II and Phase III trials of the
2 individual smokers' claims, that finding will have no
3 meaning.

4 So we believe that, for it to have meaning
5 going forward, it needs specificity.

6 So how do we go about doing that?

7 I think what is incumbent upon all of us is
8 to identify what are the claimed misrepresentations of
9 material fact; and if those are going to be enumerated,
10 then so be it. But without doing that, for the life of
11 me, I can't figure out what we do with a finding that
12 some defendant at some time made some misstatement of
13 fact.

14 I would also point out, Your Honor, that the
15 plaintiffs' proposed question makes reference to
16 members of the public. We think that is an
17 inappropriate reference. It's defined on a tag line on
18 their Question No. 4.

19 There is no such thing in Florida as fraud on
20 the public. And the public is not a party; the

21 plaintiffs in this case are current or former smokers
22 who claim to have been injured by reason of their
23 addiction to cigarettes that contain nicotine.

24 Secondly, plaintiffs' question makes
25 reference to concealment of a material fact. And under

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Miami, Florida (305 358-9047)

35955

1 Florida law, there is no independent cause of action
2 for concealment unless you owe a fiduciary or other
3 form of special duty.

4 what you're really talking about here is
5 claimed misstatements of fact. And now I would readily
6 concede to Your Honor that what can make an affirmative
7 statement misleading is the failure to disclose
8 something else. But the issue of failure to disclose
9 or concealment never arises unless an affirmative
10 representation is false.

11 So we also don't believe that reference to
12 concealment of a material fact is an appropriate
13 question under Florida law. And we can argue that in
14 more detail if Your Honor cares, even now or when we
15 get to the proposed jury instructions.

16 MS. ROSENBLATT: Well, concealment is very
17 much a part of this case because the defendants have
18 published and uttered thousands upon thousands of
19 statements about their product, the relationship of
20 smoking to disease over periods of years.

21 And once they start discussing and being
22 interviewed on shows and appearing before Congress and
23 presenting booklets by the Tobacco Institute and

335. Hearing re Proposed Jury Instructions 6.11.99

23 MR. HEIM: I've looked at them.

24 THE COURT: But if you look at these

25 questions --

TAYLOR, JONOVIC, WHITE & GENDRON
Miami, Florida (305 358-9047)

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1 MR. HEIM: We may want to comment on them.

2 THE COURT: If you want to agree with some of
3 them and disagree with others, let me know.

4 MR. HEIM: If we want to comment on them,
5 I'll let you know.

6 THE COURT: Some of these questions may be
7 exactly what you have in mind as to specificity. I
8 don't know.

9 MS. ROSENBLATT: Just for the record, we did
10 provide those last week. It wasn't just this morning.

11 MR. HEIM: No, I understand that. But I'm
12 saying that our view is that the approach we used was
13 the correct approach. But I wanted to also point out
14 that some of those questions wouldn't make any sense,
15 in any event.

16 But I can do that later in a separate
17 submission.

18 MR. SCHNEIDER: Your Honor, with respect to
19 those questions, I would submit that many of them are
20 argumentative, and that that is not the solution to put
21 before a jury, argumentative roll call of questions
22 drawn out of the plaintiffs' complaint.

23 I would direct Your Honor's attention again
24 to the defendants' submission on fraud. The questions
25 are simple. They're shorter. They're tied more

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Miami, Florida (305 358-9047)

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1 closely to the law, and we would submit that you go
2 with our fraud --

3 THE COURT: Which one?

4 MR. SCHNEIDER: Our fraud questions. Both
5 defendants.

6 THE COURT: You have just one question,
7 basically, two questions.

8 MR. SCHNEIDER: Two. We have, of course, a
9 third one --

10 THE COURT: If you look at specificity as to
11 the complaint. In other words, what I'm looking at.
12 If you look at the complaint and say in the complaint:
13 Certain allegations were made that the defendants did
14 X, Y and Z, you could tailor questions, saying: Did
15 the plaintiff prove that the defendants did X, Y and Z?
16 That can be relatively simple, if one just
17 takes out of the complaint these issues.

18 MR. SCHNEIDER: Well, Your Honor --

19 THE COURT: That's what I think -- the
20 purpose of this may not have been done according to
21 your liking in particular. But the concept is there,
22 that if you want specificity, then there is a way of
23 doing it. And saying, all right, let's look at what
24 the defendants -- the plaintiffs have alleged in their
25 complaint and what did they prove, and then use those

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1 questions to determine whether the jury says they were
2 proven or not.

3 MR. SCHNEIDER: I guess my point was this:
4 One, we should not create a list of questions that are
5 suggestive and argumentative, which I would submit
6 these are.

7 we would submit that, with respect to
8 specificity, the better way to go is to let the jury
9 say what it is they've found.

10 But a middle ground, Your Honor, short of a
11 list of suggested questions, let the plaintiffs, in
12 their closing argument, argue to the jury what it is
13 that they think are false statements, what it is that
14 they think were published in Florida. Let them argue,
15 and the jury's answer to the simple question will be in
16 response.

17 THE COURT: Okay. I didn't think you wanted
18 to do that. But you mentioned that.

19 MS. ROSENBLATT: If I understand that
20 correctly, you know, and it's just a general question,
21 that's fine. But if it's fill in the blanks and start
22 remembering, you know, obviously, we object to that.

23 My understanding of what counsel just said is
24 there would just be a general question on fraud, like
25 on the verdict form, without specificity.

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1 THE COURT: That's what he said. That was my
2 understanding.

3 MR. HEIM: If that's what he said. I don't
4 join in it. If that's what he said.

5 MR. SCHNEIDER: What I said, Your Honor, was
6 we thought the appropriate way to go is to ask this
7 question and ask for specificity in the manner in which
8 we have done it. Let the jury tell us specifically
9 what they have found.

10 THE COURT: That's at this end of the
11 spectrum.

12 MR. SCHNEIDER: That's at this end of the
13 spectrum.

14 The plaintiffs have suggested, instead, a
15 roll call of argumentative questions. I oppose that.
16 I still think that our submission is the way to go.

17 what I said was, if the Court is not going to
18 go in our direction, I don't think they should go to
19 the plaintiffs' direction.

20 And the middle direction, which I don't
21 support, but the middle direction is: Ask a simple
22 question, argue in closing what you're going to argue,
23 and whatever use can be made of that can be made of
24 that.

25 we still think the proper way to go is ask

TAYLOR, JONOVIC, WHITE & GENDRON
Miami, Florida (305 358-9047)

35971

1 the question, let the jury specify.

2 THE COURT: We're just going around in
3 circles. Okay.

7 asserted by all of the class plaintiffs) the jury will
8 then be asked to make a determination as to which of
9 all class members are entitled to punitive damages.

10 This is just a reworking and decertification,
11 in essence, a de facto determination to try all these
12 cases individual.

13 THE COURT: I have a question for Mr. Kirby.
14 You made the comment that not a single class member
15 will ever be entitled to or recover -- I'm not sure
16 what you said -- punitive damages. Let me see what you
17 did say.

18 MR. KIRBY: Let me go back and find it.

19 THE COURT: All right. You said: Not a
20 single Florida so-called addicted, injured smoker in
21 this class can ever recover punitive damages from any
22 of the defendants.

23 MR. KIRBY: That was in the context, Your
24 Honor, of me telling you why -- Mrs. Rosenblatt said
25 that the question we proposed was meaningless.

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Miami, Florida (305 358-9047)

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1 THE COURT: I don't understand what you mean
2 when you say -- because of the evidence or because of
3 some law?

4 MR. KIRBY: No, I thought what I said -- she
5 said the question we submitted was meaningless; that an
6 answer to it wouldn't mean anything. And I was telling
7 Your Honor --

8 THE COURT: Oh.

9 MR. KIRBY: -- if they answer the question
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10 "No," and that is what I said.

11 THE COURT: No. I wanted to be sure that's
12 what you said.

13 MR. KIRBY: I said: I'll tell you why, if
14 the answer is no, then not a single Florida smoker can
15 recover.

16 THE COURT: Okay. That --

17 MS. ROSENBLATT: That's true, Your Honor.
18 But if the answer is yes, we've got to try it all over
19 again.

20 THE COURT: I didn't understand what you
21 meant by that.

22 MR. KIRBY: I'm sorry I didn't make myself
23 clear.

24 THE COURT: No, that's okay.

25 MR. KIRBY: With respect to the Third DCA's

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1 opinion, what they're talking about is those issues of
2 liability that are common.

3 THE COURT: Okay.

4 All right. We'll come back here at what,
5 1:30? And hopefully at that time we can start up,
6 taking up some of these instructions.

7 (A lunch recess was taken at 12:30 p.m.).

8

9

10

11

12

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO
COMPANY, et al.,

Defendants.

_____ /

Miami-Dade County Courthouse
Miami, Florida
10:00 a.m.
June 21, 1999

TRIAL - VOLUME 340

The above-styled cause came on for trial
before the Honorable Robert Paul Kaye, Circuit Judge,
pursuant to notice.

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340. Closing Arguments Plaintiffs 6.21.99

20 million, to some very good people. You always hear
21 them bragging, a couple of people who did research, who
22 accepted money from the Council for Tobacco Research
23 won Nobel Prizes.

24 Did you see any of them in this courtroom?

25 Did you see any member of the Scientific

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1 Advisory Board of the Council for Tobacco Research sit
2 in that chair, look all of you in the eye and say: I
3 agree with Philip Morris and RJ Reynolds; there is a
4 legitimate controversy; there is a legitimate debate; I
5 don't believe causation has been scientifically proven?

6 Not one. Not a single one.

7 Part of what I'm going to do, because it is
8 confusing, it's confusing the lawyers, lawyers who know
9 this is a class action. And I've been in trial a long
10 time, you know, lawyers are confused about what this
11 case is all about. So it's important for me to tell
12 you at this point what this case is not about; what
13 it's about and what it's not about.

14 Now, I'm holding up a board now which, at the
15 very end of the case, this will be an instruction from
16 Judge Kaye. Judge Kaye will read this to you. But I
17 think it will assist you in listening to the arguments
18 if you hear this because, as far as I'm concerned, this
19 is a very basic central page.

20 Can you all see this? Okay.

21 This is part of Judge Kaye's instruction on

340. Closing Arguments Plaintiffs 6.21.99
22 the law to you, after the lawyers are done with closing
23 arguments.

24 MR. MOSS: Your Honor, we would object,
25 because the Court will instruct the jury.

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1 THE COURT: Overruled.

2 MR. ROSENBLATT: This case is unlike most
3 other lawsuits that come to trial. And before
4 instructing you on the law, I want to discuss with you
5 your role as jurors in this case.

6 In a typical lawsuit, the jury hears
7 testimony from the litigants, including the plaintiffs,
8 the parties bringing the lawsuit. Ordinarily, the
9 plaintiffs would testify about their claims and
10 describe their medical conditions and damages.
11 However, this case is not typical, because it is not
12 brought on behalf of one or two individuals, but rather
13 on behalf of a group or class of individuals.

14 The Florida class is a state-wide class
15 consisting of all Florida citizens and residents and
16 their survivors who have diseases or medical
17 conditions, or who have died from diseases or medical
18 conditions that are claimed to be caused from smoking
19 cigarettes.

20 Because of the size of the Florida class and
21 the complexity of the issues, the Court -- the Court
22 determined that all common liability issues would be
23 tried before a jury in a single trial. The common
24 issue trial has addressed the conduct of the tobacco

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Miami, Florida
Monday, 1:30 p.m.
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TRIAL - VOLUME 341

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341. Closing Arguments Plaintiffs 6.21.99

11 General of the United States. Almost 30 years later,
12 almost 30 years later we're still trying to persuade
13 people. We're still trying to persuade people what
14 this product is all about.

15 Dr. Neal Benowitz is probably one of the
16 foremost addiction experts in this country. He's a
17 medical doctor in the field of clinical pharmacology.
18 He's also board certified in the field of internal
19 medicine. He's certified by the American Board of
20 Medical Toxicology. He's been on the faculty of the
21 University of California at San Francisco since 1974.
22 He's been the president of the American Society for
23 Clinical Pharmacology, president of the Society for
24 Research on Nicotine and Tobacco, and he is still a
25 hands-on cardiologist, still working with patients.

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1 And he explained how nicotine changes brain
2 chemistry, how nicotine binds to receptors in the brain
3 in a lock-and-key type of relationship. And by
4 inhaling, gets the nicotine to the brain quicker than
5 if you were to have an intravenous injection: 10
6 seconds or less to the brain.

7 He said that for years the tobacco companies
8 have manipulated nicotine. The impact of nicotine can
9 be controlled by adjusting the pH. By enhancing the
10 amount of free nicotine, you can have actually less
11 nicotine, but if it's in the free form of nicotine, the
12 impact on the brain is greater than the nicotine in the
13 bound form.

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14 And just as Dr. Ronald Davis said,
15 Dr. Benowitz said, 90 percent of smokers begin in
16 adolescence. He was the senior scientific editor on
17 the 1988 Surgeon General's Report on nicotine
18 addiction, and he was involved for two full years
19 helping to get the 1988 Surgeon General's Report out.
20 He's talking about kids here. He's talking
21 about adolescents. Line 4: They start saying: I
22 smoke when I'm anxious because it relaxes me. I smoke
23 when I'm stressed. When I don't smoke I get irritable,
24 can't concentrate. So kids within two or three years
25 of starting to smoke, smoke for effects of nicotine and

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1 really become nicotine addicted or dependent; that's
2 within two or three years.
3 Then going to line 17: When asked do they
4 plan to smoke as adults, and this has been surveyed
5 systematically, kids in general say: No, I'm only
6 going to smoke for a few years and I'm going to stop as
7 an adult.
8 Unfortunately, what kids cannot appreciate,
9 and you can never appreciate before you take a drug, is
10 what addiction means. People say: Well, no, I'm not
11 going to become addicted; I will start and then I'll
12 stop.
13 And he goes on on the next page: When the
14 same kids are surveyed five years later, most of them
15 are not only smoking, but they're smoking more and they
16 say: I can't stop. So they become addicted even
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6 popularization of cigarettes during World War II and
7 after World War II, was a very rare disease, very rare
8 disease.

9 I think it was Dr. Whelan who said people
10 would be pulled out of their classes in medical school
11 to see a case of lung cancer in the 1920s and 1930s
12 because it was so rare.

13 And Dr. Carr, like many of the other doctors,
14 talked about that when women started smoking -- the
15 1964 Surgeon General's Report, remember had the
16 conclusion, cigarette smoking causes lung cancer in
17 men, and then they found out, and Dr. Richmond in the
18 1979 Surgeon General's Report made a very unhappy
19 prediction to the effect that with the smoking rates
20 going up among women, that it would not be long before
21 lung cancer among women overtook breast cancer as a
22 killer of American women, and unfortunately he proved
23 to be correct on that subject.

24 Dr. Houston is the other physician who you
25 saw in a courtroom setting on video, board certified in

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1 family medicine. He is the director of the department
2 of preventive medicine and environmental health at the
3 American Medical Association since 1990.

4 And he pointed out that the American Medical
5 Association -- and you've learned, what very few people
6 outside of the field of medicine and research know in
7 this country, that research money is hard to come by.

8 And that's another brilliant move of the
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9 tobacco company. They set up this organization, the
10 Council for Tobacco Research, which has millions of
11 dollars to dole out. You've heard of guilt by
12 association. This is innocence by association.
13 They're hoping to cloak themselves in innocence because
14 they do in fact give money to good institutions, who
15 are not researching whether cigarette smoking causes
16 these diseases, but they're researching molecules and
17 cells and genes as to the fundamental causes of the
18 various diseases.

19 And in spite of that, Dr. Houston says: The
20 American Medical Association has adapted a policy that
21 research hospitals, medical schools should not engage
22 in grant activities that are funded by the Council for
23 Tobacco Research.

24 The American Medical Association, which
25 represents the doctors of this country, said a very

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1 tough thing, a very tough thing, where a lot of people
2 who consider themselves very moral and ethical, takes
3 courage to say this: Keep your money. It's dirty
4 money. It's profit made on the suffering of the
5 American people. Keep it. We could use the money, we
6 could always use the money. But we don't want your
7 money. That was their recommendation.

8 M.D. Anderson in Houston; Roswell Park in
9 Buffalo, New York; Massachusetts General, the leading
10 teaching hospital at the Harvard Medical School, all
11 say: Keep your money.

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12 True, a lot of them in the '80s and '90s took
13 the money and rationalized, because it was easy to do,
14 because they could say to themselves, look, I'm not
15 going to turn down a couple of hundred thousand dollars
16 or a couple of million dollars because I'm doing good
17 research. I know I'm doing good research. It has the
18 potential to benefit mankind, so I'm not going to turn
19 down the money. And hey, in the final analysis,
20 they're not buying me, because I'll never walk into a
21 courtroom. I'll never walk into a courtroom anywhere
22 in this country and tell people that I buy their line,
23 which is, it hasn't been scientifically proven that
24 cigarette smoking causes lung cancer. So, you know, I
25 can still -- my conscience is clear.

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1 By virtue of having listened to eight months
2 of testimony, you've grown very, very sophisticated.
3 And you know, by virtue of the kinds of witnesses that
4 we had, you know the kind of witnesses they would want.
5 They would want a board certified someone who is a
6 chairman of a department at Harvard, at Yale, at the
7 University of California to come in here and back up
8 the tobacco industry line.

9 They have access to all those people over the
10 years who have taken their money to do research.
11 Couldn't get one of them. You haven't seen one of
12 them.

13 And what about the great Scientific Advisory
14 Board of the Council for Tobacco Research? Not a

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15 single member of the Scientific Advisory Board, even
16 though that organization was set up in 1954, came into
17 this courtroom and said what they said.

18 That silence, ladies and gentlemen, speaks
19 volumes.

20 Starting on Line 3.

21 You hear -- the tobacco part of their
22 technique is to say: well, you know, maybe
23 Dr. Richmond is not being objective, maybe Dr. Petty is
24 not being objective, maybe Dr. Carr, these doctors who
25 have seen people die and suffer from diseases caused by

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1 cigarette smoking, maybe they have an agenda.

2 Yeah. Their agenda is they want to improve
3 the health of the American people.

4 So I dealt with this very, very directly. Is
5 there a war going on from a public health standpoint
6 against the tobacco industry? Sure there's a war.
7 Sure there's a war.

8 If you believe that the cigarette -- if you
9 believe this wonderful product kills 400,000 of your
10 fellow Americans every year, and you as a doctor have
11 dealt with the illnesses and the families, unnecessary
12 deaths caused by this product, is there a war in your
13 mind? Do you want to irradiate this product? Of
14 course you do, of course you do, nothing to be ashamed
15 about.

16 The question is asked, Line 3: Doctor, I
17 want you to tell us all the reasons, as Mr. Cofer

341. Closing Arguments Plaintiffs 6.21.99

18 stated, why you and the American Medical Association
19 feel that you're in a war against the tobacco industry
20 from a public health standpoint. Why does that war
21 exist?

22 Answer: The war exists because the tobacco
23 industry has consistently done everything it can to
24 obstruct the public health community of physicians and
25 public policy as regards tobacco and health; has

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1 engaged in a variety of actions to create doubt within
2 the public's mind; and has done a great deal of work to
3 subvert the public health process in legislative and
4 policy bodies regarding tobacco and health; and has
5 generally obstructed the efforts of science and health
6 related to tobacco control for decades.

7 what Dr. Houston says is a simple truth:
8 From 1964 on they fought us tooth and nail, every step
9 of the way. They cast doubt on our studies; they cast
10 doubt on the Surgeon General's Reports. When we would
11 definitively say "cause," they played word games and
12 semantics, all to the detriment of the American people.
13 Yes, it's a war.

14 when Dr. Julius Richmond, who said he read
15 every word of this, and it was his responsibility to
16 read every word of the 1979 Surgeon General's Report --
17 I guess I was standing over there. And I looked at
18 this man who had been doing his best for 60 years with
19 Head Start, for the children of this country as a
20 pediatrician, and I said: You put your guts into this.

341. Closing Arguments Plaintiffs 6.21.99

21 You put your guts into this to try to get the American
22 people to see the light. What was the reaction of the
23 tobacco industry?

24 He had tears in his eyes. He said: They
25 preempted this. They called a press conference.

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1 The Tobacco Institute, nonscientists, didn't
2 know the first thing about any science, the Tobacco
3 Institute on behalf of Philip Morris and RJ Reynolds
4 and Brown & Williamson and Lorillard called a press
5 conference the day before -- and when I go over
6 documents with you tomorrow morning, they had the
7 unmitigated gall to come out with a thick document
8 called The Continuing Controversy, to plant doubt in
9 the minds of the -- hey, maybe the Surgeon General and
10 all these superstars -- and you look at the first few
11 pages of acknowledgments of the kinds of people, the
12 kinds of medical schools, the kinds of backgrounds of
13 the people that contribute to a Surgeon General's
14 Report.

15 And they told the American people: Don't
16 listen to these MDs, don't listen to these board
17 certified; listen to us, listen to your friends from
18 Philip Morris, listen to Marlboro Country, listen to
19 us. We have your interest at heart.

20 And unfortunately, unfortunately and sadly --
21 and that's what I said at the very beginning, that the
22 tobacco industry has come closer to fooling all of the
23 people all of the time than any industry in the history
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24 of this country.

25 Unfortunately, a huge number of Americans

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1 bought into their garbage, because it was persuasive,
2 it was slick. They had very nice, attractive people
3 putting forth their line, and the average person is not
4 going to go through this and make a judgment, make a
5 judgment on the facts.

6 Dr. Joe Davis testified, one of the most
7 distinguished public officials in the history of Dade
8 County, a pathologist, basically said, never did an
9 autopsy on a person who had lung cancer where the
10 history was not that of smoking.

11 I think he was the chief medical examiner for
12 Dade County for 35 years. And he came in here live.
13 He came in here live.

14 well, let me give you the exact quote from
15 Dr. Davis. I talked to you about a Dr. Ronald Davis
16 earlier. This is Dr. Joe Davis, the former medical
17 examiner of Dade County. A straight talker, a straight
18 shooter.

19 Dr. Davis, can you think of any primary lung
20 cancer that you have seen on any autopsy you have ever
21 performed, primary lung cancer as opposed to
22 metastasized from somewhere else, any primary lung
23 cancer that you've seen that was not caused in your
24 opinion by cigarette smoking?

25 And he says: No. I answered that before. I

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1 don't think I ever have.

2 Now, the next doctor I'm going to talk about
3 I know you're going to remember because he was very
4 unusual. We talked about some doctors who were in
5 their 80s. Dr. Michael Siegel, from the Boston
6 University School of Public Health, is a guy about 34
7 years old, and he's a tiny guy and has a little bit of
8 a squeaky voice. Appears even younger, but he is a
9 brilliant, brilliant doctor. Shows you across the
10 spectrum there are dedicated people. There are
11 dedicated people who are asking: Not what my country
12 can do for me, but what I can do for my country and for
13 my fellow Americans. And we're grateful to have such
14 people.

15 He was a Phi Beta Kappa graduate from
16 college. He got his MD from Yale; worked for the San
17 Jose California County Health Department, managing the
18 addictions of heroin and cocaine addicts.

19 And Dr. Michael Siegel, who had that hands-on
20 experience with heroin and cocaine addicts, said:
21 Nicotine addiction is worse. You very seldom see a
22 heroin or cocaine addict in their 60s or 70s, but
23 nicotine addicts in their 60s or 70s are very, very
24 common.

25 That was from his hands-on experience. For

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1 13 years he has researched and studied and written
2 about tobacco industry behavior, the main focus of this
3 trial, tobacco industry behavior.

4 what was he looking at? Were they honest?
5 were they honest with the public? And his answer was a
6 resounding no, they were never honest with the public;
7 they constantly lied to the public to increase their
8 bottom line.

9 And he studied for years child psychiatry as
10 it relates to smoking. He is the author of a book on
11 marketing and public health.

12 So we go to this issue. We go to this issue
13 and I just -- I grit my teeth. I grit my teeth. And I
14 say to myself: Can anyone buy this --

15 MR. REID: Objection, Your Honor. Counsel's
16 opinion.

17 THE COURT: Overruled.

18 MR. ROSENBLATT: Can anyone believe this when
19 this incredibly rich industry that spends billion,
20 billion, \$5 billion a year on advertising and
21 promotion, they come in and they dance in here and
22 smile and tell their little: Yeah, but we're not after
23 new smokers. We don't want new smokers. No, we don't
24 want to replace the dying and the quitters; we just
25 want switchers. We just want -- so I asked Dr. Siegel,

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1 an expert, Line 14: Dr. Siegel, in the course of your
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341. Closing Arguments Plaintiffs 6.21.99

8 You're getting good at this.

9 Line 17 on this page: Dr. Siegel, based on
10 your reading of the scientific literature, based on all
11 your research, what was it that the tobacco industry
12 did not turn over to the public health community in the
13 areas of disease, causation and nicotine addiction?

14 And he answers the question, starting on Line
15 24: Basically, the tobacco industry failed to turn
16 over all of the information that they had, starting at
17 the top, that they had about the health risks of
18 cigarettes and about tobacco addiction.

19 And going to Line 5 -- and this is a
20 researcher and a writer on this very subject, who says,
21 beginning on Line 5, Dr. Siegel says: They knew in the
22 early 1950s nicotine was the specific agent that
23 addicted. They knew in 1962 the mechanism by which
24 nicotine works, specifically on the hypothalamus and
25 pituitary in the brain. They knew of the mechanism of

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1 nicotine addiction that specifically nicotine changes
2 the receptors.

3 Then he continues with his answer on Line 16:
4 The companies knew specifically the mechanism by which
5 nicotine was addictive and acknowledged this and
6 explained it in the early 1960s, specifically that
7 nicotine changes the receptors in the brain so that the
8 body cannot respond to stress. And without nicotine in
9 the body, the body cannot have a normal reaction to
10 stress. It creates an unconscious desire among the
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341. Closing Arguments Plaintiffs 6.21.99

11 individual to have to take more nicotine into the body
12 in order to be able to appease those receptors, to
13 satisfy the receptors in the brain.

14 Looking at Line 2, talking about the tobacco
15 companies: They knew in 1966 that by controlling the
16 pH, by controlling the acidity of the cigarette, they
17 could increase its amount of nicotine that was present
18 in that free form in order to enhance the nicotine
19 delivery to the smoker.

20 Then the next paragraph he's talking about
21 how they knew how to add ammonia to enhance the amount
22 of nicotine in the free form and enhance the addictive
23 nature of the cigarette.

24 And continuing on Line 14: The companies
25 also knew back in 1953, 1953, that cigarettes were

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1 carcinogenic; that they caused cancer. They clearly
2 knew this in 1953. That information was never
3 disclosed to the public. They also knew that cigarette
4 smokers compensate for the loss of nicotine in a
5 cigarette by inhaling more or less.

6 So they knew everything.

7 So Dr. Siegel is asked on cross examination
8 this question -- getting back to the concept, well,
9 everybody is entitled to their opinion, that's right.
10 I suppose within certain boundaries, everybody is
11 entitled to their opinion, but intelligent people who
12 are studying an issue are entitled to make a judgment
13 that this person doesn't know what he's talking about.

341. Closing Arguments Plaintiffs 6.21.99

14 This person just doesn't know what he's talking about,
15 compared to that person. I mean, that person has the
16 qualifications and the background to speak about
17 something.

18 If somebody says -- somebody is entitled to
19 the opinion that Mark McGwire is not a good home run
20 hitter, but no one who knows anything about baseball is
21 going to spend five seconds talking to that person,
22 because that person obviously doesn't know what they're
23 talking about. They're entitled to an opinion, they
24 shouldn't go to jail for expressing an opinion, but
25 obviously they don't know anything about baseball or

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1 hitting home runs.

2 So this question is asked Dr. Siegel on
3 cross: Now, Doctor, you fault the tobacco companies
4 for taking the position that cigarette smoking is not
5 like heroin and cocaine, correct?

6 And Dr. Siegel says: Absolutely. Absolutely
7 I fault them.

8 Question: You think nicotine is like heroin
9 and cocaine, and you don't think that any reasonable
10 person would think otherwise, correct?

11 And Dr. Siegel says something very
12 significant. He says: Absolutely not true. I think
13 that the majority of the public does not know that
14 cigarette smoking is like heroin and cocaine, and the
15 reason they don't know it is because the cigarette
16 companies have been telling them that it's like coffee

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Tuesday, 1:20 p.m.
June 22, 1999

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344. Closing Argument Plaintiff 6.22.99

7 And they talk about a goal of Lorillard
8 Tobacco Company: Determine the minimal level of
9 nicotine that will allow continued smoking.

10 You remember that Dr. Benowitz testified that
11 the power of nicotine was so strong that you could
12 never get all smokers to quit by reasoning with them or
13 frightening them or telling them the facts about what
14 diseases it could cause.

15 So he came up with a theory that if the
16 nicotine level was reduced to such an extent so low
17 that it would not be addictive, and that that was a
18 possibility, that was something that the tobacco
19 companies had the technical expertise to accomplish if
20 they wished.

21 Now, what this tobacco document of the
22 Lorillard Company says: The goal is to determine the
23 minimal level of nicotine that will allow -- that will
24 allow -- continued smoking. We hypothesize that below
25 some very low nicotine level, diminished physiological

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1 satisfaction cannot be compensated for by psychological
2 satisfaction. At this point, smokers will quit or
3 return to higher-tar and nicotine brands.

4 Another document which clearly stands for the
5 proposition that the nicotine has to be manipulated to
6 such an extent that you maintain smoking behavior that
7 will allow continued smoking. They don't want smokers
8 to quit; they want smokers to continue smoking.

9 And one of the most brilliant things ever
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344. Closing Argument Plaintiff 6.22.99

10 come up with is this whole gimmick of low tar, low tar.
11 And then when they're asked, is low tar any safer than
12 high tar, they say: well, we don't make that claim.
13 we don't make that claim.

14 Plaintiffs' Exhibit 4600. This is another
15 Reynolds document dated December 9, 1981. It's a
16 memorandum about weekly highlights.

17 And this is Reynolds talking about Philip
18 Morris: Information was obtained that Philip Morris
19 USA did not live up to the alleged gentlemen's
20 agreement of not having animal laboratory facilities on
21 their premises in this country. Philip Morris indeed
22 has had such facilities for at least three to four
23 years and continues to operate them. This information
24 was communicated to all concerned.

25 And a fair hearing of the evidence and a fair

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1 reading of the documents will make it clear that there
2 always has been an agreement between the tobacco
3 companies on a variety of issues: The party line that
4 cigarette smoking does not cause lung cancer and other
5 diseases; that it hasn't scientifically been proven;
6 that you've got to identify the mechanism; and to do
7 all sensitive biological research outside the country.

8 Plaintiffs' Exhibit 3578: Target Audience
9 Appendix. This is a Brown & Williamson document.
10 Target audience.

11 who do you target and why is a particular
12 group a target? Because for this group you use this
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344. Closing Argument Plaintiff 6.22.99

12 Believe me, I know this is not fascinating.
13 But if it serves that when you're -- we have no idea
14 how long you're going to take to deliberate. And if
15 this assists you, if this assists you that when you're
16 having a discussion in the jury room and someone refers
17 to a document or someone refers to their notes, and you
18 can go to one of the exhibit numbers that you've
19 written down, hopefully -- hopefully that will be
20 valuable. And I'm going to be stopping in a half hour
21 or so.

22 Now, the next group of tobacco documents I
23 will address have to do with addiction issues, and this
24 includes the manipulation of nicotine levels by
25 increasing nicotine in cigarettes through adjustments

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1 of pH, or the addition of ammonia; and it also includes
2 research on nicotine establishing its addictiveness.

3 Now, during the 1970s and 1980s, Lorillard
4 conducted an extensive research program wherein
5 nicotine was manipulated through adjustments in pH and
6 the addition of ammonia.

7 And I'm not going to go through each of these
8 lengthy reports, but I will give you the exhibit
9 numbers and the title of each report.

10 262: Nicotine Augmentation Project, which
11 simply means how to increase nicotine;

12 Exhibit 3213: Application of Free Nicotine
13 to Cigarette Tobacco and the Delivery of That Nicotine
14 in the Cigarette Smoke;

344. Closing Argument Plaintiff 6.22.99

15 Exhibit 3000: PH of Smoke: A Review;
16 264: Final Report, Intermediate Stage,
17 Nicotine Augmentation Project;
18 3062: Nicotine Manipulation, Migration and
19 Reaction Mechanisms;
20 3092: Vapor Phase Removal and Nicotine
21 Augmentation with All Air Dilution Cigarettes.
22 And just the titles alone and the testimony
23 from some of the scientists you've heard show you the
24 incredible level of sophistication at which the tobacco
25 companies operate; and how easy it is for them to

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1 manipulate nicotine to get the desired result, to get
2 that free nicotine to the brain quickly and to have an
3 impact, the basic goal and purpose being to keep the
4 smoker smoking. It's no more complicated than that.
5 There are a large number of Brown &
6 williamson tobacco documents that reveal the ammonia
7 technology at Brown & williamson that increases the
8 smoke pH, and thereby the free nicotine.
9 And this, in turn, increases the impact of
10 nicotine on the brain on the smoker. It enables lower
11 nicotine tobacco blends to have the impact of a much
12 higher nicotine level, because even though the nicotine
13 number is lower, if the percentage of free nicotine is
14 greater, it has a greater -- it has a greater impact on
15 the brain.
16 And a few of the many documents that
17 address these issues of manipulating levels of nicotine

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344. Closing Argument Plaintiff 6.22.99

18 through ammonia and pH from Brown & Williamson would
19 include 3076, 1677, 3189, which is a handbook of
20 ammonia technology. That's how sophisticated they are:
21 ammonia technology.

22 One of the ways that Brown & Williamson has
23 manipulated nicotine levels so as to alter the normal
24 tar-to-nicotine ratio is through the genetically
25 altered Y-1 tobacco that yields higher nicotine with

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1 lower tar and was grown in Brazil.

2 And some of the Brown & Williamson documents
3 that address the Y-1 tobacco included: 3492, 3481,
4 3537, 3466, and 3195, which is a presentation by Brown
5 & Williamson on Y-1 tobacco.

6 After all the lawyers get done talking, what
7 happens next in this eight-month marathon is that Judge
8 Kaye will read to you the instructions on the law. He
9 will tell you what the law is.

10 But, you know, it's an interesting division
11 and a lot of people are confused. A lot of intelligent
12 people are confused. What is the role of the judge and
13 what's the role of the jury? You would be amazed how
14 many intelligent people are confused about that.

15 Obviously, you've learned in the last eight
16 months you are the judges of the facts. The Judge
17 doesn't decide, but you decide: Do I believe Witness
18 A, or do I believe Witness B, or do I disbelieve both
19 of them? That's the jury's decision. That's the
20 jury's decision.

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO
COMPANY, et al.,

Defendants.

_____ /

Miami-Dade County Courthouse
Miami, Florida
Wednesday, 9:35 a.m.
June 23, 1999

TRIAL - VOLUME 345

The above-styled cause came on for trial
before the Honorable Robert Paul Kaye, Circuit Judge,
pursuant to notice.

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9 there were lawyers around and the lawyers, that it was
10 the lawyers that shut the rat lab down.

11 And besides, whenever they brought the rats
12 through the building, they put a hood over it. And
13 that was secret so you wouldn't see the rats.

14 well, my God, why wouldn't you put a hood
15 over rats when you're bringing it through the company?
16 People want to watch rats running around the company.
17 That's a big secret.

18 As far as closing it down, there were
19 lawsuits against the company? Absolutely, there have
20 been lawsuits against this company for years and years
21 and years. Were there lawsuits? Yes. Were there
22 lawyers around defending lawsuits? Yes.

23 And, you know, what if this happened? Let me
24 ask you this: what if this happened? What if a lawyer
25 said -- a lawyer said: You know, this rat work, I

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1 don't know whether it's getting anywhere
2 scientifically, I don't know whether it is or it isn't.
3 You have to decide that, but, you know --

4 And Dr. Farone, by the way, he says rat work
5 isn't predictive of anything, he doesn't value rat
6 work. That was part of his testimony.

7 But I don't know whether it's getting you
8 anywhere, but I'll tell you this, people are going to
9 come along in these lawsuits and they're going to take
10 the results of what you're doing in there and they're
11 going to twist it and they're going to make it look

12 like you're proving that nicotine is addictive. And
13 you better think about that when you decide whether
14 it's scientifically okay to do that.

15 what if a lawyer said that? That's giving
16 advice to a client. And as long as the company looks
17 at that and says yes, that's a risk, that somebody will
18 misinterpret it, and we have to consider that.

19 Now, let's look at whether the work is
20 getting us anywhere. And it wasn't because they
21 couldn't develop an analog that worked. And they shut
22 the lab down. And that, suddenly, that's a big deal,
23 that's fraud.

24 And what does that have to do with anything
25 anyway? You know, what I mean, what does it have to do

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1 with anything anyway? what does it have to do whether
2 smoking is voluntary or involuntary? Nothing.

3 And you may remember that Dr. Mele did say
4 that there was a lot of concern about whether the FDA
5 would ever approve the use of an analog, anyway.

6 And just one other point about that while I'm
7 thinking about it, the one thing you do know about that
8 laboratory is that it wasn't proving that nicotine is
9 addictive. And the reason you know that is because I
10 asked Dr. Mele the question about what he told the
11 president of Philip Morris when the president was
12 visiting, and said: well, what are you doing there?
13 what are you doing with nicotine? Are you proving
14 nicotine isn't addictive or is addictive?

345. Closing Argument Defense 6.23.99

15 And he said: We haven't proved it one way or
16 the other. That's not the purpose of the work that
17 we're doing.

18 So much for Dr. Mele.

19 Now, I just want to talk about Dr. Uydess
20 very briefly. And I thought it was interesting, I
21 thought it was interesting that Dr. Uydess came in here
22 and testified, and yet you heard very little about him.
23 Very little.

24 Now, ask yourself: Why did we hear so little
25 about Dr. Uydess?

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1 we brought him here -- the plaintiffs brought
2 him here to testify about what a bad company this is.
3 That's why he was brought. And the reason you didn't
4 hear very much about Dr. Uydess is the reason I told
5 you about earlier, that during the course of his
6 testimony when the subject of spiking came up, spiking
7 nicotine, he said it didn't happen. He said Philip
8 Morris wouldn't do that.

9 So that wasn't good testimony for the
10 plaintiffs. That's why you didn't hear much about him.

11 The other reason you didn't hear much about
12 him is that the big deal that he came down here to talk
13 about was three letters, NOD, N-O-D, which is probably
14 what some of you feel like you want to do at this
15 point. But naturally occurring denitrification.

16 The NOD program, naturally occurring
17 denitrification. That's what he was here to talk

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO
COMPANY, et al.,

Defendants.

_____ /

Miami-Dade County Courthouse
Miami, Florida,
Wednesday, 1:30 p.m.
June 23, 1999

TRIAL - VOLUME 346

The above-styled cause came on for trial
before the Honorable Robert Paul Kaye, Circuit Judge,
pursuant to notice.

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1 we had to take a video deposition the day before
2 because of the schedule.

3 And you'll remember that this was an exhibit
4 from that -- from his deposition. And he agreed that
5 these are the three lines of evidence that science uses
6 to determine scientific causation.

7 And you remember Dr. Goodwin. Dr. Goodwin
8 was from over here at the Sylvester Cancer Center. And
9 Dr. Goodwin, I asked him the same question. And he was
10 here live before you:

11 In the course of your work, it's fair to say
12 you focused on all of these areas, trying to reach a
13 scientific conclusion about cause?

14 Correct.

15 So Dr. Grossman and Dr. Goodwin both accept
16 the view that there are three lines of evidence, that
17 the Surgeon General accepted, that Dr. Thomas told you
18 about, and that the defendants in this case have
19 suggested to you throughout.

20 Ladies and gentlemen, I believe you will find
21 that it is reasonable to suggest that three lines of
22 evidence are needed if you're talking about scientific
23 cause. So I want to talk about these three lines of
24 evidence, because you're going to have to decide if
25 this is a reasonable position.

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1 So we need to look at each of these lines of
2 evidence and see how the evidence has been about
3 smoking.

4 Now, the first is epidemiology. And you now
5 know that that is really a statistical analysis. And
6 you know that in 1950, there were five epidemiological
7 studies that came out that in some ways associated
8 smoking with lung cancer.

9 But the interesting thing is, ladies and
10 gentlemen, and the reason you can't just stop with
11 epidemiology, is that even the people -- some of the
12 same scientists who did those studies question whether
13 those studies were enough to prove causation.

14 Dr. Schreck, he did one of the studies. And
15 you'll notice that he said: For every expert who
16 blames tobacco, there's another who says it's not the
17 cause.

18 And he even said -- and he did one of the
19 five studies -- a statistical study cannot prove. And
20 that's all we're saying, ladies and gentlemen, is that
21 statistics alone is not enough.

22 Dr. Levin, now, you heard his name several
23 times throughout this case. He did one of those
24 original five studies. And Dr. Levin had the same
25 idea.

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1 And he said, even though you had the studies,
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2 there's a reason for -- it's a subject for further
3 inquiry, and he hoped that the federal government would
4 follow up on this.

5 And now you know that statistics can
6 oftentimes lead to the wrong conclusion. Remember you
7 heard testimony and it was mentioned to you a couple of
8 days ago about AIDS. If we had stopped -- if science
9 had stopped with epidemiology with AIDS, science may
10 still think that AIDS is caused by those recreational
11 drugs that the first epidemiological studies suggested.

12 And you heard yesterday about cirrhosis of
13 the liver and how -- try to make some connection
14 between cirrhosis and drinking and smoking. You know,
15 the interesting thing about that is that proved the
16 point. Because for cirrhosis of the liver, you have
17 animal models and there's an understanding of
18 mechanism. Completely different situation from smoking
19 and lung cancer.

20 And you also heard about peptic ulcers. We
21 all grew up thinking that people who were stressed had
22 ulcers. But now we know and the Surgeon General in
23 1979 talked about exactly this problem. It says, this
24 doesn't prove a definite answer to the question: Is
25 smoking a cause or is it associated?

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1 So the Surgeon General in 1979, with regard
2 to smoking and ulcers, was talking about the difference
3 between associations on the one hand and cause on the
4 other. This is not something, ladies and gentlemen,
Page 33

5 that we dreamed up.

6 And we only point these examples out to say
7 that you shouldn't stop with epidemiology, and it's not
8 fraud to suggest that.

9 Now, the next line of evidence is animal
10 models. And I think you heard testimony about this a
11 lot. And you understand the importance of animal
12 models.

13 The importance is that if you can recreate
14 the disease with the same substance in the same way in
15 an animal, you can learn a lot about the cause of the
16 disease and how to cure it or prevent it.

17 And you've heard testimony that there's
18 been -- there have been a lot of attempts over time to
19 induce lung cancer with animals. And no one has been
20 successful in developing lung cancer in animals
21 breathing cigarette smoke.

22 In 1964, the Surgeon General said that the
23 production of bronchogenic carcinoma has not been
24 reported by any investigator in animals and cigarettes.

25 And then again in 1967, the Surgeon General

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1 spoke about it again: The search continues for an
2 experimental animal system in which the inhalation of
3 smoke will produce malignant tissues.

4 And then in '82, the Surgeon General spoke
5 about it again: Attempts to induce significant numbers
6 of bronchogenic carcinoma, negative.

7 And then during Dr. Thomas' testimony you
Page 34

8 heard from a Dr. Cross. And this was in 1989: The
9 general evidence in animal smoke exposure is that it is
10 virtually impossible -- and you also may remember,
11 ladies and gentlemen, that Dr. Thomas was hired by the
12 United States government to try to induce tumors, lung
13 tumors, in beagle dogs. He did that study, and he was
14 unable to do it.

15 And he did this -- and he was hired by the
16 federal government to do this long before he started
17 reviewing anything for this case, before he even knew
18 anything about the tobacco work that he has done in
19 reviewing that literature.

20 And you know, this is significant, because
21 you can get tumors in some animals with other
22 substances. For instance, diesel fumes; breathing
23 diesel fumes in animals, you can get tumors. Asbestos,
24 tumors develop.

25 If cigarette smoking was the cause -- without

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1 any explanation -- then you would be able to get lung
2 cancer in animals breathing cigarette smoke. You
3 don't. And, frankly, no one knows why. And it can't
4 be fraud to say that.

5 And the third is the lack of mechanism.

6 It's important to understand how a disease
7 forms, what causes it in the initiation stage, and what
8 causes it to continue. And you learned about something
9 here that scientists call the black box theory of
10 causation.

11 And we had a board that Dr. Thomas had, and
12 the idea is that you have a whole population of folks
13 and they're exposed to all of the different things
14 we're exposed to: air pollution, smoking, cars,
15 environment, industrial chemicals and all that. And we
16 know some people over here get lung cancer. And we
17 don't know what happens here that causes that. And
18 that's never been disputed.

19 And you know, it's interesting. You know who
20 came up with that, who coined the phrase in an article?
21 Dr. Samet. Do you remember Dr. Samet, one of the
22 plaintiffs' experts in this case?

23 And no expert who came in for the plaintiffs
24 was able to explain to you why cancer develops in only
25 ten percent -- lung cancer in only ten percent of the

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1 people who smoke. Three-, four-pack-a-day smokers, ten
2 percent.

3 You know, yesterday or the day before, I
4 forget which, there was a lot of ridiculing that went
5 on, and I'm going to talk about some of it. But one of
6 the ridiculing that went on was of Dr. DerHagopian.
7 And it was almost a suggestion that he was saying
8 something that was a joke, when he said there's an
9 unknown factor that precipitates lung cancer that we
10 don't understand.

11 And, remember, counsel ridiculed him. well,
12 ladies and gentlemen, all he was doing was saying
13 exactly the same thing that Dr. Samet was saying:

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO
COMPANY, et al.,

Defendants.

_____ /

Miami-Dade County Courthouse
Miami, Florida
Thursday 9:30 a.m.
June 24, 1999

TRIAL - VOLUME 347

The above-styled cause came on for trial
before the Honorable Robert Paul Kaye, Circuit Judge,
pursuant to notice.

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347. Closing Argument Defense 6.24.99

17 improvement that would make cigarettes safer. Not one.

18 They brought in a group of witnesses who
19 essentially criticized and criticized and criticized.

20 They brought in witnesses who told you that
21 everything the industry does, everything that the
22 industry does is wrong. Everything.

23 And even though the public health community
24 was urging and applauding the industry for doing what
25 you see on that board, some of the witnesses that you

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1 heard in this case came here and criticized the
2 industry for doing this. Criticized the industry.

3 As I told you before, we all have to operate
4 under the assumption that this product is going to be
5 sold. It's going to be sold.

6 So, it seems that you would want to do the
7 best you can, given that situation. But not a single
8 witness that they brought to you had any ideas about
9 how to reduce the hazards, except going out of
10 business, that you heard about yesterday, the only
11 ethical, moral and religious thing to do. Or two days
12 ago.

13 So I would submit to you that the answer to
14 Questions 3, 6 and 8 ought to be: No, these are not
15 defective products.

16 Now, this raises another question that I
17 think is fair to ask: Are lower tar and nicotine
18 cigarettes safer?

19 Are they safer?

20 I want to review some of the evidence about
21 that, because clearly that's what we've done. So
22 that's a fair question.

23 The companies believe that they are.

24 Dr. Lilly said he thinks so. He told you he
25 couldn't prove it, but he believes it. And he said

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1 this over and over in response to questions.

2 Dr. Carchman, this was at 29073 of the record
3 said: I believe there is a reduction in risk for lung
4 cancer and several other diseases with lower tar
5 delivery products.

6 And then you heard Dr. Townsend's testimony,
7 about the same subject:

8 Have we done the right thing? Have we gone
9 in the right direction? Common sense tells me we have,
10 because if cigarette smoking is a risk for any of these
11 diseases, and it clearly is, then less ought to be
12 better. And that's the common sense we work under, and
13 that's the common sense that all toxicology works under
14 in looking at risks of exposure to anything.

15 If something may be a problem, then less
16 ought to be better. So I believe that low-tar
17 cigarettes should be. I believe they probably are, but
18 there's no way to scientifically prove it.

19 So you heard from the representatives of the
20 industry that they believe that by doing what they've
21 done, cigarettes are safer.

22 But you also heard the same opinions in the
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23 testimony and writings from members of the public
24 health community, people like Dr. Wynder, Dr. Hoffman.
25 This is what Dr. Wynder wrote, that you heard

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1 through the testimony of Dr. Carchman: Measures that
2 can succeed in reducing the tar exposure include the
3 following: Then he talked about filtration.

4 This is where the 40 percent number that I
5 mentioned to you earlier, from a given cigarette, and
6 still allow it to maintain a satisfactory pressure drop
7 in flavor.

8 There was widespread acceptance in the
9 scientific community, ladies and gentlemen, that
10 general reduction was a reasonable and was a practical
11 thing to do. Notwithstanding what you've heard in this
12 courtroom, that was what the public health and the
13 scientific community believed.

14 And in argument two days ago, counsel said to
15 you that by doing this, that the companies were being
16 clever -- that was the word he chose to use -- that
17 this was a clever thing that the companies did.

18 Well, you remember Dr. Burns, one of
19 plaintiffs' most enthusiastic witnesses, to say the
20 least? What did he say?

21 The public health community felt that the tar
22 contained the bulk of the toxic agents, and if the
23 smoker received less, it was likely to be a good thing.

24 So Dr. Burns agreed it was a good thing to
25 do.

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1 Dr. Richmond told you the same thing: As
2 Surgeon General, do you believe that declining tar and
3 nicotine, the fact that cigarettes were being produced
4 and put on the market, was a good thing in terms of
5 public health?

6 Yes. In a general way we thought that was a
7 desirable trend.

8 That was Dr. Richmond back when he was a
9 Surgeon General.

10 But he said something else about what the
11 policy of his agency, the policy of the United States,
12 at this time was:

13 A long period of time when, in fact, the
14 government, the public health organizations, have
15 encouraged the tobacco companies to bring down the
16 levels.

17 Answer: That was a matter of policy.

18 Counsel argues that this is clever. The
19 Surgeon General says it was the policy of the United
20 States.

21 And remember Dr. Siegel, who testified,
22 another expert witness brought in by the plaintiffs.
23 And he was asked that the government and other
24 scientists in the public literature made statements to
25 the effect that lower tar cigarettes may be less

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1 hazardous.

2 And he went on and acknowledged Dr. Wynder,
3 the mouse skin paintings, and his conclusion was that
4 tar was something that should be lowered, that's
5 correct.

6 So that's Dr. Siegel talking to you and
7 telling you Dr. Wynder agrees with this.

8 Then there was a Public Health Service
9 technical report that Dr. Siegel testified about, the
10 less harmful would be the effect, the effect. The
11 preponderance, the preponderance of scientific evidence
12 suggests that less tar would be less harmful.

13 And we recommend, the Surgeon General, that
14 action be encouraged which would result in the
15 progressive reduction. The Public Health Services
16 recommending to the Surgeon General to do what we did
17 because of the preponderance of the scientific
18 evidence, ladies and gentlemen.

19 And Dr. Siegel also told you that the Surgeon
20 General Reports throughout the years also agreed.

21 In fact, he even agreed that there was
22 evidence, there was evidence that it might be better.

23 And in the 1980 Banbury report, again during
24 Dr. Siegel's, Dr. Hammond wrote: The preponderance of
25 scientific evidence strongly suggests that the lower

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1 the tar and nicotine, the less harmful would be the
2 effects.

3 And Dr. Benowitz, plaintiffs' witness, about
4 nicotine, said, based on his study and his knowledge,
5 the tobacco companies were encouraged by the public
6 health community to do this; and he believed that the
7 companies, as you'll see in the next quote, he believed
8 the companies had responded to this request by the
9 public health community.

10 And more importantly, he believed that -- he
11 believed today, when he was on this witness stand on
12 10/26, that he thought they should be encouraged to
13 bring them down: And I still believe that's true.

14 Dr. Carchman told you that this has been the
15 continuing point and it continues to this day.

16 And Dr. Benowitz finally told you that in his
17 view the education was: If you're going to smoke, you
18 should switch to lower tar and nicotine. And he said
19 that the public health community did that.

20 So, ladies and gentlemen, some may say it was
21 some clever trick we were trying to do in doing this.
22 But I think you can now see from the evidence,
23 principally from the evidence, from witnesses who could
24 never be accused of being friends of the tobacco
25 industry, the public health community and the

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1 government believe this was the right way to go,
2 encouraged it, and believed the result was appropriate;
3 that is, a less hazardous cigarette.

4 But you get to be the judges of this. You
5 can say: Is that a reasonable assumption? I realize
6 we said it, I realize their experts said it. But was
7 it reasonable?

8 You know, in this whole toxicology principle
9 of the dose and the response that you've heard so much
10 about with various witnesses, if you have a headache
11 and you take two aspirin, it gets rid of the headache.
12 If you have heart problems and you take one aspirin a
13 day for a long time, it helps you there. But if you
14 take a bottle of aspirin, it could cause you to be very
15 ill or kill you. The dose is the poison, and the tests
16 by the companies proceeded on that toxicologically
17 accepted principle.

18 Dr. Carchman told you that even though he
19 can't prove it scientifically, there's beginning to be
20 epidemiology to suggest that this was exactly what the
21 company should be doing. He told you that -- and this
22 was at page 29073 -- that epidemiological studies were
23 beginning to suggest 20 to 54 percent reduction in risk
24 with lower tar products.

25 So another question I think is fair for you

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1 to ask is: If this is all true, why would the
2 companies try it, point this out, say these are safer?
3 Say: My cigarette down here is safer than your
4 cigarette down here.

5 Well, you heard the testimony that, in order
6 to say that, you have to be able to scientifically

7 prove it. And we all know there is no animal model,
8 there is no mechanism understanding. All we have is
9 epidemiology. So you can't say it because you can't
10 prove it. It would be a great advantage. Just think
11 about that.

12 If a company could advertise that, what a
13 great financial advantage that would be, if they could
14 run out and say it. If they could say: Well, there's
15 epidemiology, so we're going to say it's safer. But
16 the companies don't.

17 They've said throughout, in this whole
18 discussion about cigarette smoking and health, that
19 it's important to understand the mechanism, and it's
20 important to have animal models. They're not going to
21 stop saying that suddenly, for financial advantage, to
22 be able to advertise this, because you can't prove it.

23 So the companies, what do they do? They
24 offer a wide range of tar and nicotine level products
25 for the consumers. They offer a wide range.

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1 And I think the claim in this case by the
2 plaintiffs is that that's an inappropriate thing to do.
3 I think this probably describes or defines the two
4 worlds we're talking about here.

5 On the one side, you have the plaintiffs'
6 view that you could only get decaffeinated products
7 because there's some problems with caffeine. You could
8 only buy skim milk because there's some problem with
9 fat; you could only buy large cars because small cars

10 have problems in collisions than large cars; and you
11 couldn't buy cigarettes because there is a risk
12 associated with smoking.

13 But, ladies and gentlemen, I think you are
14 aware of the real world -- and this goes to the very
15 heart of this case -- people have a right to drink
16 caffeinated and decaffeinated. People have a right to
17 use ice cream instead of low-fat yogurt. They have a
18 right to drive smaller cars if that's the decision they
19 make.

20 And they have a right to purchase cigarettes,
21 if that's the decision they make, because, as I told
22 you long ago, it says it right on the pack. There's
23 full and complete, plus all the testimony you've heard
24 about awareness.

25 You cannot conclude that a product is

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1 defective because Pepsis aren't defective because they
2 sell caffeine and noncaffeine. Car companies, cars
3 aren't defective because you have large cars and small
4 cars. Parkay sells butter and margarine. It's not
5 defective.

6 And in the same manner, ladies and gentlemen,
7 we believe you should not answer those three questions,
8 3, 6, and 8, the way the plaintiff suggests because the
9 tobacco companies sell a legal product with well-known
10 risks associated with it.

11 I would suggest to you that those should be
12 the answers to those questions. It should be "no" to

13 those three questions.

14 But, ladies and gentlemen, that's not all
15 that we have done. That's not all.

16 You're going to hear testimony -- you're
17 going to hear argument about testimony from Mr. Ross,
18 in a few minutes, about the Tobacco Working Group. And
19 the government walked away from that. The government
20 decided it wasn't to their advantage anymore to look
21 for a safer cigarette.

22 But it didn't stop these companies. They
23 have not abandoned this research. They have continued
24 to spend large amounts of money and time. And you
25 heard that from all the witnesses from the companies.

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1 Mr. Heim told you about the product next. He
2 told you about accord of his company's, \$300 million
3 dollars spent.

4 I want to tell you a couple things that RJ
5 Reynolds did. The first product was a product called
6 Premier. This was a revolutionary product. It was the
7 first product that heated tobacco. Dr. Townsend went
8 through this with you. It heated tobacco instead of
9 burning it.

10 And Reynolds spent, I think, \$800 million in
11 the development of this product. And there were three
12 designs of this product. One was to simplify the
13 chemistry, one was to reduce the biological activity,
14 and one was to reduce environmental tobacco smoke. It
15 was a 700-page monograph, ladies and gentlemen, and

25 have set for you.

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1 They're trying to make a sentimental,
2 moralistic plea to you, and as tempting as it may be,
3 if you find the evidence shows that Brooke did not
4 manufacture or distribute cigarettes, your verdict must
5 be in favor of Brooke.

6 There isn't anything else to say about
7 Brooke, so I'm going to move on to Liggett.

8 while there is a little evidence in this
9 record about Liggett, there isn't much. What do we
10 know about Liggett? We know that Liggett is a very
11 small tobacco manufacturer. At the time that Mr. LeBow
12 testified, it had about 1.3 percent of the entire
13 tobacco domestic market.

14 Throughout the 1970s and on, its market share
15 has been very low compared to its competitors, and you
16 can see that in a number of the documents you're going
17 to take into the jury room with you.

18 We also know that Liggett's premium brands
19 have included Chesterfield, Lark, L&M, and Eve.

20 Now, as I told you during the opening
21 argument, we also know that a few years ago Liggett
22 publicly stated that smoking causes lung cancer,
23 emphysema, and heart and vascular disease; although as
24 a caveat, as Mr. Reid pointed out yesterday, not all
25 forms of cancer, emphysema and heart disease are

1 attributable to smoking.

2 we also know that Liggett has publicly stated
3 that smoking cigarettes can be addictive for some
4 people; however, it's clear from the evidence that was
5 introduced in the plaintiffs' case that millions of
6 people can and have quit smoking.

7 Liggett made the determination that as of
8 March 1996, it was reasonable to conclude that smoking
9 can cause these diseases and can be addictive in some
10 people.

11 Again, you have to keep focused on the issues
12 in the case. Just because Liggett acknowledges
13 causation on a few diseases and addiction in some
14 people doesn't mean that it should be held liable here.

15 Plaintiffs would have you believe that
16 Mr. LeBow lied under oath because he and Liggett once
17 held the same beliefs as the other tobacco companies
18 and they changed their position over time.

19 This is just not the case. Mr. LeBow did not
20 know if smoking caused disease, and he did not believe
21 it was addictive until sometime shortly before they
22 stated their new public position.

23 And he told you that when he came in here to
24 testify in November. He made these statements because
25 he thought it was the right thing to do for the public

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO
COMPANY, et al.,

Defendants.

_____ /

Miami-Dade County Courthouse
Miami, Florida
Friday, 8:20 a.m.
June 25, 1999

TRIAL - VOLUME 349

The above-styled cause came on for trial
before the Honorable Robert Paul Kaye, Circuit Judge,
pursuant to notice.

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7 evidence.

8 So, there are ten questions on there, and
9 I'll start at Question 1 and I'll go all of the way
10 through to Question 10. And that will be it for me.

11 So that's the game plan for this morning,
12 because after I finish doing that, then Mr. Rosenblatt
13 gets his time this afternoon to do the rebuttal
14 argument on behalf of the plaintiff, and then the
15 lawyers are finished. You'll all be grateful for that.
16 So we turn it back over to Judge Kaye.

17 So that's the game plan.

18 So, let me start with awareness, again, and I
19 want to -- I wanted to start this, even though for some
20 of the questions it's kind of easy to see just right on
21 their face what particular parts of the evidence that
22 you've heard applies to that question.

23 The awareness evidence -- I don't know what I
24 did with my board, but anyway, I'll find it at some
25 point -- the awareness evidence applies to a whole

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1 bunch of the different questions that you're going to
2 be asked.

3 For example, you're going to be asked in
4 Question 3, and I'll come back to this, whether the
5 product, whether cigarettes were sold in a defective
6 and unreasonably dangerous condition.

7 And Judge Kaye is going to tell you that one
8 of the ways that you look at that is to consider
9 whether it fails to perform as safely as an ordinary

10 consumer would expect. And that has to do with
11 consumers' expectations about the product.

12 So there's your awareness evidence right
13 there: what did consumers expect? What were they
14 aware of?

15 And that awareness, when you get to Question
16 Number 3 -- so when you're thinking Question Number 3,
17 you ought to be thinking in your head: How do I feel
18 about awareness? Because that applies to Question
19 Number 3.

20 Now, it also applies to Question Number 4.
21 And Question Number 4 is one that deals with the
22 overall subject of fraud. And you'll see, when I put
23 this question up on the board, that when you're dealing
24 with the subject of fraud, the Court is going to talk
25 to you about a concept called materiality. Material.

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1 whether something is material.

2 Now, that's not a -- that's a legal word. In
3 everyday parlance we don't think of material in that
4 way. We think of material being your suit or your
5 clothes. But materiality is a legal concept. It
6 means: was something important? And he's going to
7 talk to you about another -- there will be another
8 phrase that the Judge will use: not otherwise known or
9 available.

10 So, when you're looking at Questions 4, 5,
11 questions about fraud, materiality, what the Judge will
12 say to you is this. He'll say: A material fact is one

1 well, actually, though, I'm cheating a little bit.
2 I'm going to talk about addiction in 15 minutes now,
3 but there's a question on the verdict form about
4 addiction, so I'll come back to it and talk about it a
5 little bit more.

6 But here is what I'm going to do. I'm going
7 to talk about, if I can keep you with me, I'm going to
8 talk about it for 15 minutes. Then I'll ask the Judge
9 if he wants to take a morning break, and then I'll
10 start in on the verdict form. Okay. That's what I'm
11 going to do.

12 Now, how do I start on the subject of
13 addiction, on this whole subject of addiction? And
14 you're tempted -- I'm tempted to start with the issue
15 of definitions. But, you know, definitions of
16 addiction you've heard so many of in this case: You
17 heard the '64 Surgeon General's Report; you heard the
18 World Health Organization; you heard the American
19 Psychological Association; you heard the 1988 Surgeon
20 General's Report; you've heard different doctors with
21 their definitions of addiction, what it means in
22 science, what it doesn't mean, what it means, you know,
23 among ordinary people, and it's enough to make your
24 head spin. It really is enough to make your head spin.

25 So, I'm not going to -- I'm not going to

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1 start there. I will come back a little later to
2 definitions, because I just think, for one thing, I
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3 think the definition -- what did -- you know,
4 definitions are labels, and what label you put on --
5 what the label you put on smoking behavior isn't
6 important. The question is, is addiction -- is
7 nicotine -- do any of those things keep people from
8 stopping smoking if they want to stop smoking?

9 I mean, that's what it really comes down to:
10 Can people quit if they want to? Is it nicotine that's
11 keeping them from quitting? That's smoking behavior.
12 That's what smoking behavior is about.

13 And the bottom line of all of it is: Can
14 people quit? And if they make up their minds, if
15 that's what they really want to do, the bottom line is:
16 Can people quit smoking if they want to? And as I said
17 the other day, you know, 50 million people have. The
18 question answers itself.

19 But I'm going to start this 15 minutes with
20 just a couple of things. One is, people inside the
21 companies struggled with this issue, as well as outside
22 the company. Is nicotine addictive? What does
23 addictive mean?

24 And I just want to show you quickly some --
25 and I picked -- because I represent Philip Morris, I

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1 picked documents from Philip Morris to show you about,
2 you know, people talking about nicotine, talking about
3 addiction, and concluding that based on the criteria
4 then in use, that nicotine was not addictive; it may be
5 other things, they said, but not addictive. The

5 He said: It's a bad idea to do that. He
6 said: It's a bad idea to do that because people --
7 once you start calling it an addiction, once you put
8 that label on it, people say -- and I'll just read a
9 little bit of what he says: They say to me: I'm
10 addicted, doc. I can't stop. I'm addicted.
11 They come and they've heard they're addicted.
12 Now, that never happened ten years before.
13 So what he's saying is -- and he goes on and
14 says: I'm saying this as a psychiatrist. In my
15 experience, when people say addicted, that means
16 helpless, that means hopeless, that means give up,
17 forget it; I'm gone; I can't do anything about it.
18 And I don't believe that. He said: That's
19 the wrong label to put on smoking. It's a bad, bad
20 idea.
21 So, you know, you have a chance to put
22 your -- to put your label on it. The Judge is going to
23 tell you what the definition of addiction is.
24 The Surgeon General for 24 years didn't
25 change from the position that it was a habit. In 1988,

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1 he called it an addiction. Nothing had changed about
2 smoking.

3 And in 1964 -- 389, Number 389 -- this is
4 what he said: In medical and scientific terminology,
5 the practice should be labeled habituation, to
6 distinguish it clearly from addiction, since the
7 biological effects of tobacco, like coffee and other

8 caffeine-containing beverages, betel morsel chewing and
9 the like, are not comparable to those produced by
10 morphine, alcohol, barbiturates and many other potent,
11 addicting drugs.

12 And ladies and gentlemen, nothing has changed
13 about it. It's still true today. Nothing has changed
14 about smoking.

15 So that's it. I did it. I'm finished with
16 addiction, at least for now. I've been through what I
17 like to call the triple A's, which are awareness,
18 advertising and addiction,

19 And, Your Honor, if this is a convenient time
20 for the Court, probably it would be a good time for the
21 morning break.

22 THE COURT: All right. We'll take our
23 morning break at this time, folks.

24 The same rules apply. Do not discuss the
25 case or come to any final conclusions.

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1 (The jury was excused from the courtroom.)

2 THE COURT: All right. We'll be in short
3 recess.

4 (A brief recess was taken.)

5 THE COURT: All right. Have a seat, folks.

6 MR. ROSENBLATT: Does the jury understand
7 you're charging them on Monday?

8 THE COURT: I haven't told them anything.

9 MR. ROSENBLATT: Because I was thinking of
10 mentioning that in mine.

3 the time and money on and there weren't any repeat
4 purchases of it, that was in the late '80s and early
5 '90s, and that process that was used, that super
6 critical carbon dioxide extraction process, took almost
7 every bit of nicotine out. Just tiny traces of
8 nicotine were left in it from that process.

9 And nobody, no witness has suggested that
10 that cigarette would have been addictive or was
11 addictive for anybody. In fact, the suggestion has
12 been the opposite; that that's why people didn't buy
13 the second pack. That's the plaintiffs' point of view;
14 that's not the defense's point of view.

15 well, you know what? There are actually
16 cigarettes made available by the defendants that have
17 just about that level of nicotine in it. 10 years
18 later the cigarettes have been -- the progress that has
19 been made is that there's some cigarettes, one is
20 called Carlton Ultra and one called Merit Ultima, that
21 have 22/100 of a milligram of nicotine in it.

22 So are cigarettes that contain nicotine
23 addictive or dependence-producing? well, certainly not
24 all cigarettes. And if there are cigarettes that
25 contain nicotine at those levels, they just can't be

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1 addictive or dependence-producing. And that's a third
2 reason why this question should be answered no.

3 So there's three reasons: People can quit;
4 nicotine doesn't keep people from quitting; the
5 definition and the fact that there are cigarettes on

6 the market with extremely low levels.

7 okay. On this fast ride through the jury
8 verdict form, we now turn to Question Number 3. And
9 Question Number 3 -- where is it here? Oh, okay.
10 Let's see if we can just get it up here.

11 And you can read it: Did one or more of the
12 defendant tobacco companies place cigarettes on the
13 market that were defective and unreasonably dangerous?
14 Defective and unreasonably dangerous.

15 And the reason -- and this is a question
16 where I have to talk a little bit about what the Judge
17 is going to tell you about what those terms mean.
18 Because, you know, you think, defective and
19 unreasonably dangerous, what does it mean and what is
20 it talking about?

21 And what you're going to see is a little bit
22 of the Judge's charge, but what we're talking about is
23 the design of cigarettes. When you get to this
24 question, you need to think design, design of
25 cigarettes.

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1 And if we could put slide 802 up there for a
2 minute.

3 This is Question Number 3, and we've taken
4 part of the Judge's instruction that you're going to
5 hear. This is when the Judge gives you the legal
6 instructions: A product is unreasonably dangerous
7 because of its design if the product fails to perform
8 as safely as an ordinary consumer would expect when

9 used as intended or in a manner reasonably foreseeable
10 by the manufacturer, or the risk of danger in the
11 design outweighs the benefits.

12 So there's a lot in there, a lot in those
13 words that the Judge is going to talk about.

14 As an ordinary consumer would expect.
15 Remember when I started this morning, I told you this
16 was one of the questions that everything that Dr. Ford
17 was talking about, this mountain of awareness, all of
18 the awareness evidence, this applies here, because it's
19 expectations. In order to expect something, you have
20 to be aware of it. And so that's where that fits in
21 there.

22 And then you have to also consider -- and you
23 probably have a headache already and it's going to get
24 worse -- because then you have to consider whether or
25 not the risk or the benefits in the design -- you have

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1 to look -- you have to consider the risk or benefits of
2 the design. And that's all the Court is going to tell
3 you about that.

4 So I want to talk about the risk of danger in
5 the design outweighing the benefits. Now, weighing,
6 weighing in this situation is not a mechanical process
7 where you try to figure out: well, how do I weigh
8 the -- first of all, how do I look at the benefits? I
9 mean, cigarettes, it's been pointed out to you before,
10 cigarettes are not something that you have to have.
11 They're not -- it's not food. So how do you look at
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12 the benefits? And that's something that you need to
13 think through a little bit.

14 Mr. Rosenblatt mentioned at one point Tuesday
15 or Monday that cigarettes were put in soldiers' rations
16 during world war II, and that's the case when you're
17 looking at benefits. How do you put a number? How do
18 you evaluate, for example, whatever value cigarettes
19 may have had for a soldier who was in combat, the
20 relaxing effect of cigarettes, the mild enhancing
21 effect, of ability to concentrate, the enjoyment that a
22 soldier had in very, very difficult situations? How do
23 you evaluate that as a benefit against the risk of
24 danger in the design? Risk of danger in the design.

25 And it's something that you have to kind of

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1 work your way through. And when you're looking at this
2 question, the question as it's put to you is not
3 whether the risks of cigarettes outweigh the benefits.
4 That's not the question. The test is whether
5 cigarettes are as beneficial -- the test is -- the way
6 to look at it, and I'm trying to find -- I'm trying to
7 find a way to capture this legal concept for you.

8 It's not like -- you're not looking to see:
9 well, are cigarettes as helpful as, for example, water
10 would be if you're thirsty? Of course not. That's not
11 the test. It's whether the risk in the particular
12 design of the cigarette outweigh the benefits of the
13 design.

14 And in looking at that, take yourself back to
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349. Closing Argument Defense 6.25.99

15 the question of cigarette design. You had witnesses
16 who came here and testified about cigarette design.
17 And it's fair for you to say: Well, wait a minute.
18 All right, cigarettes are what they are. They're
19 designed the way they are. They have filters; they
20 have holes in them to ventilate, to get air through
21 them; they have reconstituted tobacco and expanded
22 tobacco to bring the tar and nicotine levels down.
23 These are all things that were done with the design.
24 Those are things that the companies did.
25 Now, think, when you're thinking design, was

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1 there a technologically feasible, technologically
2 feasible and available design that the companies didn't
3 do? was there one available? was there something that
4 the companies knew about in terms of something that was
5 feasible that worked, an alternative design for
6 cigarettes? And was there any that the companies
7 didn't do?

8 Because if there was no technologically and
9 feasible alternative design, then this design was as
10 good as it could be; and the risk of the design is very
11 low, because there's no other design, nobody knows of
12 another design.

13 And that ought to be in your heads in
14 thinking about comparing the one part of it where
15 you're comparing risk with benefits, because it's the
16 risk of the design you're going to hear in the Judge's
17 charge in talking about design with the benefits of

18 smoking.

19 And when you look at it that way, could they
20 have designed it better? Could they have done anything
21 else? was there anything in the evidence? Did the
22 plaintiffs put on an engineer or a scientist who said,
23 you know, there were things that obviously could have
24 been done to make these cigarettes better? They were
25 there, they were technologically feasible, there were

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1 alternatives and they didn't use them?

2 Now, I want to say a couple more words about
3 benefits. Plaintiffs may take the position that there
4 are no benefits to smoking. And a nonsmoker might
5 think that that has to be so, because if you've never
6 smoked, you may actually say: well, you know, I can't
7 imagine what people would get out of smoking.

8 But smokers, smokers will tell you, and
9 Dr. Cloninger, I think, and Dr. Hammer both told you,
10 that smokers say that smoking cigarettes relaxes them,
11 and that it helps them concentrate and they enjoy it.
12 They enjoy the ritual. They enjoy having the cigarette
13 in their hand. It's part of a pleasure in life. And
14 this is a real pleasure.

15 Now, it's true, that if all people looked at
16 was the health consequences when they're making
17 decisions, there are a lot of things that they probably
18 wouldn't do. They probably wouldn't smoke. That would
19 be first. If that's all you looked at were health
20 consequences, you probably wouldn't smoke.

21 And, well, what else? You probably wouldn't
22 eat Big Macs. You'd probably stay away from them
23 because of the fat content, and you may not eat steak
24 and you probably would stop using butter and you'd
25 probably not roller blade or use a motorcycle, and I

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1 could go on and on if all you thought about were the
2 risks of the activity. That's what you would do.

3 But the difficulty with that is that there
4 are really benefits if you enjoy a product. There are
5 benefits if you enjoy an activity. There are benefits,
6 real benefits that people have.

7 And a supposedly better design, by the way,
8 if somebody says: Oh, well, there was a better
9 design -- Dr. Carchman said: A better design, you
10 know, you've got to take into consideration, will
11 people use it? A better design that nobody will use
12 isn't a better design. That just isn't a better
13 design. If people are going to smoke, Dr. Carchman
14 said, you've got to give them something. Especially if
15 you want them to smoke a low-tar, low-nicotine
16 cigarette, you've got to make it acceptable to them.
17 And Dr. Townsend, Dr. Townsend said the same thing.

18 So, you know, what this question comes down
19 to is looking at what the companies did in terms of
20 design. Was there any better design available,
21 balancing the risk from the design that they have and
22 thinking about whether that was about as good as you
23 could do with today's technology and then thinking

24 about the benefits?

25 And if you look at the plaintiffs' evidence

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1 in this case, what it really comes down to is what
2 Mr. Rosenblatt, very straightforward -- and I think,
3 you know, it's fine, what the plaintiffs' position in
4 the case is, that there shouldn't be smoking, there
5 shouldn't be cigarettes. I mean, he told you that.
6 That's flat-out where you would go.

7 But that's not what this question is talking
8 about. In fact, that's not what the case is about.
9 You know, you can't look at this question from the
10 point of view under the law -- and that's why I started
11 out talking about the law -- you can't look at it from
12 the point of view, a question like this, on whether
13 it's defective or unreasonably dangerous, from the
14 point of view of whether cigarettes themselves as a
15 product category are wrong or unethical or immoral or
16 against religion, or whatever other words were used.
17 That's just not what the law requires you to do.
18 That's not what the case is about. The case isn't a
19 referendum on smoking. Just not -- that's not what
20 it's about.

21 So what the plaintiffs are doing is their
22 evidence here doesn't challenge the design as much as
23 it challenges the existence of. Existence doesn't
24 challenge cigarette design; it just challenges whether
25 there should be any.

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1 And your job is hard enough going through
2 this verdict form without taking on that as well. It's
3 just not part of this case.

4 Now, one of the things the Judge is going to
5 tell you is that when a risk is obvious or generally
6 known, the consumer will or should know of its
7 existence. If it's obvious -- when a risk is obvious
8 or generally known, the consumer will or should know of
9 its existence.

10 So the risk that you weigh, when you're
11 weighing this part of the instruction, doesn't outweigh
12 the benefits to the consumer of this product, because
13 it's the kind of risk that people are very much aware
14 of in their decision-making process: whether to smoke,
15 whether to continue to smoke. These are the kinds of
16 risks that they're aware of.

17 So when you answer Question 3, remember these
18 points: Consumers fully expect cigarettes to have the
19 risk that they have; plaintiffs have shown you no
20 feasible alternative design, the word design again, to
21 compare to cigarettes; they haven't shown you that
22 there's a way to make cigarettes safer than these
23 companies have made them. What they want to do is get
24 rid of cigarettes, but that's not what we're here to
25 do.

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1 So this Question Number 3 is that they're not
2 unreasonably dangerous, they're not defective and
3 unreasonably dangerous, because people are aware of the
4 risks, and the design is as good as it can be. And
5 because there are benefits for people who smoke.

6 Okay. I'm going to go to Question Number 4.
7 And now we're into the plaintiffs' charges of fraud,
8 fraud and misrepresentation. And you can see the
9 question: Did one or more of the defendants make a
10 false statement of a material fact, either knowing the
11 statement was false or misleading or being without
12 knowledge as to its truth or falsity, with the
13 intention of misleading smokers?

14 A lot in that question. A lot of legal
15 concepts in that question. And you've heard fraud,
16 fraud, fraud from the plaintiffs, but none of what the
17 plaintiffs have shown you in evidence is fraud.

18 And I'm going to explain to you why that is
19 so. And Judge Kaye is going to give you the legal
20 elements of fraud in his instruction.

21 Now, I want to take that question apart for
22 you the way you're going to have to do it in the jury
23 room. Because this job of going through these
24 questions is not an easy job. You've got to take each
25 one of these questions and look for each and every

1 element of the question when you get inside the jury
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1 difference to a decision to smoke or to continue to
2 smoke.

3 This is also an area where this doctrine of
4 preemption comes into play in a very peculiar way. And
5 I'm going to refer you again to the Judge's instruction
6 about July 1st, 1969 and preemption. Because whatever,
7 whatever gets argued this afternoon, and there will be
8 argument plenty, but whatever gets argued this
9 afternoon, whatever is said that this was concealed,
10 this was concealed from the public, the Judge is going
11 to instruct you, you can't base any finding of
12 liability -- using that "P" word again, preemption, you
13 cannot base any finding of liability on a determination
14 that after July 1st, 1969, the companies have had
15 information that was known to them that should have
16 been part of the warnings or should have been
17 additional warnings, or somehow should have affected
18 the warnings that smokers have, because Congress has
19 said otherwise.

20 So you can't say whatever he says, whatever
21 anybody says, about anything that was important that
22 was supposedly concealed. That can't be a basis for
23 liability if the theory is that people -- if that had
24 been made known, then more warnings or better warnings
25 or additional -- you know, more clearly stated warnings

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1 would have occurred.

2 Can't do that. Can't go there. Congress has
3 said no, the warnings were sufficient. So that's one
4 aspect about this claim of concealment that you have to
5 consider.

6 And then more fundamentally, and I've said
7 this before, you can't conceal facts from somebody if
8 they already know them. You can't defraud somebody by
9 telling them -- you can't defraud people by not telling
10 them things that they already know. And they have
11 already known that smoking is risky; that there are
12 risks; that some people get sick; that some people get
13 seriously sick; that some people find it hard to quit.
14 Those risks -- you know, I'm not going to beat a dead
15 horse about it, but you can't defraud someone by not
16 telling them or hiding from them something that they
17 already know, which is the risk to this product.

18 So, anyway, when the Judge gives you his
19 instruction on these questions, and on this question in
20 particular, fraud by concealment, you're going to hear
21 him talk about a concept not otherwise known or
22 available. And I put that in quotes, "Not otherwise
23 known or available."

24 So, in other words, if the fact that was
25 supposedly concealed, if whatever it was was supposedly

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1 concealed, was otherwise known or available, then that
2 can't be a basis for fraud by concealment, because it
3 was otherwise known or available.

4 And I think Mr. Schneider went through with
5 you the fact that this product has been researched to
6 death by virtually everyone. And that you can't -- you
7 know, you can't do more in terms of what was known or
8 available.

9 This product was known. The risks of it were
10 known or available. And the scientific information
11 about it was known and available in the scientific
12 community. And there was nothing that was known by the
13 defendants that was material that wasn't known by the
14 scientific community; that if the scientific community
15 wanted to publish -- and they did publish. They did
16 publish it. It's in all those books. So the research
17 that was out there by government, by universities, by
18 scientists, all establishes that there was nothing in
19 the knowledge of tobacco companies that was different
20 than the knowledge that the outside researchers had.

21 And that's the significance when the Judge
22 gives you the charge in connection with this case. It
23 has to be not otherwise known or available. Well, that
24 just can't be so. It can't be so, because what the
25 tobacco companies knew was otherwise known or

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1 available. And that's the reason, that's another
2 reason why you should check 4 A no, why you should
3 check it no. Plaintiffs have not pointed to any
4 material information that was not available, that was
5 not otherwise known or available. So 4 A ought to be
6 checked no.

7 And I'm going to go to 5. I hope. Okay. 5
8 and 5 A all have to do with another legal concept. And
9 I'm going to try to shorten what I have to say on this
10 subject, but it is the concept of conspiracy. This is
11 conspiracy. These two questions, 5 and 5 A,
12 essentially deal with the charge that the plaintiffs
13 have made that there was a conspiracy among the tobacco
14 companies.

15 Now, I have a hard time dealing with this
16 question in some way, with 5 and 5 A, and I want to
17 tell you why. I have a hard time figuring out what the
18 conspiracy was supposed to be. And my guess is I'm
19 going to find out this afternoon. So I'm going to just
20 go through the legal aspects of conspiracy and I'm
21 going to -- I'm going to try to anticipate what I think
22 the charge of conspiracy is.

23 And I could get it wrong, because there's no
24 evidence of a conspiracy that is worthy of being
25 credited. There's no evidence of conspiracy that is

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1 really something that could get you anywhere close to
2 why you want to answer yes as to these two questions.

3 These companies, you know, we sit on the same
4 side over there of the table because that's the way the
5 courtroom is set up. But in practice, out in the real
6 world, these companies are bitter, bitter competitors
7 who fight, scratch and quarrel over every inch of
8 market share. And, you know, that \$5 billion that gets
9 spent on advertising and promotion -- I think I
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10 misspoke and said a half a billion, but I meant 5
11 billion. That's spread among those companies because
12 they're trying to take customers from one another. So
13 the idea that they conspired together is really just
14 not something that's borne out by the evidence.

15 But let me tell you what is required under
16 the law. You've got to have an agreement before you
17 can have a conspiracy. You've got to have two people.
18 You can't have one. One person can't conspire with
19 himself. One company can't conspire with itself.

20 The law says two or more people have an
21 agreement, and the agreement has to be to do an
22 unlawful act or an unlawful act by an unlawful means.
23 That's the legal definition of a conspiracy. Two or
24 more people joined together, they have an agreement,
25 conspiracy, to do an unlawful act.

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1 And it has to be beforehand. It can't be one
2 company makes a misstatement that you find. Let's say
3 that you think there's a misstatement made, and another
4 company comes along and says: Yeah, we like that
5 misstatement; why don't we make a misstatement like
6 that? That's not a conspiracy. That's just one
7 following what the other one did. A conspiracy has to
8 be beforehand. That's what a conspiracy is. You get
9 together and agree to do something that's unlawful.

10 And you're not going to find any evidence.
11 You know, there are millions of pages of documents, and
12 you're not going to find any documents that -- you

13 know, if there's one or two or three that talk about an
14 agreement, it would be a lot. I can't remember any.
15 Maybe there's one, but I doubt it.

16 But, you know, it's true, you don't have to
17 have a writing to prove a conspiracy. You don't have
18 to have a writing. You can prove conspiracies other
19 ways. But the idea is you've got to prove an
20 agreement.

21 And there was only one piece of testimony
22 about an agreement. It came very early in the case,
23 when one of the witnesses said that there was an
24 agreement between Philip Morris and another company
25 that he didn't know about, couldn't tell you who the

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1 company was, to do product testing overseas.

2 And that was the -- that's one agreement, and
3 I'm trying to figure out where this agreement stuff is
4 going and where this conspiracy stuff is going. But if
5 you look, if that's the theory, well, that's got to be
6 wrong, because the evidence is absolutely plain as day
7 that Philip Morris did product testing, biological
8 product testing in its laboratories in Richmond.

9 Dr. Spears got on the witness stand. He was
10 asked about a conspiracy. He said: I don't know
11 anything about a conspiracy, and we've done our
12 biological testing and our product testing right here
13 in our headquarters here in the U.S.

14 Dr. Carchman, from Philip Morris, said he
15 never heard of anything like that. He's been around

16 quite a while. He's responsible for that kind of
17 testing. He said: we do it in Richmond; we do it in
18 Germany; we do it in Switzerland. We do it all over
19 the place, and I've never heard of any such agreement.
20 And so did Dr. Townsend, talking about where -- so if
21 there was any such an agreement somewhere, back in
22 time, nobody followed it.

23 And so it can't be. It can't be a conspiracy
24 if nothing happened, if it wasn't kept. And if there
25 ever was, and nobody seems to know anything about it --

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1 you look at the facts. You look at what the companies
2 did. I keep saying it over and over and over again,
3 but it's so true. Just look at the facts as to what
4 the companies did. So if that was a conspiracy, it
5 didn't happen.

6 Now, another -- I'm anticipating what the
7 theory is here and I know I'm going to get it wrong.
8 Maybe it was a conspiracy to market to youth, because I
9 heard a little bit about that. I heard that maybe it
10 was a conspiracy -- and by the way, I forgot Dr. Boyse.
11 Dr. Boyse was asked about where it did its product
12 testing. It just said that Brown & Williamson has done
13 its product testing in the United States as well. So
14 she couldn't see how it could be any part of a
15 conspiracy, and it wasn't and hadn't been.

16 Now, what about the idea that there was a
17 conspiracy to market to youth, because I think there
18 was something like that was said. Well, you know, the
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349. Closing Argument Defense 6.25.99

19 idea that these tobacco companies would get together
20 and agree on something like that, well, first of all,
21 where's the evidence of it? It didn't happen. These
22 companies don't agree on anything when it comes to
23 getting market share from one another.

24 And the idea that there was any agreement
25 about marketing to youth, you know, you have to always

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1 start with, where's the evidence? You've got to start
2 there.

3 Say, okay, this is the charge. It's a pretty
4 fancy charge, pretty serious charge, darn serious
5 charge. But where's the evidence of it? Where's the
6 evidence of it? Start there. Where's the evidence?
7 So if that was the conspiracy, there's no conspiracy.

8 You know, there are some agreements -- you
9 can find some agreements among the companies here to
10 look at to see whether there were conspiracies. But
11 you have to apply the law to them.

12 The companies agreed to issue The Frank
13 Statement, except for Liggett. The companies agreed to
14 issue The Frank Statement. So was that a conspiracy?
15 was that a conspiracy to misrepresent anything? Of
16 course not. They believed that what they were saying
17 was right. So, you know, you can find an agreement
18 between the companies on The Frank Statement.

19 There's another place you can find an
20 agreement between the companies, to start CTR, which
21 was back then TIRC. Tobacco Industry Research Council
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22 was renamed Council for Tobacco Research.

23 Yeah, they agreed to do that, absolutely.

24 But it doesn't make it an agreement to do something

25 unlawful. It's not two people to get something

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1 unlawful. Nothing unlawful about giving millions of
2 dollars of research. So that's an agreement.

3 Did they participate in a trade association?

4 They did. You know, Tobacco Institute was a trade
5 association, not just of the tobacco companies,
6 agricultural. The tobacco farmers were represented in
7 that trade association; other groups that have to do
8 with tobacco.

9 But participating in a trade association is
10 not a conspiracy. You know, if it was, the milk people
11 would be conspirators; the beef people would be
12 conspirators. That's just not the way it works.
13 People are allowed to do those kinds of things.
14 They're allowed to get together to promote their common
15 interest without it being a conspiracy. So there was
16 no conspiracy.

17 And I'm just going to move through this to
18 5 A, and just say very little about it. Each of these
19 questions is posed two ways: Was an affirmative act
20 done or was there a concealment done? In the fraud
21 area, this is another one that you answer no for the
22 same reasons.

23 There's still no evidence of an agreement.

24 Got to have an agreement there, an agreement to
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25 conceal. There's no evidence of an unlawful act, or

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1 unlawful means. There's no evidence of an intention to
2 fool smokers or hurt smokers or anything like that.
3 And again, this is a preemption question, too, for the
4 reason that I talked about earlier. For the very same
5 reasons.

6 So if the companies got together, for
7 example, and said: Let's publicize our side of this
8 issue the way we believe it to be and let's issue a
9 statement about it, that's not a conspiracy. That's
10 just not a conspiracy for a whole bunch of reasons I
11 talked about.

12 Because it's a conspiracy to do what?
13 Conspiracy to commit a fraud. And I already covered
14 what you need to find a fraud. It's a conspiracy to
15 conceal a material fact, something that was significant
16 to people, something significant in their
17 decision-making whether to smoke, whether to continue
18 to smoke. And none of that happened. And there's no
19 evidence.

20 So ask, you know, when you look at these
21 things, say: what are the facts here? What's the
22 evidence? I keep asking you to do that. What's the
23 evidence? What are the facts? And you'll come up with
24 precious few, precious few. These questions have to be
25 answered no, because the plaintiffs haven't proven

1 them.

2 6 and 7 have to do with warnings. Go to 6,
3 whether cigarettes violate an implied warranty, and the
4 question here: Are cigarettes reasonably fit for the
5 purpose intended or reasonably foreseeable by the
6 defendants? That's what this concept is: Was there an
7 implied warranty? What is it? What is the foreseeable
8 use? What's the use the cigarette manufacturers
9 intended for their products?

10 That's an easy question. That's one you
11 know: To smoke. Cigarette manufacturers intended that
12 the cigarettes be smoked. And there's not one scrap of
13 evidence that the defendants haven't tried to make
14 their product as fit as they can make it.

15 People who buy cigarettes, consumers,
16 smokers, get what they expect from cigarettes: a
17 cigarette that smokes, a cigarette that gives a certain
18 amount of pleasure, and a cigarette that has risk.
19 That's what's foreseeable: A cigarette that smokes,
20 gives pleasure, has risk.

21 And the whole idea of a warranty -- you know
22 what warranties are because you've gotten them,
23 guarantees or warranties. The idea of a warranty is
24 that you get what you are told you're getting. You are
25 getting what you expect. That's the idea of a

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO
COMPANY, et al.,

Defendants.

_____ /

Miami-Dade County Courthouse
Miami, Florida
Monday, 9:30 a.m.
June 28, 1999

TRIAL - VOLUME 351

The above-styled cause came on for trial
before the Honorable Robert Paul Kaye, Circuit Judge,
pursuant to notice.

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351. Jury Charge Issued 6.28.99

6 THE COURT: Have a seat, folks, please.
7 We're about to get into the reading of the
8 instructions to the jury, and usually standard
9 procedure is that once we start, nobody comes in or out
10 of the courtroom. So if any of you folks feel the need
11 now that you'd like to leave, do so now because the
12 doors will be locked.
13 Good morning, folks. Everybody have a nice
14 weekend, I hope?
15 Did you come in contact with any information
16 regarding this case or any other case in any manner,
17 shape or form?
18 JURORS: No, sir.
19 THE COURT: Now, I've got some instructions
20 that I'm going to read to you. You don't have to take
21 notes on these instructions because I'm going to give
22 you a copy of them. And I want you to listen to what I
23 say, and then we'll give you a copy of this for your
24 review.
25 Now, this case is unlike most other lawsuits

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1 that have come to trial, and before instructing you on
2 the law, I want to discuss with you your role as jurors
3 in this case.

4 In a typical lawsuit, the jury hears
5 testimony from the litigants, including the plaintiffs,
6 the parties bringing the lawsuit. Ordinarily, the
7 plaintiffs would testify about their claims and
8 describe their medical conditions and their damages.

351. Jury Charge Issued 6.28.99

9 However, this case is not typical, because it is not
10 brought on behalf of one or two individuals, but rather
11 on behalf of a group or a class of individuals.

12 The Florida class is a state-wide class
13 consisting of all Florida citizens and residents and
14 their survivors who have suffered, presently suffer or
15 who have died from diseases and medical conditions
16 caused by their addiction to cigarettes that contain
17 nicotine.

18 Because the size of the Florida class and the
19 complexity of the issues, the Court has determined that
20 all common liability issues would be tried before a
21 jury in a single trial. This common issue trial has
22 addressed the conduct of the tobacco industry. This
23 trial did not address issues as to the conduct or
24 damages of individual members of the Florida class.
25 Those issues are not relevant during this trial.

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1 The Court has determined that the conduct of
2 class members is not relevant to the issues presented
3 in this common liability trial, and therefore, you did
4 not hear testimony from any members of the Florida
5 class who are plaintiffs bringing the action. You
6 should not hold it against any of the class
7 representatives or class members that they did not
8 testify before you or provide you with their medical
9 records or other information, because that was the
10 decision of this Court.

11 You will not determine any issues regarding
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351. Jury Charge Issued 6.28.99

12 the conduct of individual class members of the Florida
13 class, including any issues as to compensatory damages
14 for individual class members. You will, however,
15 consider the issue of entitlement to punitive damages,
16 since punitive damages address only the conduct of the
17 defendants.

18 Members of the jury, I shall now instruct you
19 on the law that you must follow in reaching your
20 verdict. It is your duty as jurors to decide the
21 issues, and only the issues that I submit for
22 determination by your verdict. And in reaching your
23 verdict, you should consider and weigh the evidence,
24 decide the disputed issues of fact, and apply the law
25 on which I shall instruct you, to the facts as you find

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1 them from the evidence.

2 The evidence in this case consists of the
3 sworn testimony of all the witnesses, all of the
4 exhibits received in evidence, and all facts that may
5 be admitted or agreed to by the parties.

6 In determining the facts, you may draw
7 reasonable inferences from the evidence. You may make
8 deductions and reach conclusions which reason and
9 common sense lead you to draw from the facts shown by
10 the evidence in this case. But you should not
11 speculate on any matters outside of the evidence.

12 Now, there are some general considerations
13 you have to take into consideration here. One is, in
14 determining the believability of any witness and the

351. Jury Charge Issued 6.28.99

11 the legal significance, if any, of the dates. The
12 legal significance of the dates is a matter which will
13 be considered solely by the Court.

14 Now, on the claim of strict liability of the
15 Florida class against the defendant tobacco companies,
16 the issue for your consideration is whether cigarettes
17 sold by these tobacco companies were defective when
18 they left the possession of the companies.

19 A product is defective if it is in a
20 condition unreasonably dangerous to the user and the
21 product as expected to and does reach the user without
22 substantial change affecting that condition.

23 A product is defective if by reason of its
24 design the product is in the condition unreasonably
25 dangerous to the user and the product is expected to

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1 and does reach the user without substantial change
2 affecting that condition.

3 A product is unreasonably dangerous because
4 of its design if the product fails to perform as safely
5 as an ordinary consumer would expect when used as
6 intended or in a manner reasonably foreseeable by the
7 manufacturer, or the risk of danger in the design
8 outweighs the benefits.

9 If you find against one or more of the
10 defendants, you are also to consider whether the
11 defendants' conduct occurred before or after July 1,
12 1974.

13 On the Florida class claim for fraud and
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351. Jury Charge Issued 6.28.99

14 misrepresentation, the issues for your determination
15 are:

16 1, whether one or more of the defendants made
17 a false statement concerning a material fact;

18 2, whether one or more of the defendants knew
19 the statement was false when it was made, or made the
20 statement knowing that said defendants were without
21 knowledge of its truth or falsity;

22 3, whether in making a false statement, or in
23 concealing material facts, one or more of the
24 defendants intended that another rely on the false
25 statement or misrepresentation;

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1 If you find against one or more of the
2 defendants, you are to consider whether the defendants'
3 conduct occurred before or after May 5, 1982.

4 On the plaintiffs' claim for fraud by
5 concealment, the issues for your determination are:

6 1, whether one or more of the defendants
7 omitted or concealed material facts that would be
8 necessary to make statements by said defendants not
9 misleading;

10 2, whether one or more of the defendants knew
11 the statement was false when it was made, or made the
12 statement without knowing -- excuse me -- or made the
13 statement knowing that said defendant was without
14 knowledge as to its truth or falsity, or knew of the
15 existence of material facts that were not disclosed;
16 and

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1 A, whether one or more of the defendants
2 engaged in extreme and outrageous conduct;

3 B, whether one or more defendants acted with
4 the intent to cause severe emotional distress or with
5 reckless disregard of the high probability of causing
6 severe emotional distress.

7 Extreme and outrageous conduct is behavior
8 which, under the circumstances, goes beyond all
9 possible bounds of decency and is regarded as shocking,
10 atrocious and utterly intolerable in a civilized
11 community.

12 Emotional distress is severe when it is of
13 such intensity or duration that no ordinary person
14 should be expected to endure it.

15 The issue for determination on the negligence
16 claims of the plaintiffs against each of the tobacco
17 companies is whether one or more of the tobacco
18 companies were negligent in designing, manufacturing,
19 testing, or marketing of cigarettes. Another issue for
20 your determination is whether one or more of the
21 defendant tobacco companies were negligent prior to
22 July 1, 1969 in failing to warn smokers of the health
23 risks of smoking or the addictiveness of smoking.

24 Negligence is the failure to use reasonable
25 care. Reasonable care is that degree of care which a

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IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO
COMPANY, et al.,

Defendants.

_____ /

Miami-Dade County Courthouse
Miami, Florida
Tuesday, 1:45 p.m.
November 2, 1999

TRIAL - VOLUME 383

The above-styled cause came on for trial
before the Honorable Robert Paul Kaye, Circuit Judge,
pursuant to notice.

TAYLOR, JONOVIC, WHITE & GENDRON
TAMiami, JFlorida WH305-358-9047N
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383. Defense Opening Statement Phase II 11.2.99

10 THE COURT: Anybody else is going to speak?

11 MR. SMITH: Your Honor, may I have one moment
12 to do housekeeping?

13 THE COURT: Yes.

14 MR. SMITH: Thank you, Your Honor.

15 Good afternoon, ladies and gentlemen. I'm
16 Gordon Smith. Let me reintroduce myself. I'm from
17 Atlanta, Georgia. I'm the partner of Richard
18 Schneider, known as Doc to anybody who knows him. I
19 helped Doc get ready for Phase I, and he asked me to
20 take over for Phase II, which I'm doing, and I'm doing
21 it with Anthony Upshaw. I don't know if everyone can
22 see Tony here. So, for Brown & Williamson in Phase II,
23 it's going to be Gordon Smith and Mr. Upshaw.

24 I'm going to be substantially shorter than
25 any of the two openings. There are two more, but they

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1 will be much shorter than I am, just so you know it's
2 coming.

3 when I say this phase of the case, what do I
4 mean, Phase II of the case? I mean the phase of the
5 case where for the first time you're going to consider
6 evidence about two smokers and what responsibility they
7 have, what decisions they make, what risks they knew
8 about smoking.

9 You're going to find out what two individual
10 people knew about whether smoking was risky or not.
11 Tony and I are going to do our best to present this

383. Defense Opening Statement Phase II 11.2.99
12 case to you as efficiently and as quickly as we can,
13 and it will be shorter than Phase I.
14 We know the service that you have performed,
15 and I don't know if any jury has performed anything
16 like it, honestly. I can't predict how long Phase II
17 will last exactly, but I will tell you, on behalf of
18 Gordon Smith and Tony Upshaw and Brown & Williamson, we
19 will put on our case quickly because this is really two
20 cases about two individuals and only those two cases.
21 It's not going to be the cases of any of the other
22 class members, however many thousands or hundreds of
23 thousands it may be. This is two individual cases
24 we're dealing with here.
25 I know, or I would think, that during all the

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1 months of Phase I, you must have wondered: When do we
2 get to hear the evidence about the individuals? When
3 do we get the evidence of the other side of the
4 equation? When do we get the evidence about the
5 smokers? And the answer is: You get it in Phase II.
6 And I'm going to describe to you the evidence
7 that you are going to hear, about the responsibility of
8 individuals who choose to smoke, who choose to continue
9 to smoke, who say they like to smoke, who don't make
10 serious efforts to quit until very late in the game,
11 about smokers who then get sick and then seek to get
12 paid money.
13 That's the evidence you get to hear in
14 Phase II.

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21 see evidence in this phase of the case relating to
22 smokers' choices and you won't have to ignore that in
23 this phase.

24 You will hear evidence that these people can
25 choose, in the face of a known risk, to smoke and to

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1 continue to smoke because they want to and it's their
2 choice in the face of warnings for decades.

3 Now you get to look at the other side of the
4 equation. As to these two smokers, the evidence will
5 show that you can't start to smoke, continue to smoke,
6 not make serious efforts to quit until very late in the
7 game, be warned for decades that it can be risky to
8 your health, and then recover money for that.

9 You decided in Phase I that you didn't like
10 some of the things that these companies have done and
11 you gave your verdict on that. You made your statement
12 on that. You took your stand on that and that will
13 resonate forever. And it will ensure that all the
14 class members have a day in court.

15 Now is the time --

16 MR. ROSENBLATT: This is argument. This has
17 nothing to do with opening statement.

18 THE COURT: I agree. Sustained.

19 The jury will disregard the last statement.
20 It's more fitting for a closing argument than opening
21 statement. There is a big distinction.

22 MR. SMITH: Thank you, Your Honor. I'll

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conclude.

24 At the end of this case, based on the
25 evidence of these two smokers, I'm going to ask you, on

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1 behalf of my client, the Brown & Williamson Tobacco
2 Corporation, to return a verdict as to these two
3 defendants for Brown & Williamson. There may be cases
4 down the road where people should recover, but I think
5 the evidence in this case will show you that Mr. Amodeo
6 and Ms. Farnan should not as to Brown & Williamson.

7 I appreciate your attention and I look
8 forward to bringing our evidence to you. Thank you.

9 THE COURT: Is there anyone else that wishes
10 to make an opening statement?

11 MR. REILLY: Ten minutes max. May take me
12 longer to get to the podium.

13 THE COURT: I'm not restricting you on time,
14 counsel.

15 MR. REILLY: Good afternoon.

16 I'm Ken Reilly. Judge Kaye introduced me to
17 you at the beginning of yesterday, and I represent
18 Lorillard Tobacco Company and Lorillard,
19 Incorporated -- I'm going to call them Lorillard --
20 along with Jim Newsom and David Ross. I know you
21 remember those faces from Phase I.

22 I'm the fourth defense lawyer to address you
23 today, and there are a couple of golden rules when you
24 are the fourth lawyer. The first one is be brief, and
25 I'm going to be brief. The second one is don't repeat
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**Denials of Defendants' Request for Certiorari Review
in the United States Supreme Court**

RJR v. Odom, 139 S. Ct. 1311 (2019); *RJR Co. v. Nally*, 139 S. Ct. 1273 (2019); *RJR v. Johnston*, 139 S. Ct. 1273 (2019); *PM v. Boatright*, 139 S. Ct. 1263 (2019); *PM v. Brown*, 139 S. Ct. 1263 (2019); *PM v. McKeever*, 139 S. Ct. 1263 (2019); *RJR v. Searcy*, 139 S. Ct. 1262 (2019); *RJR v. Pardue*, 139 S. Ct. 1261 (2019); *PM v. Jordan*, 139 S. Ct. 1261 (2019); *RJR v. Monroe*, 138 S. Ct. 923 (2018); *RJR v. Lewis*, 138 S. Ct. 923 (2018); *PM v. Lourie*, 138 S. Ct. 923 (2018); *RJR v. Grossman*, 138 S. Ct. 748 (2018); *RJR v. Turner*, 138 S. Ct. 736 (2018); *PM v. Naugle*, 138 S. Ct. 735 (2018); *RJR v. Block*, 138 S. Ct. 733 (2018); *RJR v. Graham*, 138 S. Ct. 646 (2018); *RJR v. Walker*, 573 U.S. 913 (2014); *RJR v. Brown*, 573 U.S. 912 (2014); *RJR v. Kirkland*, 573 U.S. 905 (2014); *RJR v. Koballa*, 573 U.S. 905 (2014); *RJR v. Smith*, 573 U.S. 905 (2014); *RJR v. Sury*, 573 U.S. 905 (2014); *RJR v. Townsend*, 573 U.S. 905 (2014); *PM v. Barbanell*, 573 U.S. 904 (2014); *RJR v. Mack*, 573 U.S. 904 (2014); *Lorillard Tobacco Co. v. Mrozek*, 573 U.S. 904 (2014); *PM v. Douglas*, 571 U.S. 889 (2013); *RJR v. Clay*, 568 U.S. 1027 (2012); *RJR v. Gray*, 566 U.S. 905 (2012); *RJR v. Hall*, 566 U.S. 905 (2012); *PM v.*

Campbell, 566 U.S. 905 (2012); *RJR v. Campbell*, 566 U.S. 905 (2012); *RJR v. Martin*, 566 U.S. 905 (2012); *RJR v. Engle*, 552 U.S. 941 (2007).