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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF LOS ANGELES**

11 RICHARD BOEKEN,)

12 Plaintiff,)

14 v.)

15 PHILIP MORRIS INCORPORATED, a)
16 corporation; INTERNATIONAL HOUSE OF)
17 PANCAKES, INCORPORATED, a)
corporation; DOES 1-100 inclusive,)

18 Defendants.)
19 _____)

Case No. BC 226593

12 **MEMORANDUM OF POINTS AND**
13 **AUTHORITIES IN SUPPORT OF**
14 **DEFENDANT'S MOTION FOR**
15 **JUDGMENT NOTWITHSTANDING**
16 **VERDICT**

15 DATE: August 6, 2001
16 TIME: 9:30 a.m.
17 DEPT: 308
18 JUDGE: Honorable Charles W. McCoy

19 Complaint Filed: March 16, 2000
20 Judgment Entered: June 11, 2001

1 **INTRODUCTION**

2 The \$3 billion judgment in this lawsuit is the largest punitive damage judgment on behalf of
3 an individual in the history of American jurisprudence. It dwarfs (by a factor of more than 100) the
4 highest individual punitive award previously upheld on appeal in California.

5 The gross excessiveness of the verdict is a subject of defendant’s companion motion for a
6 new trial. As we argue there, the \$3 billion award was the result of passion and prejudice and must
7 be set aside. What makes the \$3 billion award all the more egregious, however, is that Mr. Boeken
8 failed to prove that Philip Morris is liable to him at all. Philip Morris’ liability *to this plaintiff* was
9 never proven. The jury was so inflamed against Philip Morris – as manifested by the \$3 billion
10 punitive damage award – that it ignored plaintiff’s failure of proof.

11 As shown in detail below, Philip Morris is entitled to judgment notwithstanding the verdict
12 on each of the remaining claims in this case.

13 **The Affirmative Fraud Claims: Mr. Boeken’s Failure to Identify Specific False**
14 **Statements on Which He Relied.** The trial record does not reveal even a single specific statement
15 by Philip Morris (or any other tobacco manufacturer or trade organization) that Mr. Boeken claims
16 he saw or heard and relied upon. But reliance upon such specific statements, whether direct or
17 indirect, is the sine qua non of a fraud claim. *See, e.g., Mirkin v. Wasserman* (1993) 5 Cal. 4th
18 1082, 1089. Despite plaintiff’s pre-trial promise that he would prove a case of fraud based upon
19 indirect communication, his actual evidence fell well short of the mark. At best, plaintiff’s evidence
20 purported to show a generic “fraud on the market” – a theory that California law clearly bars. This
21 Court gave plaintiff ample opportunity to prove a traditional fraud case, but he failed to do so.
22 Accordingly, this Court should enter judgment for Philip Morris on all the fraud claims asserted.

23 **All Claims: Common Knowledge of the Risks of Smoking.** It has been commonly
24 known for decades that smoking is associated with various diseases — including lung cancer.
25 Indeed, the health hazards of smoking have for many years been the subject of thousands of
26 scientific studies, innumerable public reports, and congressionally mandated health warnings on
27 each cigarette package. Common knowledge of the risks of smoking bars plaintiff’s various fraud-
28 based claims because plaintiff cannot justifiably rely on supposed statements that are refuted by the

1 common knowledge of the public. It bars plaintiff's fraudulent concealment claims and negligent
2 failure-to-warn claims because there is no duty to disclose information about commonly known
3 dangers. And it bars the products liability claims because California law does not impose liability
4 for the sale of a product with inherent dangers within the expectations of the ordinary consumer.

5 **Pre-1969 Failure to Disclose Claims: No Showing that Additional Information Would**
6 **Have Made a Difference.** Mr. Boeken's pre-1969 claims for failure to provide information –
7 whether sounding in negligence, strict liability, or fraudulent concealment – fail because he has
8 offered no meaningful evidence of proximate causation – *i.e.*, that additional information would
9 have made a difference to his smoking behavior. The undisputed facts are that plaintiff continued to
10 smoke through the year 2000, even though the federally required warnings had appeared on all
11 packs of cigarettes for over 30 years and that he had personally become convinced by 1994 that
12 smoking caused lung cancer. In light of overwhelming evidence that additional information about
13 smoking and health would not have caused Mr. Boeken to change his smoking behavior, defendants
14 are entitled to judgment. *See Mirkin*, 5 Cal. 4th at 1093.

15 **Design Claims: No Safer Alternative Design.** Mr. Boeken cannot save his products
16 liability claims by invoking the risk/benefit test in lieu of the consumer expectation test. In the case
17 of a consumer product like cigarettes – the consumers of which can be expected to form views on
18 the dangers of the product – the consumer expectation test alone applies. To apply the risk/benefit
19 test would result in confusion and uncertainty, undercut the purposes of the consumer expectation
20 test, and make no sense from a policy perspective. Moreover, even if one *did* apply the risk/benefit
21 test to Mr. Boeken's claims, the trial record is bereft of any evidence that could support judgment
22 for Mr. Boeken on such a theory. The risk/benefit test requires concrete evidence of a feasible safer
23 alternative design for the product, and no such evidence is in the trial record. Nor is there any
24 evidence that the failure to use such an alternative design *caused* Mr. Boeken's cancer or that
25 Mr. Boeken would have even used an alternative product if it had been available.

26 **All Claims: Section 1714.45 Immunity.** Section 1714.45 immunizes Philip Morris from
27 liability for any injury to Mr. Boeken caused by Philip Morris' conduct prior to 1998. The repeal of
28 1714.45 in 1998 was not retroactive – nor could it be, consistent with constitutional principles. This

1 is especially true as to the punitive award because allowing retroactive imposition of punitive
2 damages based upon previously immunized activity would violate the *ex post facto* and due process
3 clauses of the California and federal constitutions.

4 For all these reasons, this Court should enter judgment for defendant notwithstanding the
5 verdict.

ARGUMENT

I. PHILIP MORRIS IS ENTITLED TO JUDGMENT ON PLAINTIFF’S FRAUD CLAIMS BECAUSE PLAINTIFF FAILED TO IDENTIFY ANY MISREPRESENTATION UPON WHICH HE RELIED

The Court should enter judgment for Philip Morris on each of plaintiff’s three affirmative fraud theories¹ because plaintiff failed to prove that Philip Morris ever made an actionable misrepresentation of material fact or false promise that Mr. Boeken saw or heard – much less actually or justifiably relied upon.

A. Basic Legal Principles Governing Fraud Claims Require Identification of Reliance on Specific Misrepresentations

It is axiomatic “that the person complaining of fraud [must] actually have relied on the alleged fraud, and suffered damages as a result.” *City of Atascadero v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal. App. 4th 445, 482. The California Supreme Court has forcefully rejected any theory of “fraud in the air” or “fraud-on-the-market” – *i.e.*, misrepresentations communicated generally to the public but which plaintiff cannot prove he actually heard and relied upon. *See, e.g., Mirkin v. Wasserman* (1993) 5 Cal. 4th 1082, 1089 (rejecting “fraud-on-the-market” theory); *Goldrich v. Natural Y Surgical Specialties, Inc.* (1994) 25 Cal. App. 4th 772, 782 (fraud “in the air” is “not the stuff of which a fraud claim is made”).

These principles hold equally true in cases of fraud by “indirect communication.” In such cases, plaintiff must still prove that he actually received and justifiably relied upon the indirect communication. *Mirkin*, 5 Cal. 4th at 1097 (“To say that a plaintiff who relies on secondhand misrepresentations can state a cause of action for deceit is not to say that reliance may be presumed”); *Gawara v. U.S. Brass Corp.* (1998) 63 Cal. App. 4th 1341, 1355 (rejecting “indirect” fraud claim where plaintiffs failed to show that fraudulent statements were ever “passed along [to

¹ Plaintiff alleged theories of fraud by (1) false promise, (2) misrepresentation, (3) negligent misrepresentation, and (4) fraudulent concealment. We deal with the claim of fraudulent concealment in a subsequent section.

1 them] or that [they] relied on these communications”); *Acosta v. Synthetic Indus., Inc.* (2001) 88
2 Cal. App. 4th 944, 964 (expressly approving *Gawara* and holding that, in a fraud case premised on
3 indirect communication, plaintiff must prove that “misrepresentations [were] made to an
4 intermediary,” that the “misrepresentations were communicated by the intermediary to plaintiff[,]”
5 and that plaintiff acted in “actual reliance” upon the indirectly communicated misrepresentations”).

6 Finally, it is not enough that plaintiff generically recalls that he heard the substance of an
7 alleged misrepresentation at some *unidentified* time from some *unidentified* source. Instead, a
8 plaintiff must identify a *specific* misrepresentation actually communicated (either directly or
9 indirectly) to him. *E.g., Mirkin*, 5 Cal. 4th at 1089-92 (no reliance where plaintiffs “cannot allege
10 that they actually read or heard the alleged misrepresentations”); *Goldrich*, 25 Cal. App. 4th at
11 782-83 (affirming dismissal where there was “no explanation about how [plaintiff] could have
12 relied upon something she cannot now describe in any fashion”). Additionally, “[t]he requirement
13 of specificity in a fraud action against a corporation requires the plaintiff to allege the names of the
14 persons who made the allegedly fraudulent misrepresentations, their authority to speak, to whom
15 they spoke, what they said or wrote, and when it was said or written.” *Tarmann v. State Farm Mut.*
16 *Auto. Ins. Co.* (1991) 2 Cal. App. 4th 153, 157. In a case of fraud by “indirect communication,” this
17 can be accomplished only if the plaintiff links to the defendant the representations that he heard
18 repeated by a third party to the defendant.

19 Before trial, Philip Morris requested summary adjudication on the fraud and express
20 warranty claims in light of plaintiff’s failure to specify particular statements by Philip Morris which
21 he heard and upon which he relied. Philip Morris characterized Mr. Boeken’s theory as “fraud on
22 the market” or “fraud in the air.” Plaintiff responded by denying that he was pursuing a “fraud in
23 the air theory” and instead characterizing his theory as one of fraud by “indirect communication.”
24 This Court accepted plaintiff’s characterization and allowed the claims to proceed to trial. Court
25 Order re Summary Adjudication Motions, March 5, 2001, at 9-11.

1 At the conclusion of plaintiff's case and again at the close of all the evidence, Philip Morris
2 moved for judgment on the fraud and express warranty claims. Philip Morris argued that, contrary
3 to plaintiff's pretrial promise to prove a case of fraud by "indirect communication," his evidence
4 amounted to no more than "fraud in the air."² His allegations of misrepresentation were not linked
5 in any meaningful way to anything that Mr. Boeken himself ever heard (from any source) and relied
6 upon. Although the Court allowed Mr. Boeken's fraud claims to proceed to verdict, the Court
7 dismissed his express warranty claim, holding that "there is no evidence which would support an
8 express promise to Mr. Boeken which formed the basis of the bargain between him and Philip
9 Morris." (RT 5810) (Ex. 1).³

10 **B. Plaintiff Fails To Satisfy the Rigorous Legal Standards for Fraud**

11 Plaintiff did not testify at trial. Most of his videotaped deposition, however, was shown to
12 the jury. That testimony unequivocally demonstrates the following:

- 13 • Plaintiff never relied upon any direct communication by Philip Morris, any other
14 cigarette manufacturer, or any tobacco trade organization. (Boeken Depo at 294-299
(12/28/00) (Ex. 2)).
- 15 • Plaintiff cannot trace any information that he did hear about smoking and health from
16 third-parties to any specific statement by Philip Morris, any other cigarette manufacturer,
17 or any tobacco trade organization. (Boeken Depo at 294-299 (12/28/00)).
- 18 • Plaintiff did not begin smoking because of any misrepresentation by Philip Morris.
19 According to his own testimony, he began smoking because "everybody smoked. All
20 adults smoked. It was fashionable. It was sophisticated. It was cool. All the —
21 everybody smoked, and I wanted to be grown up." (Boeken Depo at 36 (12/18/00)).
- 22 • Ultimately, Marlboro became Mr. Boeken's brand of choice. Again, this decision had
23 nothing to do with any alleged misrepresentation by Philip Morris. Instead, plaintiff was
24 "impressed by the ads," which "represented [a] very macho, sophisticated, hip way of
25 smoking." (Boeken Depo at 53 (12/20/00); 40 (12/18/00)).⁴ He chose Marlboro's
26 because "they were tasty." (Boeken Depo at 56 (12/20/00)). Also, "[t]hey had a filter

23 ² In this sense, plaintiff's proof was presaged by the approach in his complaint, which simply
24 alleges that defendants' fraud "permeat[ed] the public conscience." Compl., ¶ 58. Although the
25 Complaint listed a number of specific alleged misrepresentations, plaintiff never heard a single one
26 of them.

26 ³ All exhibits are attached to the accompanying Declaration of John L. Carlton.

27 ⁴ Plaintiff did feel that the "health and robust nature" of the cowboys in certain unspecified
28 Marlboro ads implied "[t]hat Marlboro's were good for you," (Boeken Depo at 227-228
(12/27/00)), but we do not understand such claims to form the basis for his fraud claim. Indeed,
plaintiff indicated that he had "no idea" whether these ads contributed to his continued smoking. *Id.*

1 and they were the cigarette of my group's cultural choice." (Boeken Depo at 55-56
2 (12/20/00)).

3 In short, Mr. Boeken does not claim that he relied to his detriment on direct fraudulent
4 misrepresentations in Philip Morris' advertising or other direct statements. Instead, he claims that
5 he obtained indirect information that the cigarette companies "refut[ed] the fact that [cigarettes]
6 were addictive, that [they were] dangerous, that [they were] cancer causing." (Boeken Depo at 82
7 (12/18/00)). The source of Mr. Boeken's information? The "news." (Boeken Depo at 211-212
8 (12/27/00)). But, again, Mr. Boeken cannot – with two irrelevant exceptions – pinpoint particular
9 news items that he heard even on these subjects.⁵

10 Rather, Mr. Boeken spoke in general terms about media stories – on television, in
11 newspapers, or in magazines – that supposedly occurred on unidentified occasions over forty years.
12 He identified no specific story or any specific news broadcast that he saw or any specific newspaper
13 or magazine article that he read. He provided no dates or times. He never even offered any
14 evidence that the tobacco statements shown to the jury and which formed the basis of his fraud
15 claims were broadcast or reported in the media – much less that he relied on.

16 Plaintiff's invocation of the theory of fraud by "indirect communication" does not excuse
17 him from proving the traditional elements of fraud. On the contrary, such a theory actually adds
18 "necessary links to the chain." *Gawara*, 63 Cal. App. 4th at 1357. In particular, to prove "indirect
19 reliance" under California law, Mr. Boeken was obligated to show:

20
21 ⁵ The two exceptions are: (i) news coverage of the 1994 appearance of CEO's of major tobacco
22 companies before Congress (Boeken Depo at 97-98 (12/18/00); 213-214 (12/27/00); 294
23 (12/28/00)); and (ii) a television broadcast in 1997 alleging that the tobacco companies put
24 "accelerants" and other material into cigarettes. (Boeken Depo at 97 (12/18/00)). As an initial
25 matter, both exceptions occurred during the period of immunity conferred on defendants by the pre-
26 1998 Civil Code § 1714.45. *See infra* Section IV. Beyond that, neither of these news items cast
27 doubt on the link between smoking and lung cancer. And the 1994 CEO testimony occurred almost
28 simultaneously with the death of Mr. Boeken's mother from lung cancer caused by smoking — an
event which plaintiff concedes eliminated all doubts in his mind as to whether smoking caused lung
cancer. (Boeken Depo at 87-90 (12/18/00); 213-214 (12/27/00)). Moreover, until he revised his
testimony after consultation with counsel in the midst of his deposition, plaintiff testified that he did
not even believe the CEO's testimony in 1994. (Boeken Depo at 91-92 (12/18/00)). ("I knew they
were lying."). In any event, Mr. Boeken believed that he was addicted to cigarettes well before
1994. Finally, with respect to the 1997 broadcast, Mr. Boeken never offered any explanation as to
what he meant by "accelerants" or how they connected to his claims of fraud.

- (1) that the “defendant made misrepresentations or omissions directly to one victim,”⁶
- (2) “who then repeated the misrepresentations to another who thus was an indirect recipient of the defendant’s communications,”⁷
- (3) and who actually and justifiably relied on the representations and suffered resultant damages.⁸

As tried, Mr. Boeken’s case is a far cry from a case of fraud by “indirect communication.” Plaintiff never identified particular statements even by the third party media outlets upon which he ostensibly relied. Certainly the evidence never linked up Mr. Boeken’s vague recollections of those unspecified media statements to any particular statements by Philip Morris. Rather, plaintiff was permitted to introduce generalized evidence of “fraud in the air” against Philip Morris, untethered to the actual substance of the ill-defined third-party media statements that he claims he heard. Given the vagueness of plaintiff’s contentions, Philip Morris was deprived of the opportunity to defend itself. Defendant could not deny having made representations that were never identified; nor could defendant argue with any specificity that unidentified statements were in fact true.⁹

Plaintiff’s failure to link up the allegedly false statements to his own claims was perhaps most pronounced with respect to his claim based upon a 1954 newspaper advertisement known as the “Frank Statement.” In that advertisement, Philip Morris allegedly promised to conduct scientific research on the health effects of cigarettes and report the results to the public. But Mr. Boeken freely admitted that he had never heard of this “Frank Statement” (whether directly or indirectly), much less relied upon it. (Boeken Depo at 298 (12/28/00)). In short, there is no

⁶ *Gawara*, 63 Cal. App. 4th at 1357.

⁷ *Id.*

⁸ *Acosta*, 88 Cal. App. 4th at 964.

⁹ The law routinely demands *greater* — not less — specificity in cases of fraud than in other types of cases. *See, e.g., Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal. 3d 197, 216-17 (“The pleading of fraud ... is also the last remaining habitat of the common law notion that a complaint should be sufficiently specific that the court can weed out nonmeritorious actions on the basis of the pleadings”); *Scafidi v. Western Loan and Building Co.* (1946) 72 Cal. App. 2d 550, 553 (“[i]n pleading a cause of action based upon fraud ... [i]t is essential that the facts and circumstances which constitute the fraud should be set out clearly, concisely, and with sufficient particularity to apprise the opposite party of what he is called on to answer”) (internal quotations omitted); 5 Witkin, *Cal. Procedure* (4th ed. 1997) Plead., § 669, p. 125 (“[f]raud actions ... are subject to strict requirements of particularity in pleading”).

1 evidentiary link between the Frank Statement and Mr. Boeken's smoking. Dismissal of the fraud
2 claim is required for the same reason that his express warranty claim was dismissed – a failure to
3 link the fraud with Mr. Boeken's decision to purchase and smoke cigarettes.

4 The same is true for Mr. Boeken's theories of fraud by intentional misrepresentation and
5 fraud by negligent misrepresentation. Given plaintiff's inability even to recall precisely what he
6 heard in various media reports (or to pinpoint when those media reports occurred, who delivered
7 them, through what medium, etc.), it is impossible to connect these statements to any representation
8 by Philip Morris. How can we know what the third party media even said? How can we know if
9 they accurately repeated what Philip Morris (or someone else) had said? How can we know
10 whether Philip Morris' underlying statements, if any, were true? The simple answer is that, due to
11 plaintiff's failure to identify particular statements, we cannot.

12 Plaintiff's fraud-in-the-air theory has produced the remarkable scenario that now confronts
13 this Court. The jury has entered a verdict for Mr. Boeken on four different fraud theories and
14 awarded him an astronomical \$3 billion in punitive damages. But even at this late date, neither
15 Philip Morris, nor the Court, nor Mr. Boeken for that matter, has any idea of (a) what precisely
16 Philip Morris said concerning cigarettes upon which Mr. Boeken relied, (b) who at Philip Morris
17 said it and when, (c) who repeated the statement to Mr. Boeken and what they said, and (d) when
18 any of the statements that Mr. Boeken supposedly relied upon were uttered. In other words, there is
19 no way for this Court, and there was no way for the jury, to know whether the particular statements
20 upon which Mr. Boeken relied (if any) were false, whether they faithfully repeated what Philip
21 Morris (or perhaps an alleged "co-conspirator") had actually said, or whether any reliance by
22 Mr. Boeken was justifiable. Nor is there any way for the parties or this Court to know whether such
23 a statement if identified would be admissible under the rules of evidence, federal preemption, or the
24 *Noerr-Pennington* doctrine. Given the absence of any proof concerning the indispensable elements
25 of plaintiff's fraud claim, *Mirkin*, *Gawara* and *Acosta* require that this Court now enter judgment
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27
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1 notwithstanding the jury's verdict on behalf of Philip Morris with respect to each of plaintiff's
2 affirmative fraud claims.¹⁰

3 **C. Plaintiff's Reliance on *Children's Television* and the Theory of**
4 **Indirect Fraud Cannot Excuse His Failure of Proof**

5 Plaintiff can be expected to attempt to excuse his failure to identify any particular
6 misrepresentation upon which he relied by claiming that *Committee on Children's Television, Inc.*
7 *v. General Foods Corp.* (1983) 35 Cal. 3d 197 permits such generalized proof. Plaintiff's reliance
8 on *Television* is misplaced for several reasons."

9 First, such an expansive reading of *Children's Television* is squarely foreclosed by the
10 California Supreme Court's subsequent decision in *Mirkin v. Wasserman* (1993) 5 Cal. 4th 1082,
11 1095. *Mirkin* specifically rejected the argument that *Children's Television* adopted a fraud on the
12 market theory. *Id.* at 1099 (rejecting the plaintiffs' argument that "misrepresentations to the
13 marketplace . . . intending to influence the behavior of the ultimate purchaser," sufficiently stated a
14 fraud claim). Instead, the *Mirkin* Court held that the holding in *Children's Television* was "based
15 on the idea of an indirect communication." *Id.* As the Court noted, if the *Children's Television*
16 Court "had actually intended to announce such a drastic change to settled law on a point as
17 important as the nature of reliance in an action for deceit, one would expect to see the
18 announcement of the new rule to be supported with reasons and the citation of authority," *id.*,
19 neither of which was present in the *Children's Television* decision.

20
21 ¹⁰ Common knowledge of the risks of smoking (discussed *infra*) also requires judgment on
22 plaintiff's affirmative fraud claims. Even if Mr. Boeken could identify specific fraudulent
23 statements upon which he relied (he never did), no reliance on defendant's supposed fraud can
24 possibly be justified in the face of common knowledge of the dangers of smoking. *See, e.g.,*
25 *Kahn v. Lischner* (1954) 128 Cal. App. 2d 480, 489 (finding reliance not justifiable if it was
26 unreasonable "in the light of . . . ready availability of information"). Numerous courts have granted
27 judgment to defendants on fraud claims because common knowledge of the risks of smoking
28 precludes justifiable reliance. *E.g., White v. R.J. Reynolds Tobacco Corp.* (D. Md. 2000) 109 F.
Supp. 2d 424, 429-30; *Tillman v. Reynolds Tobacco Corp.* (S.D. Ala. 2000) 89 F. Supp. 2d 1297,
1303; *Massachusetts Laborers Health & Welfare Fund v. Philip Morris* (D. Mass. 1999) 62 F.
Supp. 2d 236, 242-43 (all non-California cases are provided in the Appendix of Non-California
Authorities in Support of Motion for Judgment Notwithstanding Verdict filed herewith). That result
applies here with special force given Mr. Boeken's self-proclaimed status as a "real advocate of
following the news," (Boeken Depo at 81 (12/18/00)), who has been "quite regular with [his]
viewing of the news every day" for the past quarter century. (Boeken Depo at 196 (12/27/00)).

1 Second, *Children's Television* did not hold that, in a fraud-by-indirect communication case,
2 a plaintiff need not prove that the misrepresentations were actually passed along to plaintiff and that
3 plaintiff actually relied on them, as required by *Gawara*. *Children's Television* involved allegations
4 that manufacturers and marketers of sugared breakfast cereals had engaged in fraud in marketing
5 their products to children as healthful, magical, or imbued with other qualities. The children then
6 allegedly urged their parents to purchase the cereals. In other words, the children were allegedly
7 deceived (there was no allegation that the parents believed the cereals had magical qualities). As
8 the *Mirkin* Court concluded, *Children's Television* did no more than hold that, in those unique
9 circumstances, "children cannot be expected to convey representations about products with
10 precision," *id.*, and therefore the complaint did not have to set out the precise language of each
11 allegedly false advertisement.

12 Third, *Children's Television* did not implicate the issue of what proof was necessary to
13 prove fraud at trial, a point highlighted by the Court in its opinion. 35 Cal. 3d at 212.

14 Plaintiff would have this Court read *Children's Television* to do precisely what *Mirkin* said
15 it did not do – dramatically change the common law of deceit. Plaintiff may not rely on a fraud on
16 the market theory, which is at most all his evidence tended to show.

17 **II. PLAINTIFF FAILED TO PROVE FRAUD BY CONCEALMENT**

18 Plaintiff's claim of fraud by pre-1969 concealment¹¹ fails for at least two reasons. First,
19 there is no duty to warn consumers of commonly known risks, such as the dangers of smoking.
20 Second, plaintiff failed to prove that any pre-1969 disclosures by Philip Morris about the dangers of
21 smoking would have made any difference to Mr. Boeken's smoking behavior.

22 **A. Common Knowledge of the Dangers of Smoking Requires Judgment on** 23 **Plaintiff's Claim of Fraudulent Concealment**

24 A "fraudulent concealment" action must rest on "some duty of disclosure." *Goodman v.*
25 *Kennedy* (1976) 18 Cal. 3d 335, 347. It is well established, however, that there is no duty to

26 ¹¹ The sole claim of concealment that went to the jury concerned only the period before July 1,
27 1969. There is no claim of concealment after July 1, 1969, nor could there be, consistent with the
28 FCLAA. The warnings prescribed by Congress are conclusively presumed to be sufficient and no
additional warning can be required by state law. *See Allgood v. R.J. Reynolds Tobacco Co.* (5th Cir.
1996) 80 F.3d 168.

1 disclose commonly known risks. *Holmes v. J.C. Penney Co.* (1982) 133 Cal. App. 3d 216, 220
2 (finding no duty to disclose because the harm connected with the firing of a pellet gun was
3 obvious); *Bojorquez v. House of Toys, Inc.* (1976) 62 Cal. App. 3d 930, 933 (finding no duty to
4 warn because the dangers of a slingshot are common knowledge). Accordingly, because the
5 dangers of smoking have been commonly known for decades, Philip Morris is entitled to judgment
6 on plaintiff's fraudulent concealment action as a matter of law.

7 As early as 1900, the United States Supreme Court took judicial notice of the dangers of
8 smoking, observing that:

9 [W]e should be shutting our eyes to what is constantly passing
10 before them were we to affect an ignorance of the fact that a belief
11 in [cigarettes'] deleterious effects, particularly upon young people,
12 has become very general, and that communications are constantly
13 finding their way into the public press denouncing their use as
14 fraught with great danger to the youth of both sexes.

15 *Austin v. Tennessee* (1900) 179 U.S. 343, 348; *see also Food & Drug Admin. v. Brown &*
16 *Williamson Tobacco Corp.* (2000) 529 U.S. 120, 138, 144-45 (noting that for decades, the negative
17 health consequences of smoking have been "well known" and "documented . . . in great detail" in
18 reports issued to the general public). In short, numerous decisions demonstrate judicial recognition
19 of the widespread, longstanding public awareness of the inherent dangers of cigarettes and tobacco.

20 Mr. Boeken did not begin to smoke until approximately 1957, approximately four years after
21 what was known as the "Big Scare" of 1953, when widely published scientific reports linked
22 smoking to lung cancer. (RT 4022 (Hoffman)). Courts in California and throughout the country
23 have found that the health risks of smoking had become matters of public knowledge as of the
24 1950's or earlier. *See, e.g., Wawanese Mut. Ins. Co. v. Matlock* (1997) 60 Cal. App. 4th 583, 587
25 n.3 ("The noxiousness of tobacco was known long before 1891."); *Sanchez v. Liggett & Myers, Inc.*,
26 (5th Cir. 1999) 187 F.3d 486, 492 (the health risks of smoking have been common knowledge since
27 1957); *White v. R.J. Reynolds Tobacco Co.* (D. Md. 2000) 109 F. Supp. 2d 424, 431-32 (finding that
28 the health risks of smoking have been common knowledge at least since the early 1950s, including
1952 when the plaintiff began smoking); *Tompkins v. R.J. Reynolds Tobacco Co.* (N.D.N.Y. 2000)
92 F. Supp. 2d 70, 89 (finding no duty to warn consumers because the health risks of smoking were

1 commonly known in 1938); *Paugh v. R.J. Reynolds Tobacco Co.* (N.D. Ohio 1993) 834 F. Supp.
2 228, 230-31 (stating that where the decedent began smoking in 1940, the court found that the
3 common knowledge of the dangers of smoking precluded plaintiff's design defect claims based
4 upon common knowledge of risks); *Wolf v. Philip Morris, Inc.* (Mass. Super. Ct. June 21, 2000) No.
5 99-1260-B, slip op. at 8 (taking judicial notice of the public's common knowledge of the health
6 risks of cigarette smoking dating back to the 1930s); *Eastern States Heath & Welfare Fund v. Philip*
7 *Morris, Inc.* (N.Y. Sup. Ct. Mar. 3, 2000) No. 603869/97, slip op. at 21 (“[T]he alleged dangers of
8 smoking have been publicized and known to the general public for more than one century.”).

9 The evidence at trial confirmed that the dangers of smoking were widely known during the
10 1950's. During that decade, the *Los Angeles Times* published hundreds of articles on the health
11 risks of smoking, many of which featured headlines specifically identifying the relationship
12 between smoking and lung cancer. (RT 3831-32 (Hoffman)). *Reader's Digest*, the most widely
13 circulated magazine of the time, published more than 200 articles between the 1930's and the
14 1990's regarding the health risks of smoking, and twenty-two of those articles were published in the
15 1950's. (RT 3819-20 (Hoffman)). Other national magazines, such as *Time* and *Life*, as well as
16 major newspapers in California and nationwide, reported scientific developments linking smoking
17 to various health problems throughout the 1950's. (RT 3831-33 (Hoffman)). Likewise, the
18 American Cancer Society implemented nationally acclaimed programs in Los Angeles high schools
19 during the 1950's when Mr. Boeken attended those schools as a student. The programs, which were
20 designed to educate young people about the health risks of smoking, won a national award for being
21 the “most outstanding” such programs in the nation. (RT 3843-44 (Hoffman)).

22 Indeed, as early as 1949, a Gallup poll demonstrated that 60% of the American public
23 believed that smoking was harmful. (RT 5053-54 (Viscusi)). By 1954, 90% of all respondents to a
24 nationwide Gallup poll indicated that they had recently heard or read “that cigarette smoking may
25 be a cause of Cancer of the Lung.” (RT 5051 (Viscusi)); *see also White*, 109 F. Supp. 2d at 432.
26 And a 1959 poll of junior and senior high school students found that 97.4% of them had heard of
27 the connection between smoking and cancer. (RT 4023; 4147 (Hoffman)); *see also Insolia v. Philip*
28

1 *Morris, Inc.* (W.D. Wis. 1999) 53 F. Supp. 2d 1032, 1037, *aff'd in rel. pt.* (7th Cir. 2000) 216 F.3d
2 596.

3 So widespread was the publicly available information on the dangers of smoking that U.S.
4 Surgeon General Leroy Burney concluded in 1957 that cigarette warning labels were entirely
5 unnecessary:

6 Our position is that we have informed the public through the
7 excellent coverage of the press, radio, and TV. We have informed
8 the official health agencies of the States who are responsible for
9 this area and we have informed the American Medical
10 Association, recognizing that many people will go to their own
11 physicians for advice.

12 *Hearings Before a Subcomm. of the House Comm. on Government Operations*, 85th Cong. 139
13 (1957), *See* RT 5065 (Viscusi). The Director of the National Cancer Institute, Dr. John Heller,
14 echoed the Surgeon General's sentiments when he testified that: "Newspapers, radio, TV, and other
15 media have done an excellent job covering this problem, and a very objective job. This is an
16 exceedingly valuable way of informing the public." (RT 5065 (Viscusi) (discussing Dr. Heller's
17 testimony)).

18 The wealth of public information concerning the health risks of smoking continued to
19 accumulate throughout the time that Mr. Boeken smoked. By the time that the United States
20 Surgeon General assembled a committee in 1962 to review the vast smoking and health literature,
21 there were well over 7,000 published research findings on that subject. *See Cipollone v. Liggett*
22 *Group, Inc.* (1992) 505 U.S. 504, 513. Moreover, the Surgeon General's 1964 Report on Smoking
23 and Health created a nationwide media frenzy. The report's conclusions appeared on the front
24 pages of many newspapers across the country, including Mr. Boeken's paper, the *Los Angeles*
25 *Times*. (RT 3857-60 (Hoffman)).

26 The crowning stroke of public awareness followed on the heels of the 1964 Surgeon
27 General's Report. Notwithstanding the views of the American Medical Association and others
28 (which echoed the Surgeon General's view from the 1950s) that the public's saturation with

1 information concerning the health risks of smoking rendered additional warnings superfluous,¹²
2 Congress enacted legislation in 1965 which (as of January 1, 1966) required prominent display of
3 specifically-prescribed health warnings on every package of cigarettes sold in the United States.
4 Those warnings have specifically alerted smokers to the risks of smoking for the past thirty-five
5 years. *See, e.g., Barker v. Brown & Williamson Tobacco Corp.* (2001) 88 Cal. App. 4th 42, 50
6 (“[I]t has been a matter of common knowledge since at least 1965 that cigarette smoking is not
7 healthy.”). Since 1984, one of four rotating warnings has warned specifically that “SMOKING
8 CAUSES LUNG CANCER” and certain other diseases. 15 U.S.C. § 1333 (a)(1).

9 Mr. Boeken half-heartedly contended that throughout this time he somehow remained
10 oblivious to this deluge of information. The record makes clear that Mr. Boeken was amply
11 exposed to the ubiquitous public discussion of the risks of smoking.¹³ However, even if Mr.
12 Boeken’s self-proclaimed insulation from the stream of public knowledge could be believed,¹⁴ it
13 would be irrelevant. During the entire time Mr. Boeken was a smoker – and, indeed, well before
14 then – the health risks of smoking were indisputably common knowledge in the community.
15 Mr. Boeken’s claimed lack of personal knowledge is irrelevant to whether the dangers of smoking
16

17
18 ¹² “The health hazards of excessive smoking have been well publicized for more than 10 years and
19 are common knowledge. Labeling will not alert even the young cigaret [*sic*] smoker to any risks of
20 which he is not already aware.” F.J.L. Blasingame, *Full Text of AMA Letter of Testimony to FTC*,
21 188 JAMA 31 (Apr. 1964) (Ex. 3).

22 ¹³ Even if one credits Mr. Boeken’s remarkable assertion that, although aware of them for over 30
23 years, he never read a warning label on a cigarette package until Christmas Eve 2000 (because they
24 were “political,” Boeken Depo at 78 (12/18/00)), the state of common knowledge would render it
25 patently unreasonable for him to “accept defendant[’s] [supposed] statement without an independent
26 inquiry or investigation.” *Wilhelm v. Pray, Price, Carlton & Russell* (1986) 186 Cal. App. 3d 1324,
27 1332. California law is clear that, “[w]here adequate warnings have been passed along from
28 manufacturer or seller to the ultimate consumer, there can be no liability.” *Schwoerer v. Union Oil*
Co. (1993) 14 Cal. App. 4th 103, 110-11. Plaintiff was not “entitled to ignore reasonable
warning[s]” that appear on cigarette packs. *Triple A Mgt. Co. v. Frisone* (1999) 69 Cal. App. 4th
520, 530-31.

¹⁴ In fact, this Court is not obligated to accept such far-fetched testimony. *See Foggy v. Ralph F.*
Clarke & Assoc. (1987) 192 Cal. App. 3d 1204, 1215 (ruling on a motion for JNOV that the trial
“court may disregard evidence in support of the verdict if that evidence is inherently incredible”)
(internal quotations omitted). *See Paugh*, 834 F. Supp. at 230-31 (finding “[t]hat some ignore or
underestimate these risks has little bearing on the extent to which knowledge of the dangers are
salient within the community”) (citation omitted).

1 are commonly known and whether there was a duty to disclose those dangers to consumers. His
2 concealment claim is barred as a matter of law because the ordinary consumer knew of the potential
3 dangers of smoking.¹⁵

4 **B. Defendant is also Entitled to Judgment on the Fraudulent**
5 **Concealment Claim Because Plaintiff Failed to Prove that**
6 **Additional Disclosures Would Have Made A Difference**

7 Plaintiff's concealment claim also fails for lack of proximate cause. There was no proof that
8 any additional disclosures by Philip Morris would have made any difference to Mr. Boeken's
9 smoking behavior. As the Supreme Court held in *Mirkin*, in an omissions case, plaintiff must
10 "prove that, had the omitted information been disclosed, [he] would have [1] been aware of it and
11 [2] behaved differently." 5 Cal. 4th at 1093.

12 Here, plaintiff offered no meaningful proof that he would have heard any additional pre-
13 1969 statements by Philip Morris confirming the relationship between smoking and health. More
14 important, even if such statements had come to his attention, there is insufficient evidence that they
15 would have caused him to quit smoking. The fact of the matter is that plaintiff continued to smoke
16 through the time of his deposition in the year 2000, even though the federally required warnings had
17 appeared on all packs of cigarettes for over 30 years and he had personally become convinced by
18 1994 that smoking caused lung cancer. Furthermore, Mr. Boeken continued to smoke after he

19 ¹⁵ The community's knowledge of smoking hazards existed notwithstanding any efforts of
20 cigarette manufacturers to downplay the health hazards of smoking. Courts consistently have held
21 that such statements do not provide smokers license to ignore warnings from physicians, public
22 health authorities, and other reliable sources. *See, e.g., White*, 109 F. Supp. 2d at 432-33 ("Even a
23 consumer faced with conflicting information about the risks of smoking would have known there
24 was a real chance that the information from reliable sources alerting him to the dangers was
25 correct."). Especially where – as here – the information concerning the health risks of smoking was
26 "offered by persons and organizations whose credibility would not ordinarily be lightly dismissed,
27 such as the American Cancer Society . . . , the Sloane-Kettering Institute . . . , and the Surgeon
28 General," there is "no basis for concluding that it was reasonable for the plaintiff to rely upon the
defendants' information as opposed to the contradicting information from other sources also in the
public domain." *Massachusetts Laborers' Health & Welfare Fund v. Philip Morris, Inc.* (D. Mass.
1999) 62 F. Supp. 2d 236, 242-43. *See also Glassner*, No. 5:99 CV 0796, slip op. at 7, *aff'd*, (6th
Cir. 2000) 233 F.3d 343 ("despite information promulgated by tobacco companies calling into
question the negative effects of smoking, there was more than enough data even in the 1950s from
which the ordinary person could conclude that smoking was dangerous"). Likewise, the disclosure
in the 1990's of information which Mr. Boeken alleges established a conspiracy among cigarette
manufacturers does not "negate the public's long held knowledge that cigarettes are (and were)
dangerous to health." *Hollar v. Philip Morris Inc.* (N.D. Ohio 1998) 43 F. Supp. 2d 794, 807.

1 himself had been diagnosed with lung cancer and even after he had filed this lawsuit. If all those
2 events did not cause Mr. Boeken to quit smoking, there is no basis for concluding that additional
3 pre-1969 warnings by Philip Morris which merely repeated what the Surgeon General and other
4 health officials were saying would have had that effect. Mr. Boeken’s response to this conundrum –
5 “I can’t make sense of that”¹⁶ – hardly provided a basis for the jury to conclude that he would have
6 quit smoking had Philip Morris provided additional warnings before 1969. Indeed, even if such
7 information had prompted Mr. Boeken to attempt to quit smoking, there is no reason to believe that
8 the attempt would have been successful – that is, any different from his various failed attempts to
9 quit, most of which were initiated for health reasons. *See, e.g., Allgood*, 80 F.3d at 172 (no
10 causation because plaintiff would have kept smoking notwithstanding additional information due to
11 his addiction).

12 **III. PLAINTIFF FAILED TO PROVE HIS PRODUCT LIABILITY CLAIMS**

13 **A. Plaintiff Did Not Prove that** 14 **Cigarettes Fail the Consumer Expectation Test**

15 The common knowledge described above also disposes of plaintiff’s product liability
16 claims. It requires judgment on the strict liability claims because they are governed by the
17 consumer expectation test. That test focuses on the extent of danger contemplated by the ordinary
18 consumer possessed of the “ordinary knowledge common to the community.” *Barker v. Lull Eng’g*
19 *Co.* (1978) 20 Cal. 3d 413, 425. Numerous courts have dismissed product liability claims against
20 cigarette manufacturers because of common knowledge of the dangers of smoking. *E.g., Glassner*,
21 223 F.3d at 352; *Tillman v. Reynolds Tobacco Corp.* (S.D. Ala. 2000) 89 F. Supp. 2d 1297, 1301;
22 *White*, 109 F. Supp. 2d at 431; *Kotler v. American Tobacco Co.* (1st Cir. 1990) 926 F.2d 1217,
23 1235, *vacated on other grounds*, (1992) 505 U.S. 1215, *reaff’d* (1st Cir. 1992) 981 F.2d 7.

24 Indeed, since 1969, Congress has required warning labels on all packs of cigarettes that, as a
25 matter of federal law, “inform the public adequately about the hazards of cigarette smoking.”
26 *Lorillard Tobacco Co. v. Reilly* (U.S. 2001) 2001 WL 721016, 121 S.Ct. 2404. The presence of
27 these federally required warnings satisfies the consumer expectation test as a matter of fact. *E.g.,*

28 ¹⁶ (Boeken Depo at 213 (12/19/00)).

1 *Glassner*, 223 F.3d at 352; *Wakeland v. Brown & Williamson Tobacco Corp.* (S.D. Ala. 1998) 996
2 F. Supp. 1213, 1219. Furthermore, when a defendant provides a warning adequate as a matter of
3 law, the consumer expectation test is satisfied as a matter of law because an ordinary consumer is
4 not entitled to expect a product to be safer than that indicated by such a warning. *See Papike v.*
5 *Tambrands Inc.* (9th Cir. 1997) 107 F.3d 737, 743 (“Tambrands’ warnings met the federal
6 requirements and Papike’s design defect claim therefore fails the ‘consumer expectation’ test. To
7 rule otherwise would allow the anomalous circumstance that a consumer is entitled to expect a
8 product to perform more safely than its government-mandated warnings indicate.”); *Lescs v. Dow*
9 *Chemical Co.* (W.D.Va. 1997) 976 F. Supp. 393, *aff’d*, (4th Cir. 1999) 168 F.3d 482 (“Dursban is
10 regulated by a federal legislative scheme which broadly preempts state claims based on federally
11 approved labeling. For this court to allow a claim of defective design based on consumer
12 expectations would represent an unwarranted end-run around federal preemption.”).

13 For these reasons, defendant is entitled to judgment on the “consumer expectation test.”¹⁷

14 **B. The Risk/Benefit Test Does Not Apply to Cigarettes, Which Are**
15 **Governed Exclusively by the Consumer Expectation Test**

16 In appropriate circumstances, California recognizes the risk/benefit test as an alternative to
17 the consumer expectation test for purposes of determining a design defect claim. This is not such a
18 case.

19 Unlike the consumer expectation test, the risk/benefit test focuses on *avoidable* danger. In
20 the words of the California Supreme Court, under the risk/benefit test, the jury weighs the relative
21 risks and utilities of the product in question and determines whether the design of the product

22 ¹⁷ The 1998 repeal of 1714.45 immunity for cigarette manufacturers cannot reasonably be read as
23 repealing the consumer expectation test as it applies to cigarettes (as this Court suggested in its
24 Court Order re Summary Adjudication Motions, March 5, 2001, at 4-9). As the Court of Appeal for
25 the Fourth District held in *Barker v. Brown & Williamson Tobacco Co.*, “[t]he Legislature declared
26 its intent was only to eliminate the total immunity previously granted [by statute] and to thereby
27 restore the common law rules relating to lawsuits for inherently dangerous consumer products.” 88
28 Cal. App. 4th 42, 49; *see also* Civ. Code § 1714.45 (1997 Note) (“[t]he Legislature hereby finds and
declares that to the extent that the common law rules as to product liability actions with respect to
tobacco were superseded by the [original] version of Section 1714.45 . . . , this act restores those
common law rules”); 6.B. Witkin, *Summary of California Law, Torts*, § 1312 (9th ed. Supp. 1999).
In short, there is no basis for the conclusion that the Legislature was also rooting out the common
law principles reflected in the consumer expectation test.

1 embodies “excessive *preventable* danger.” *Barker v. Lull Eng’g Co.* (1978) 20 Cal. 3d 413, 430
2 (emphasis added).

3 Nothing in *Barker v. Lull* or its progeny suggests that a plaintiff is always free to select
4 between the consumer expectation test and risk/benefit test (or even pursue them both) as to any
5 given product. On the contrary, in this case, only *one* of the two alternative tests is appropriate. As
6 the Supreme Court ruled in *Soule v. General Motors Corp.* (1994) 8 Cal. 4th 548, 566, “each [test
7 is] appropriate to its own circumstances.” Unlike the risk/benefit test, the “consumer expectations
8 test is reserved for cases in which the every day experience of the product’s users” permits them to
9 form a conclusion about the dangerousness of the product.¹⁸ *Id.* at 567. This result is consistent
10 with numerous decisions – regarding cigarettes and other products – holding that the consumer
11 expectation test alone governs claims concerning consumer products as to which consumers can be
12 expected to form views of dangerousness. *See, e.g., Todd v. Societe Bic SA* (7th Cir. 1994) 21 F.3d
13 1402, 1411 (declining to employ risk/benefit test to cigarette lighters); *Haddix v. Playtex Family*
14 *Prods. Corp.* (7th Cir. 1998) 138 F.3d 681, 684 (tampons); *Greif v. Anheuser-Busch Cos.* (D. Conn.
15 2000) 114 F. Supp. 2d 100, 102-03 (beer); *Dart v. Wiebe Mnftng., Inc.* (Ariz. 1985) 709 P.2d 876,
16 882 (stating that a design defect case “should, if possible be decided upon the consumer expectation
17 test” and should proceed under a risk/benefit theory only “[i]f that test is inapplicable”).

18 Cigarettes are in fact the paradigmatic product encompassed by the “consumer expectation”
19 test. Because the cornerstone of the risk/benefit test is the concept of excessive *preventable* danger,
20 *see Barker*, 20 Cal. 3d at 430, where, as here, the dangers posed by a product cannot be prevented
21 — as where they inhere in the very nature of the product itself — the product cannot be said to have
22 a design “defect” within the meaning of the risk/benefit test. *See Kotler v. American Tobacco Co.*
23 (1st Cir. 1990) 926 F.2d 1217, 1225, *vacated on other grounds*, (1992) 505 U.S. 1215, *reaff’d*, (1st
24 Cir. 1992) 981 F.2d 7 (“The pivotal question, then, is whether, in the absence of a non-inherent
25 defect, breach of warranty can be found based solely on a risk/utility analysis. We think this

26
27 ¹⁸ The California Supreme Court’s view in this regard is consistent with numerous statements by
28 the drafters of the Restatement. *See, e.g.,* Page Keeton, *Product Liability and Meaning of Defect*, 5
St. Mary’s L.J. 30, 37 (1973).

1 question must be answered in the negative.”). As the Supreme Court in *Soule* recognized,
2 “manufacturers are not insurers of their products; they are liable in tort only when ‘defects’ in their
3 products cause injury.” *Soule*, 8 Cal. 4th at 568 n.5.¹⁹

4 Although cigarettes pose potential health risks, those risks do not flow from any avoidable
5 defect, but rather from the attributes inherent in the product. See Thomas C. Galligan, *A Primer On*
6 *Cigarette Litigation Under the Restatement (Third) of Torts Products Liability*, 27 Sw. L. Rev. 487,
7 501 (1998) (noting that plaintiffs cannot “establish that there is an alternative, safer design for a
8 cigarette”). It should come as little surprise, then, that courts consistently have refused to apply the
9 risk/benefit test to cigarettes. *Kotler*, 926 F.2d at 1225 (finding that, in the “absence of a non-
10 inherent defect,” the risk/benefit test cannot be applied to cigarettes); *Gianitsis v. American Brands,*
11 *Inc.* (D.N.H. 1988) 685 F. Supp. 853, 858-59 (finding that the risk/benefit test is inapplicable to
12 cigarettes); *Gunsalus v. Celotex Corp.* (E.D. Pa. 1987) 674 F. Supp. 1149, 1159 (refusing to usurp
13 legislative role by applying risk/benefit test to cigarettes).

14 There is a strong public policy supporting the position that the risk/benefit test cannot be
15 applied to cigarettes. Because no viable safer alternative to cigarettes exists, a finding that the risks
16 of smoking outweigh its benefits is essentially ***a determination that cigarettes should be not***
17 ***marketed as a consumer product at all.*** Such a determination, however, directly intrudes upon the
18 legislative function. Both state and national law making bodies have had numerous opportunities to
19 consider the public health consequences of smoking and have concluded without exception that
20 cigarettes should remain a legal, albeit highly regulated, commodity. See, e.g., 15 U.S.C.
21 §§1331-40 (requiring cigarette manufacturers to place preemptive warning labels on each package

22
23 ¹⁹ Although the *Restatement (Third) of Torts* adopts a pure risk/benefit test for design defect, it too
24 rejects the proposition that makers of inherently dangerous products should be held liable for design
25 defect. *Restatement (Third) of Torts, Products Liability* §2 cmt. (d), at 21 (1998) (recognizing with
26 approval that “courts have not imposed liability for categories of products that are generally
27 available and widely used and consumed, even if they pose substantial risks of harm. Instead,
28 courts generally have concluded that legislatures and administrative agencies can, more
appropriately than courts, consider the desirability of commercial distribution of some categories of
widely used and consumed, but nevertheless dangerous, products”); see also Aaron D. Twerski,
Inside the Restatement, 24 Pepp. L. Rev. 839, 846 (1997) (“Few within the ALI argued that risk-
benefit balancing should be used to declare such products as cigarettes, alcohol, or handguns
defective because the overall harm of these products to society outweighs their benefit.”).

1 of cigarettes sold in the United States); 15 U.S.C. §§375, *et seq.* (imposing reporting requirements
2 on cigarette distributors). For the courts to step in and impose absolute liability on tobacco
3 manufacturers on the ground that the dangers of smoking outweigh its benefits would effectively
4 second-guess broad legislative policy determinations that cigarettes, properly labeled, can be sold.
5 This is something courts, with good cause, have refused to do. *See Gunsalus*, 674 F. Supp. at 1159
6 (“Whether products should be banned or whether absolute liability should be imposed for their use
7 are determinations more appropriately made by the legislative branch of government.”); *see also*
8 *Restatement (Third) of Torts* §2 cmt. (d), at 21 (1998) (“courts generally have concluded that
9 legislatures and administrative agencies can, more appropriately than courts, consider the
10 desirability of commercial distribution of some categories of widely used and consumed, but
11 nevertheless dangerous, products.”); *see also* Harvey M. Grossman, *Categorical Liability: Why The*
12 *Gates Should Be Kept Closed*, 36 S. Tex. L. Rev. 385 (1995) (explaining why categorical liability
13 should not be embraced as part of the product liability system).²⁰

14 **C. Even if the Risk/Benefit Test Could be Applied Here, Plaintiff Failed**
15 **to Produce Evidence Sufficient to Prove a Claim Under That Theory**

16 Even assuming the risk/benefit test applies, plaintiff has failed as a matter of law to adduce
17 evidence to prove his design defect claim – that is, he has introduced no evidence to show the
18 existence of (1) an avoidable design feature that (2) caused his cancer. Instead, he showed at most
19 that his cancer was caused by the *inherent* cancer-causing properties of the product. *None* of
20 plaintiff’s experts testified that any identifiable and avoidable design feature of cigarettes – as
21 opposed to cigarette smoking in general – caused Mr. Boeken’s injuries.²¹ In fact, if anything, the
22 evidence shows that a demonstrably safer cigarette was not and is not available:

23 ²⁰ This Court itself repeatedly agreed that the risk/benefit test does not apply to cigarettes as a
24 product, apart from evidence of a avoidable defect. *See* Statement of Decision Re Motions in
25 Limine, March 9, 2001; *see also* oral ruling on motion for directed verdict, TR5809-10. As shown
26 below, there is no such evidence. The risk/benefit test simply does not apply to cigarettes.

27 ²¹ Nor is this a case in which the jury’s common sense understanding of a product’s design
28 allowed the inference, without expert testimony, that cigarettes could have been made safer and that
the plaintiff likely would not have contracted lung cancer if defendant had used some other feasible
design in manufacturing its cigarettes. *See Endicott v. Nissan Motor Corp.* (1977) 73 Cal. App. 3d
917, 927 (“[E]xpert testimony will normally be necessary to establish proximate cause of injury on
the individual facts”); *Truman v. Vargas* (1969) 275 Cal. App. 2d 976, 983 (“From what injuries
would Truman have been saved if he had been using a seat belt? Projected forward by the great

(Footnote Cont’d on Following Page)

- 1 • Scientists do not know which constituents in tobacco smoke cause lung cancer. *See* (RT
2 4702-03; 4705 (Carchman)); *see also* (RT 5450 (Whidby)). Because it has not been
3 possible to render cigarettes “safe” by removing particular components of smoke, the
4 general approach has therefore been to attempt to reduce as many of the components
5 found in cigarette smoke as possible, primarily by reducing the “tar” in which they are
6 found. (RT 4550; 4705 (Carchman)). But tar is not the only compound present in
7 tobacco smoke that may pose health risks. (RT 4701 (Carchman)).
- 8 • The only cigarette posited by plaintiff to be potentially “safer” than other cigarettes was
9 the Cambridge, a cigarette with extremely low tar marketed by Philip Morris in the early
10 to mid-1980s. Even products with the lowest possible tar and nicotine were not
11 considered to be “safe.” (RT 5406-07; 5439; 5441-42 (Whidby)). Plaintiff’s own expert
12 witness, Dr. William Farone, was unwilling to testify that the Cambridge cigarette could
13 be considered safe. *See* (RT 1637-37 (Farone)) (“I didn’t declare it was safe.”). Rather,
14 Dr. Farone could only state that there was a “high probability” that the Cambridge
15 cigarette would have a “lower score” in any hypothetical “animal-type cancer testing.”
16 *Id.*
- 17 • The evidence shows that the Cambridge cigarette still delivered some tar to the smoker
18 and thereby carried some degree of risk. Although the Federal Trade Commission’s
19 (“FTC”) smoking machines measured the Cambridge cigarette’s tar delivery at 0.0, a
20 Philip Morris scientist testified that some amount of tar was still ingested by the smoker
21 although it was not enough to be measured by the FTC’s machine. *See* (RT 4834-35
22 (Carchman)). Thus, the Cambridge cigarette was not “safe.” *Id.* at 4835-36; *see also*
23 (RT 5441 (Whidby)) (“It always had smoke that came out of it. When you got smoke,
24 you got tar”).
- 25 • Because of suspected “compensation” by individual smokers (*i.e.*, changes in smoking
26 behavior resulting from a switch to lower tar cigarettes), the health community has
27 begun to doubt whether low tar cigarettes are “safer” at all. (RT 4569-70 (Carchman))
28 (the 1989 Surgeon General’s Report found that the reduction in risk was insignificant),
4572 (a very large group within the public health community is concerned about the
safety of low tar products), 4631. Currently, however, there is no way to determine
whether or not lower tar cigarettes are “safer” (RT 4629-30; 4632; 4709-11 (Carchman))
because any study involving human subjects would necessarily involve at least a 20-year
latency period for lung cancer to develop. *Id.* at 4710-11. Thus, although one might
hypothesize that the Cambridge cigarette was “safer,” the evidence in the record shows
that such a conclusion is pure speculation.
- Even if the Cambridge cigarette did not deliver any tar to the smoking consumer, the
evidence shows that the adverse consequences to the commercial appeal of the product
were too great. The undisputed evidence shows that the Cambridge cigarette was not
smokeable. (RT 4827 (Carchman)).
- Even if it were “safer,” there is no evidence that Plaintiff would have bought it. On the
contrary, the evidence was that, although Cambridge was actually on the market for
approximately six years, Plaintiff did **not** buy it – he continued to smoke Marlboros.
(Boeken Depo at 41 (12/18/00)).

(Footnote Cont’d From Previous Page)

force caused by the collision what would have been the effects upon his body if he had been wearing the seat belt? The nonexpert could only guess.”).

1 Plaintiff's failure of proof on this issue of causation necessarily precludes both of his claims
2 for design defect – strict product liability and negligence. *See Lambert v. General Motors Corp.*
3 (1998) 67 Cal. App. 4th 1179, 1185 (“Where liability depends on the proof of a design defect, no
4 practical difference exists between negligence and strict liability; the claims merge.”). Plaintiff has
5 failed entirely to establish the requisite causal link between an avoidable design feature of Philip
6 Morris' cigarette products and his injuries.

7 **IV. PHILIP MORRIS IS ENTITLED TO JUDGMENT BASED UPON**
8 **THE STATUTORY IMMUNITY CONFERRED BY SECTION 1714.45**

9 **A. The Amendment to Section 1714.45 Is Not Retroactive**

10 Enacted in 1987, Section 1714.45 originally provided: “In a product liability action, a
11 manufacturer ... shall not be liable if: (1) The product is inherently unsafe and the product is known
12 to be unsafe by the ordinary consumer ... and (2) The product is a common consumer product
13 intended for personal consumption, such as ... tobacco.” Civ. Code § 1714.45(a) (1987).²² Almost
14 immediately after its enactment, the Court of Appeal interpreted the section as granting “automatic
15 immunity” to manufacturers and sellers of tobacco products. *American Tobacco Co. v. Superior*
16 *Court* (1989) 208 Cal. App. 3d 480, 485-87. *See also Richards v. Owen-Illinois, Inc.* (1997) 14 Cal.
17 4th 985, 1002. Plainly, if the 1987 statute applies to Mr. Boeken's claims, his entire lawsuit must
18 be dismissed.

19 Mr. Boeken's claims can be saved only if this Court rules that the amendment (the
20 “Amendment”) which (effective January 1, 1998) repealed the “absolute immunity” afforded to
21 cigarette manufacturers applies retroactively to Philip Morris' pre-1998 conduct.²³ That issue is

22 ²² Section 1714.45, defines the term “product liability action” as “any action for injury or death
23 caused by a product.” Civil Code § 1714.45(b) (1987); Civil Code § 1714.45(c) (1998). All of
24 plaintiff's causes of action are for injury caused by cigarettes and thus are encompassed by Section
25 1714.45.

26 ²³ Only retroactive application of the Amendment can save Mr. Boeken's claims, because all of
27 Philip Morris' conduct on which he seeks to impose liability occurred prior to 1998. The fact that
28 Mr. Boeken's injury did not occur (or his causes of action did not accrue) until after January 1, 1998
is of no moment to the retroactivity question. *Aktar v. Anderson* (1997) 58 Cal. App. 4th 1166,
1180 (any application of a statute that would “increase a party's liability for past conduct” is
retroactive); *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 282 (a “new compensatory
damages provision would operate ‘retrospectively’ if it were applied to conduct occurring before”
the effective date). In his prior briefing on Section 1714.45, plaintiff suggested that application of
the Amendment to past conduct in a cause of action accruing after the effective date would not be

(Footnote Cont'd on Following Page)

1 now pending before the California Supreme Court in a group of four cases, and the Courts of
2 Appeal and other courts have produced inconsistent decisions on the subject.²⁴ Although Philip
3 Morris is mindful that, to date, this Court has expressed the view that the Amendment is retroactive,
4 the jury's \$3 billion punitive damage award based upon conduct immune before the Legislature
5 enacted the Amendment requires the Court to re-examine this issue.

6 The starting point of the analysis is the heavy presumption against retroactivity. See
7 *Evangelatos v. Superior Court* (1988) 44 Cal. 3d 1188, 1208 (noting the "fundamental principle"
8 that "legislative enactments are generally presumed to operate prospectively and not retroactively
9 unless the Legislature expresses a different intention"). This presumption is so strong that a statute
10 cannot be applied retroactively "unless such be 'the unequivocal and inflexible import of the terms,

11 _____
12 (Footnote Cont'd From Previous Page)

13 retroactive under *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal. 4th 520. *Buttram* does
14 not, however, establish a rule making accrual the touchstone of retroactivity in all cases. Rather, the
15 Court made clear that it was defining accrual "for the *specific and limited purpose* of determining
16 whether the provisions of *Proposition 51* can prospectively be applied to this case." *Id.* at 531
17 (emphasis added).

18 ²⁴ The issue is before the California Supreme Court in the following cases: *Naegele v. R.J.*
19 *Reynolds Tobacco Co.*, No. S090420 (rev. granted October 18, 2000); *Myers v. Philip Morris Inc.*,
20 No. S095213 (req. for answer to certified question granted Mar. 23, 2001); *Souders v. Philip*
21 *Morris, Inc.*, No. S096570 (rev. granted May 16, 2001); *Bowyer v. Philip Morris, Inc.*, S097441
22 (rev. granted June 13, 2001). The only appellate decision currently reported states that the
23 Amendment is not retroactive. See, e.g., *Barker v. Brown & Williamson Tobacco Corp.* (2001) 88
24 Cal. App. 4th 42, 48-49, *rev. denied* (2001). Decisions from numerous trial courts have held that
25 the Amendment is not retroactive. *Bright v. Philip Morris, Inc.*, No. BC 206968, slip op. at 2 (Los
26 Angeles Superior Court June 15, 1999) ("The intervening amendment to the statute cannot be
27 applied retroactively to strip Philip Morris of its vested right in the absolute immunity that the
28 original version conferred"); *In re Tobacco Cases II*, J.C.C.P. 4042, slip op. at 3 (San Diego
Superior Court Mar. 26, 1999) (telephonic ruling transcribed on San Diego County Superior website
<http://www.sandiego.courts.ca.gov/jccp/tobacco/index.html>); *Fibreboard Corp. v. R.J. Reynolds*
Tobacco Co., No. 791919-8, slip op. at 2 (Alameda Superior Court Jan. 13, 1999) (holding that
amendment to Section 1714.45 "cannot be retroactively applied"); *Stern v. Brown & Williamson*
Tobacco Corp., No. M 37696, slip op. (Monterey Superior Court Aug. 7, 1999); *Colfield v. The*
American Tobacco Co., No. CV-98-1695-DFL-DAD, slip op. at 11 (E.D. Cal. Aug. 6, 1999); *The*
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*9; *Myers v. Philip Morris Inc.*, No. CIV-F-99-5449-REC LJO, slip op. at 9 (E. D. Cal. May 25,
1999) ("Retroactive application of the Amendment, however, would be contrary to the law"); *Van*
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(same); *Persley v. Brown & Williamson Tobacco Corp.*, No. CV 97-2696 (JMI), 1998 U.S. Dist.
LEXIS 22496, at *3 (C.D. Cal. Feb. 11, 1998) ("Said amendment contains no express declaration of
retroactivity, and therefore can only be applied prospectively").

1 and the manifest intention of the legislature.’ “ *Id.* at 1207 (citing *United States v. Security Indus.*
2 *Bank* (1982) 459 U.S. 70, 79-80). Indeed, the presumption against retroactivity has itself been
3 codified by the Legislature: “No part of the Civil Code is retroactive, unless expressly so declared.”
4 Civil Code § 3.

5 Thus, the only real question here is whether the Legislature has expressly declared that the
6 Amendment is retroactive. Do the “unequivocal and inflexible import of the terms” of the
7 Amendment, and the “manifest intention” of the Legislature, unambiguously support a retroactive
8 application? Philip Morris submits that they do not.

9 First, there is no express retroactivity provision in the Amendment. The word “retroactive”
10 does not appear anywhere in the text, even though the Legislature is fully capable of using the term
11 “retroactive” or comparable language when it wishes to do so. *See, e.g.*, Civ. Code § 3, *supra*; Civ.
12 Code § 1646.5 (“[t]his section . . . shall be fully retroactive”); Civ. Code § 4996.18(h) (“[t]his
13 subdivision shall apply retroactively”). As the Fourth District Court of Appeal held in *Barker v.*
14 *Brown & Williamson*, there is an “absence of any language showing an intent for a retroactive
15 application.” 88 Cal. App. 4th at 48; *see also id.* at 49 n.6, (“No such intent [of ‘retroactive
16 application’] appears in the . . . amendments.”).²⁵

17 Second, far from containing an express declaration of retroactivity, the Amendment contains
18 language that can only be read to reject retroactivity. Specifically, in addition to repealing the
19 absolute immunity of cigarette manufacturers, the Amendment also made a parallel change to
20 subsection (e) of § 1717.45 – a provision that previously had clarified that the immunity against
21 suits by individual smokers did not extend to “cost recovery” lawsuits by public entities.²⁶ The
22 Amendment added the four words italicized below to subsection (e):

23 In the action brought by a public entity [to recover medical
24 expenses paid on behalf of individual smokers], the fact that the

25 _____
26 ²⁵ Given the pendency of *Naegele*, *Myers*, and *Souders* before the California Supreme Court,
27 *Barker* is the only appellate decision addressing the issue of retroactivity of the Amendments that is
28 still good law.

²⁶ Subsection (e) had originated in a bill that took effect several months before the Amendment
was enacted. Assembly Bill No. 1603, 1997-98 Reg. Session.

1 injured individual's claim against the defendant may be barred by
2 *a prior version of this section shall not be a defense.*

3 If the Legislature had intended retroactively to abolish the immunity, it would have simply
4 deleted subsection (e) in its entirety as unnecessary. Instead, the Amendment plainly contemplates
5 that the claims of some smokers will continue to be barred by the "prior version" of Section
6 1714.45 – a conclusion that is squarely at odds with retroactive application of the Amendment. In
7 other words, if the Legislature intended for the Amendment to be retroactive, its change to
8 subsection (e) was nonsensical.

9 This Court's pretrial opinion offered no explanation for the Amendment's change to
10 subsection (e). Yet, as the opinion notes, the Court must "avoid[] any construction rendering key
11 provisions [of the statute] meaningless." Statement of Decision Re: Defendant's Motions For
12 Summary Adjudication (March 5, 2001) at 5 (citing *Skeketee v. Lintz, Williams & Rothberg*, 38 Cal.
13 3d 46, 51-52 (1985)). That canon of statutory interpretation applies equally to the Amendment's
14 change to subsection (e). At a minimum, this change to subsection (e) raises sufficient doubt about
15 retroactivity to preclude a finding that retroactivity is the "unequivocal and inflexible import" of the
16 statutory terms.²⁷

17 Third, the legislative history of the Amendment demonstrates that the Legislature was fully
18 aware of the requirements of the presumption against retroactivity, yet did not add language clearly
19 articulating an intent that the Amendment apply retroactively. The April 1997 Senate Judiciary
20 Committee Report, cited in the Court's pretrial opinion, acknowledged the "absence of specific
21 language in the legislation specifying retroactive application" and noted the general rule that "[i]n
22 the absence of specific language in the legislation specifying retroactive application, a measure will
23 operate prospectively only upon its enactment." Sen. Judiciary Comm. Rep. on Sen. Bill No. 67

24 ²⁷ The Court's prior Section 1714.45 opinion erroneously relied on the statement in Civil Code
25 § 1714.45(d) that the section "shall apply to all product liability actions pending on, or commenced
26 after, January 1, 1988." This language was not part of the Amendment but instead was part of the
27 1987 statute that enacted the original version of Section 1714.45. The Legislature left that
28 provision, unlike subsection (e), entirely unchanged in the Amendment, other than relettering it as
subdivision (d). Under controlling California statutory law, that vestigial language from the original
statute was not part of the Amendment, and cannot reflect any retroactive intent regarding the
Amendment. Civ. Code §9605 ("Where a section or part of a statute is amended, it is not to be
considered as having been repealed and reenacted in the amended form. The portions which are not
altered are to be considered as having been the law from the time when they were enacted. . .").

1 (1997-98 Reg. Sess.) (Comm. Rep.). Despite this awareness of the requirements to overcome the
2 presumption against retroactivity, the Legislature did not add “specific language in the legislation
3 specifying retrospective application.”

4 Finally, the provision in the Amendment that this Court stated “almost certainly was added
5 in response to these expressed concerns” of the Senate Judiciary Committee is ambiguous and, if
6 interpreted to support retroactivity, is inconsistent with the above indications that Amendments are
7 not retroactive. Specifically, subsection (f) states that:

8 It is the intention of the Legislature in enacting the amendments . . .
9 to declare that there exists no statutory bar to tobacco-related
10 personal injury, wrongful death or other tort claims against tobacco
11 manufacturers . . . by California smokers or others who have
12 suffered or incurred injuries, damages or costs arising from the
13 promotion, marketing, sale or consumption of tobacco products. It
14 is also the intention of the Legislature to clarify that such claims
15 which were or are brought shall be determined on their merits,
16 without the imposition of any claim of statutory bar or categorical
17 defense.

18 Nothing in this language unequivocally demonstrates an intent to apply the Amendment
19 retroactively, particularly given the rejection of retroactivity in the change to subsection (e). In its
20 pretrial opinion, the Court relied heavily on subsection (e)’s reference to plaintiffs “who have
21 suffered or incurred injuries.” Under settled rules of statutory construction, that statement cannot
22 give rise to an inference of retroactive intent. Because the statement is phrased in the present-
23 perfect, it “does not point in the direction of retroactive application.” *Gutierrez v. Lara* (1987) 188
24 Cal. App. 3d 1575, 1580 (construing phrase “has obtained a judgment” as prospective). When read
25 from the perspective of a claim filed in the future, the statement is consistent with application of the
26 1998 Amendment to claims based upon conduct occurring after the Amendment’s effective date.
27 The same is true of subsection (f)’s statement that there “exists” no statutory bar; that statement
28 declares simply that the 1998 Amendment only is intended to eliminate the statute’s preexisting
immunity for tobacco products while leaving in place the immunity for other inherently dangerous
products. The provision says nothing about whether the Amendment was intended to reach pre-
enactment manufacturing conduct. Finally, the use of the phrase “claims which were or are
brought” in the last sentence does not state that the Amendment was intended to apply to pre-1998

1 conduct and, in any event, if read as a statement of retroactive intent would be inconsistent with the
2 clear contrary indication in subsection (e) that all such claims were not barred by the Amendment.

3 The change to subsection (e), which was part of the Amendment, is plainly inconsistent with
4 retroactive application of the Amendment. Any conceivable indication to the contrary in subsection
5 (f), at best, only creates ambiguity on the issue. As a matter of law, ambiguous indications cannot
6 overcome the presumption against retroactivity. The policy considerations that underlie the
7 presumption against retroactivity apply with special force here: “Requiring *clear* intent [to support
8 retroactive application] assures that [the legislature] itself has affirmatively considered the potential
9 unfairness of retroactive application and determined that it is an acceptable price to pay for the
10 countervailing benefits.” *Aktar*, 58 Cal. App. 4th at 1180 (quoting *Landgraf*, 511 U.S. at 272-73)
11 (emphasis added). No such assurance exists in this case. Indeed, it is telling that, in connection
12 with another proposed amendment to Section 1714.45, the same Senate Judiciary Committee that
13 issued the April 1997 Report that this Court found “almost certainly” led to subsection (f), expressly
14 recognized that the Amendment would not be interpreted by the courts to be retroactive.²⁸

15 **B. Retroactive Application of the Amendment Violates**
16 **Philip Morris’ Constitutional Rights**

17 As described above, the Amendment is not retroactive because the Legislature did not
18 clearly and unequivocally express a retroactive intent. Moreover, even if the Legislature had made
19 the Amendment retroactive, retroactive application would violate constitutional due process.

20 The due process clauses of the California and federal Constitutions constrain the California
21 Legislature’s ability to ascribe retroactive effect to newly adopted statutes. *See California*
22 *Employment Stabilization Comm’n v. Payne* (1947) 31 Cal. 2d 210, 215; 7 Witkin, *Summary of*
23 *California Law* § 486 (9th Ed. 1988) (a retrospective law is invalid “if it deprives a person of a
24 vested right or substantially impairs such right, thereby denying due process”); U.S. Const. Am.
25 XIV; Cal. Const. Art. 1, §7. Laws that “create new obligations, or impose new duties, or exact new

26 ²⁸ *See* S.B. 340 (providing that cigarette manufacturers “never” had the immunity). The Senate
27 Judiciary Committee stated that, unlike S.B. 340 (the bill that did not become law), the Amendment
28 was not retroactive. *See* Sen. Comm. Rep. at 1 (“unlike SB 67 [the Amendment], this bill [S.B.
340] will likely be interpreted by the courts to be retroactive in application”).

1 penalties because of past transactions are generally considered to be repugnant to fundamental legal
2 principles espoused by both the civil and common law.” *People v. Fontaine* (1965) 237 Cal. App.
3 2d 320, 330, *rev’d on other grounds*, (1968) 390 U.S. 593.

4 Original Section 1714.45 created an absolute defense in lawsuits by smokers against
5 cigarette manufacturers – a fact that the Legislature implicitly acknowledged in repealing the
6 immunity by calling it a “categorical defense.” California courts have consistently held that due
7 process forbids retroactive changes in law that eliminate such an absolute substantive defense to a
8 cause of action. *See Morris v. Pacific Elec. Ry. Co.* (1935) 2 Cal. 2d 764, 768-69 (due process
9 prevented retroactive application of statutory amendment eliminating railway companies’ absolute
10 substantive defense to drivers’ lawsuits; “the legislature may not . . . deprive a party of a substantive
11 right, such as . . . an absolute or a substantial defense which existed theretofore.”); *In re Marriage of*
12 *Garcia* (1998) 67 Cal. App. 4th 693, 698 (due process prevented retroactive application of statute
13 eliminating child custody defense as application would deprive defendant of a “vested right”). *Cf.*
14 *Beck Dev. Co., Inc. v. Southern Pac. Transp. Co.*, (1996) 44 Cal. App. 4th 1160, 1207-08
15 (“legislation that makes certain conduct unlawful cannot be applied to conduct that was lawful and
16 completed before its enactment”).²⁹

17 The due process problems are compounded in this case to the extent that the statute is
18 interpreted to permit retroactive imposition of punitive damages. The *ex post facto* and due process
19 clauses of the California and federal constitutions “flatly prohibit[] retroactive application of penal
20 legislation.” *Landgraf*, 511 U.S. at 266 (involving punitive damages); *see also Tapia v. Superior*
21 *Court* (1991) 53 Cal. 3d 282, 288. As such, they should apply to legislation authorizing punitive
22 damages. *See Davis v. Hearst* (1911) 160 Cal. 143, 162 (“the doctrine of punitive damages [is] a

23 ²⁹ In rejecting Philip Morris’ pre-trial constitutional challenge, the Court cited *In re Marriage of*
24 *Bouquet* (1976) 16 Cal. 3d 583 to uphold the Amendment’s constitutionality, because it found both
25 that the State’s interests in “protecting past and future California tobacco product consumers” were
26 compelling and that Philip Morris had not taken any action in reliance on the immunity. However,
27 the general language in *Bouquet* cannot override the specific holding in *Morris*. Moreover,
28 applying the immunity-repealing Amendment retroactively to conduct occurring before its effective
date will not protect any “past” consumers from cigarettes they already smoked, nor is a retroactive
application useful in protecting “future” consumers. And, actual reliance – as opposed to the right
to rely – is not required by the constitutional analysis. *See In re Marriage of Heikes* (1995) 10 Cal
4th 1211, 1224.

1 sort of hybrid between a display of ethical indignation and the imposition of a criminal fine”);
2 *Peterson v. Superior Court* (1982) 31 Cal. 3d 147, 161 (“the award of punitive damages is a type of
3 penalty imposed to deter wrongful conduct”). *See also Troensegaard v. Silvercrest Indus., Inc.*
4 (1985) 175 Cal. App. 3d 218, 228 (construing Civil Code to prevent “double recovery” of “punitive
5 and penal damages”). This view is consistent with that of the United States Supreme Court. *See*
6 *Landgraf*, 511 U.S. at 281 (retroactive imposition of punitive damages raises “a serious
7 constitutional question” because punitive damages “share key characteristics of criminal
8 sanctions”).

9 As a matter of law, the conduct at issue in this case could *not* have supported an award of
10 punitive damages prior to enactment of the Amendment. The Legislature could not simply with the
11 stroke of a pen make conduct that had been “automatically immune” and not tortious the basis of a
12 *post hoc* punitive damages award. The retroactive assessment of quasi-criminal penalties would
13 flout the *ex post facto* and due process clauses of the constitution of this state as well as the federal
14 Constitution.

15 **V. PLAINTIFF FAILED TO SATISFY THE LEGAL PREREQUISITES**
16 **FOR OBTAINING PUNITIVE DAMAGES**

17 Judgment should be granted on the punitive damage claim for two additional reasons. First,
18 a plaintiff seeking punitive damages for fraud must establish the defendant’s fraud by “clear and
19 convincing” evidence. Civ. Code § 3294(a). To be “clear and convincing,” evidence must be
20 “sufficiently strong to command an unhesitating assent of every reasonable mind.” *Tomaselli v.*
21 *Transamerica Ins. Co.* (1994) 25 Cal. App. 4th 1269, 1287-88. Even if this Court were to sustain
22 the fraud verdicts under the “preponderance of the evidence” standard, the evidence plainly does not
23 satisfy the more rigorous “clear and convincing” standard. Plaintiff’s failure to show fraud by clear
24 and convincing evidence is further highlighted by his inability to identify a single specific
25 misrepresentation by Philip Morris, which he heard (either directly or indirectly) and upon which he
26 relied.

27 Second, even assuming that California law would permit plaintiff’s generalized fraud theory
28 (it does not), such a theory could not be used to support the imposition of punitive damages. To

1 permit the imposition of punitive damages based on vague impressions by plaintiff without
2 identification of the specific statements at issue would greatly chill the exercise of free speech and
3 therefore intrude upon First Amendment protections. Beyond that, plaintiff’s theory would require
4 the jury to assess the total effect of the defendant’s conduct on the market. The inevitable result,
5 especially in smoking and health litigation, would be that successive juries would assess punitive
6 damages against the same defendant for the same conduct and harm to the “market” – resulting in
7 clearly excessive and duplicative damages. Indeed, the California Supreme Court warned against
8 this precise scenario in *Mirkin*:

9 There are . . . good reasons not to combine a cause of action that
10 permits an award of punitive damages, such as common law deceit,
11 with the fraud-on-the market doctrine. An assessment of the
12 defendant’s culpability, for the purpose of setting punitive damages,
13 would presumably take into account the total effect of the defendant’s
14 misrepresentations on the market. However, plaintiffs may sue
15 separately, and if juries in several lawsuits are able to assess punitive
16 damages against the same defendant for the same transaction, there is
17 a danger of overkill.

18 *Mirkin*, 5 Cal. 4th at 1106-07 (citations and internal quotations omitted); accord *Stevens v. Owens-*
19 *Corning Fiberglass Corp.* (1996) 49 Cal. App. 4th 1645, 1671 (“an assessment of punitive damages
20 in a fraud-on-the-market case presumably accounts for the total effect of the defendant’s
21 misrepresentations on the market. Because the fraud is committed on the market as a whole, rather
22 than on individual plaintiffs, awards in separate cases would punish the defendant repeatedly for the
23 same transaction.”). See also *Gawara*, 63 Cal. App. 4th at 1359. Therefore, even if this Court were
24 to uphold plaintiff’s fraud claim, defendant would be entitled to judgment on the punitive damage
25 claim as a matter of law.
26
27
28

1 **VI. CONCLUSION**

2 For all the foregoing reasons, defendant Philip Morris respectfully requests that the Court
3 grant it judgment on all of plaintiff's claims.

4 Dated: July 6, 2001

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MAURICE A. LEITER
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