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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF LOS ANGELES  
10

11 RICHARD BOEKEN, )  
12 )  
Plaintiff, )  
13 )  
vs. )  
14 )  
PHILIP MORRIS INCORPORATED, a )  
15 corporation, et al., )  
16 Defendants. )  
17 )

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CASE NO. BC 226593  
Date: August 6, 2001  
Time: 9:30 a.m.  
Dept. 308  
Judge Charles W. McCoy, Jr.

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN OPPOSITION TO  
MOTION FOR JUDGMENT  
NOTWITHSTANDING THE VERDICT**

18 Complaint Filed: March 16, 2000  
Judgment Entered: June 11, 2001  
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I.

**INTRODUCTION**

Defendant Philip Morris has moved this Court for judgment notwithstanding the verdict. Not surprisingly, Defendant fails to set forth the standard for granting a JNOV motion: "The court . . . shall render judgment in favor of the aggrieved party notwithstanding the verdict whenever a Motion for a Directed Verdict for the aggrieved party should have been granted had a previous motion been made. . ." Code of Civil Procedure, Section 629.

Since this court has previously ruled against Philip Morris on virtually all of the issues it raised in its Motion JNOV, and since the same standard was applied then as must be applied now, the result must be to again deny the motion.

"The trial court's discretion in granting a motion for judgment notwithstanding the verdict is severely limited. The trial judge's power to grant a judgment notwithstanding the verdict is identical to his power to grant a directed verdict. The trial judge cannot reweigh the evidence, or judge the credibility of witnesses. If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied. A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom in support of the verdict, the motion should be denied. The trial court cannot consider witness credibility." Hansen v. Sunnyside Products, Inc. (1997) 55 Cal. App.4th 1497, 1510. (Emphasis added.)

Philip Morris challenges the sufficiency of the evidence to support the jury's verdict on each and every one of Plaintiff's causes of action, but the evidence was fully sufficient to support the jury's findings in every respect.

Additionally, Philip Morris's attacks on the punitive damages award are without merit. The reprehensibility of Philip Morris's misconduct is unprecedented: intentionally exposing Mr. Boeken and tens of millions of others to lung cancer, thus contributing to one of our Nation's "most troubling public health problems" creating over 400,000 deaths annually from tobacco-related illnesses.<sup>1</sup> There is clearly a high degree of reprehensibility in Philip Morris's conduct that spanned many decades, injuring a very large number of persons annually and in the most serious of ways,

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<sup>1</sup> Food and Drug Administration v. Brown & Williamson Tobacco Corp. (2000) 529 U.S. 120 S.Ct. 1291, 2000 WL 289576.

1 including death from lung cancer.

2 In sum, applying routine tort standards to Philip Morris's incredibly reprehensible  
3 misconduct, the jury (not surprisingly) found Philip Morris liable and deserving of punishment and  
4 deterrence. That this is a cigarette case-revealing a public fraud lasting for decades and affecting  
5 many smokers-does not alter the analysis or the outcome. All manufacturers that send products  
6 to California are subject to the same standards. Hence, traditional principles, given to the jury in  
7 proper instructions, compel denial of Defendant's JNOV motion.

8 **II.**

9 **BACKGROUND**

10 **A. PHILIP MORRIS'S DECEPTION REGARDING**  
11 **THE HEALTH RISKS OF SMOKING**

- 12 • There exists "no proof" that smoking causes cancer.
- 13 • "Authorities" have reached "no agreement" on what causes lung cancer.
- 14 • Smoking is "not injurious to health." Ex. 363.00; see, also, Exs. 54.00;  
15 270.00; 295.00; 340.00; 342.00; 404.00; 648.00.<sup>2</sup>

16 Philip Morris spread these denials of smoking's health hazards at the same time that 10-  
17 year-old Richard Boeken first smoked in 1954<sup>3</sup> and for decades thereafter. In an admitted strategy  
18 of "vigorous denial,"<sup>4</sup> Philip Morris's disinformation campaign<sup>5</sup> since 1954 spread these denials by  
19 mass publication in newspapers, mass mailings to "people of influence" (doctors, teachers, editors),  
20 and purported "news" reports.<sup>6</sup> Philip Morris's disinformation campaign can best be summed up

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21 <sup>2</sup> Unless otherwise noted, all references to exhibits contained herein are to Plaintiff's trial exhibits,  
22 which were admitted into evidence and which are attached to the accompanying Declaration of  
23 Michael J. Piuze.

24 <sup>3</sup> Boeken Depo. at 35-36.

25 <sup>4</sup> See, Ex. 65.

26 <sup>5</sup> Disinformation is "[i]ncorrect and deliberately misleading information" spread to "negat[e] and  
27 discredit[] authentic information . . . ." American Heritage Dictionary (1985 Second College Ed.) p.  
28 405.

<sup>6</sup> See, e.g., Exs. 54.00; 270.00; 340.00; 342.00; 363.00; 456.00; 514.00; 648.00; 2,340.00;  
9,455.00; 9,456.00; 10,019.00. Reporter's Transcript ("RT") at 2690-2699.

1 as "...creating doubt about the health charge without actually denying it." Ex. 330.

2 But these denials were knowingly false. By 1953 leading medical authorities recognized  
3 "proof" that smoking "causes" cancer.<sup>7</sup> By 1961 even Philip Morris and the Industry admitted  
4 (internally) that cigarette smoke contains *carcinogens*. Ex. 35.00. But Philip Morris concealed this  
5 truth from the public.

6 To further mislead the public, Philip Morris promised in 1954 that, out of supposedly  
7 "paramount" concern for "people's health," Philip Morris would "research . . . all phases of tobacco  
8 and health" and report the "truth" to "the public."<sup>8</sup> But these promises were knowingly false. Philip  
9 Morris and the Industry in 1954 entered a "gentleman's agreement"<sup>9</sup> to avoid all biological research,  
10 so as to publicly plead ignorance on what causes cancer. For four decades Philip Morris avoided  
11 such research, buried and cleaned up adverse findings, and hid sensitive research on cancer and  
12 addiction at a secret lab in Germany.<sup>10</sup>

13 Philip Morris further misled the public about addiction. Although Philip Morris knew that  
14 nicotine is addicting, calling it a "drug" and (according to R.J. Reynolds) manipulated the content  
15 of its cigarettes to maximize addiction, Philip Morris concealed these facts so it could "defend"  
16 lawsuits by claiming that "addicted" smokers are making a "free choice."<sup>11</sup>

17 Compounding these false denials and concealment of cancer and addiction, Philip Morris  
18 launched a barrage of deceptive advertisements: ads suggesting that smoking was perfectly  
19 healthy, consistent with athletic activity, and macho.<sup>12</sup> These ads created actionable "false  
20

21 \_\_\_\_\_  
22 <sup>7</sup> See, e.g., RT at 1333-1335; 1336-1338; 1360-1362. See, also, Ex. 10,016.00

23 <sup>8</sup> Ex. 363.00.

24 <sup>9</sup> See, Exs. 67.00, 10,30.00.

25 <sup>10</sup> See, e.g., Exs. 82.00; 85.00; 91.00; 130.00; 132.00; 207.00; 219.00; 295.00; 305.00; 330.00;  
26 331.00; 404.00; 422.00; 423.00; 507.00.

27 <sup>11</sup> See, e.g., Exs. 3.00; 130.00; 148.00; 226.00; 388.00; 423.00; 1,642.00; 9,455.00.

28 <sup>12</sup> See, e.g., RT at 2601-2612; 2555-2557; 2567-2568; 2620-2621; 2623-2626.

1 impressions" by "imagery and example", gave a false impression of safety, and helped hook the  
2 young Richard Boeken in the late 1950s and 1960s.

3 Philip Morris's later ads implying that its low-tar Marlboro Lights were a less harmful or  
4 "healthier" cigarette implied to the consumer that somehow it is better for you. Philip Morris knew  
5 that these claims were false (low-tar cigarettes were not less harmful, not better for you, not  
6 "healthier").<sup>13</sup>

7 Finally, Philip Morris targeted minors.<sup>14</sup> Knowing that minors are too young to make a  
8 "mature" decision on smoking, Philip Morris nevertheless polled minors, learned that they smoke  
9 to assert their "independence" and "adulthood," and designed its ads to exploit these desires.<sup>15</sup>  
10 Philip Morris placed these ads where children would see them (e.g, children's TV programs; Sunday  
11 comics). As Philip Morris admitted in 1981, targeting of minors developed "a rapidly increasing pool  
12 of teenagers from which to replace smokers lost through normal attrition"-i.e., death. But this  
13 targeting of minors had grave health consequences: the younger a smoker's starting age, the higher  
14 the cancer risk.

15 Richard Boeken, starting at age 13, was the model target for Philip Morris's disinformation  
16 campaign. He wanted to smoke to be "macho," "sophisticated" and "hip." Boeken Depo. at 40.  
17 Trusting Philip Morris's ads depicting smokers as "healthy," he "believed" the Industry's denials of  
18 the health risks of smoking.<sup>16</sup> Because of Philip Morris's disinformation campaign, no one had told  
19 him that smoking causes lung cancer. He would have believed Philip Morris if it had told him their  
20 product was dangerous,<sup>17</sup> but Philip Morris never said so.

21 Thus, Richard Boeken made Marlboros his brand and became addicted long before he  
22 turned 18. His continued smoking for the next four decades was reinforced by Philip Morris, whose

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23  
24 <sup>13</sup> See, e.g., RT at 1483-1486; 1531-1537.

25 <sup>14</sup> See, e.g., RT 2609-2610; 2623-2628; 2711-2713. Exs. 218.00; 229.00; 421.00.

26 <sup>15</sup> Ex. 218.00

27 <sup>16</sup> Boeken Depo. at 78-84.

28 <sup>17</sup> Boeken Depo. at 233-236.

1 admitted public relations program gave smokers a psychological crutch and a self-rationale to  
2 continue smoking. Mr. Boeken was diagnosed in 1999 with lung cancer. More than 160,000 other  
3 Americans were similarly diagnosed that year.

#### 4 **B. TRIAL, VERDICT AND JUDGMENT**

5 That Philip Morris's disinformation campaign was a cause of Mr. Boeken's smoking was  
6 established by experts: Dr. Goldberg (cigarette advertising and its effect); Mr. Ferree (common  
7 knowledge concerning the health risks of smoking); Dr. Feingold (medical knowledge on cancer);  
8 and Dr. Benowitz (addiction). Other medical experts linked Marlboros to Mr. Boeken's cancer  
9 without dispute from Philip Morris.

10 Philip Morris's principal defense was that smoking's link to cancer was "common know-  
11 ledge," supposedly relieving Philip Morris of all liability. But there exists a clear inconsistency  
12 between Philip Morris's assertion of public knowledge of the risks of smoking and Philip Morris's  
13 repeated denials that smoking causes cancer. Philip Morris cannot argue persuasively that its  
14 customers knew more than it did.

15 The jury found Philip Morris liable for Mr. Boeken's lung cancer under all causes of action:  
16 (1) intentional and (2) negligent misrepresentation, (3) concealment, (4) false promise, (5) design  
17 defect (based on consumer expectations, risk benefit analysis and failure to warn before 1969), and  
18 (6) negligence. No finding was made on Mr. Boeken's comparative fault because Philip Morris  
19 chose not to assert that defense.

20 The jury awarded Mr. Boeken \$5,539,127.00 for compensation and assessed \$3 billion in  
21 punitive and exemplary damages.

### 22 **III.**

#### 23 **ARGUMENT**

##### 24 **A. AMPLE EVIDENCE SUPPORTED FRAUD BASED VERDICTS**

25 Substantial evidence supported the jury's findings that Philip Morris committed the four kinds  
26 of "deceit" barred by Civil Code section 1710: (1) intentional misrepresentation; (2) concealment;  
27 (3) false promise; (4) negligent misrepresentation.

28 *///*

1. Plaintiff's Affirmative Fraud Causes of Action (Intentional Misrepresentation, Negligent Misrepresentation, and False Promise) Are Supported by Substantial Evidence

An intentional misrepresentation occurs when the defendant either knows that its representation is false or makes it "recklessly and without regard for [the] truth."<sup>18</sup> A negligent misrepresentation occurs when the defendant has "no reasonable ground for believing [the false representation] to be true."<sup>19</sup> A "false promise" occurs when the defendant "promise[s] to do something" without the "intention to perform."<sup>20</sup> The jury found Philip Morris liable to Plaintiff on all three theories.

Philip Morris claims that "[t]he Court should enter judgment for Philip Morris on each of plaintiff's three affirmative fraud theories because Plaintiff "failed to prove that Philip Morris ever made any actionable misrepresentation of material fact or promise that Mr. Boeken saw or heard — much less actually or justifiably relied." JNOV at 4. Philip Morris is mistaken.

**a. Philip Morris Committed Fraud on the Public**

Fraud on the public, including fraud by advertisements, is actionable: "One who practices a deceit with intent to defraud the public, or a particular class of persons, is deemed to have intended to defraud every individual in that class who is actually misled by the deceit."<sup>21</sup> Therefore, "one who makes false representations with fraudulent intent need not have any particular victim in mind."<sup>22</sup> One who "deceives the public by advertisements which are intended to induce reliance may be liable to any individual who reasonably relies on the misrepresentation."<sup>23</sup> Many cases hold

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<sup>18</sup> Engalla v. Permanente Med. Group, Inc. (1997) 15 Cal.4th 951, 974; Alliance Mortgage Co. v. Rothwell (1995) 10 Cal.4th 1226, 1239.

<sup>19</sup> B.L.M. v. Sabo & Deitsch (1997) 55 Cal.App.4th 823, 834.

<sup>20</sup> Engalla, supra, 15 Cal.4th at pp. 973-974; Lazar v. Superior Court (1996) 12 Cal.4th 631, 638.

<sup>21</sup> Civil Code §1711; see Geernaert v. Mitchell (1st Dist., Div. 2 1995) 31 Cal.App.4th 601, 605 (defendant defrauding a class of persons is "deemed to have deceived everyone").

<sup>22</sup> Mirkin v. Wasserman (1993) 5 Cal.4th 1082, 1092.

<sup>23</sup> Block v. Tobin (1975) 45 Cal.App.3d 214, 219 (allowing fraud claim based on false advertisement that an auction would be held); accord Rest.2d Torts, §402B: A "public" misrepresentation of "material fact" in "advertising" about the "character or quality of a chattel" creates "liability for physical harm . . . caused by justifiable reliance on the

1 that false claims of safety or quality in the media, packaging, or product literature are actionable.<sup>24</sup>  
2 Advertising is actionable even if it merely gives a false "impression."<sup>25</sup> The Supreme Court  
3 acknowledged this in Committee on Children's Television v. General Foods (1983) 35 Cal.3d 197,  
4 where the cereal ads' false "imagery and example" created "implicit" misrepresentations supporting  
5 fraud claims.<sup>26</sup>

6 Philip Morris ignores these California authorities holding that false advertising constitutes  
7 actionable fraud. Instead, Philip Morris once again uses the world's oldest rhetorical device in its  
8 reliance argument. It sets up a straw man and then knocks it down. Defendant hopes that this  
9 Court will believe that Plaintiff's case requires adoption of a clearly inapplicable legal theory, "fraud  
10 on the market" or "fraud in the air," when in fact Plaintiff's case depends only upon conventional  
11 theories of direct and indirect reliance.<sup>27</sup> In sum, Defendant's fraud liability arises from explicit or  
12 implicit misrepresentations that are intentional or reckless and are made to the public in any  
13 manner, including ads.

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16 misrepresentation."

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18 <sup>24</sup> See, Committee on Children's Television, Inc. (1983) 35 Cal.3d 197 (allowing fraud claim for  
19 misleading television ads about nutritional value of defendant's breakfast cereals); Hauter v.  
20 Zogarts (1975) 14 Cal.3d 104, 111-112 (affirming judgment for packaging and instruction booklet  
21 falsely stating that defendant's golf-practice device was "completely safe"); Khan v. Shiley, Inc.  
22 (1990) 217 Cal.App.3d 848, 858 (allowing fraud claim for misrepresentations and concealment in  
23 "reports" to doctors about defendant's heart valve's "propensity to fracture"); Toole v. Richardson-  
Merrell, Inc. (1967) 251 Cal.App.2d 689, 707 (affirming fraud judgment for false advertising in  
24 medical journals about safety of defendant's cholesterol drug); see also Evraets v. Intermedics  
Intraocular, Inc. (1994) 29 Cal.App.4th 779, 789-791 (allowing fraud claim for concealing dangers  
25 of defendant's artificial eye lens); Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy  
26 (1992) 4 Cal.App.4th 963, 966, 970 (allowing fraud claim for dairy's ads concealing unpasteurized  
27 milk's dangerous bacteria by claiming milk to be "safest" and "purest" and of the "highest quality").

24 <sup>25</sup> Kievlan v. Dahlberg Electronics, Inc. (1978) 78 Cal.App.3d 951, 956 (ads for "Miracle Ear" hearing  
25 aids were "false" and "misleading" because they "conveye[d] the *impression* that the hearing aid  
26 would have a curative or therapeutic effect").

26 <sup>26</sup> Children's Television, supra, 35 Cal.3d at pp. 205, 222.

27 <sup>27</sup> Note that Restatement (Third) of Torts, Section 9 eliminates any requirement for reliance in  
28 connection with representations by a commercial seller. In addition, there need be no proof that  
the seller intentionally or even negligently misrepresented anything. Failure of the goods to  
conform to the warranty is sufficient.

1           **b.       Reliance may be indirect**

2           To recover for misrepresentation and concealment, the plaintiff must show that he "actually  
3 relied" on the deceit.<sup>28</sup> But the plaintiff's reliance need not have been "the sole or even the  
4 predominant or decisive factor in influencing his conduct."<sup>29</sup> Instead, reliance exists as long as the  
5 deceit was a "substantial factor" in "influencing" the plaintiff's "decision."<sup>30</sup> Concealment induces  
6 reliance where, if the omitted information had "been disclosed," the plaintiff would have "behaved  
7 differently."<sup>31</sup>

8           Philip Morris is wrong to claim that Mr. Boeken had to prove that he "actually saw or heard"  
9 Philip Morris's false statements. JNOV at 4. California follows the Restatement's indirect-reliance  
10 rule: a defendant is liable for a "fraudulent misrepresentation" made to a "third person" when the  
11 defendant "intends or has reason to expect" that (1) the third person will "repeat" the  
12 misrepresentation or "communicate" its "substance" to the plaintiff, and that (2) the  
13 misrepresentation will "influence" the plaintiff's "conduct."<sup>32</sup> Under the indirect-reliance rule, it is  
14 "not necessary that the [defendant] have the particular [plaintiff] in mind" if the defendant "intended"  
15 repetition to "a particular class of persons," including the public generally.<sup>33</sup> Moreover, a defendant  
16 has "reason to expect" communication of its misrepresentation when it "has information that gives  
17 [it] special reason to expect that the information will be communicated to others and will influence

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19  
20       <sup>28</sup> Mirkin, *supra*, 5 Cal.4th at p. 1088.

21       <sup>29</sup> Engalla, *supra*, 15 Cal.4th at pp. 976-977 (*citing* Rest.2d Torts, § 546, com. b).

22       <sup>30</sup> Engalla, *supra*, 15 Cal.4th at p. 977.

23       <sup>31</sup> Mirkin, *supra*, 5 Cal.4th at p. 1093.

24       <sup>32</sup> Section 533 has been followed in Mirkin, *supra*, 5 Cal.4th pp. 1095, 1098 (recognizing indirect  
25 reliance as "valid" but finding none because plaintiffs never received the "substance" of the  
26 misrepresentation); Children's Television, *supra*, 35 Cal.3d at p. 219; Geernaert, *supra*, 31  
27 Cal.App.4th at p. 601 (prior real-property sellers who defrauded prior buyers "intended" or had  
"reason to expect" that the fraud would be passed to subsequent buyers); Barnhouse v. City of  
Pinole (1982) 133 Cal.App.3d 171, 191-192; Varwig v. Anderson-Behel Porsche/Audi, Inc. (1977)  
74 Cal.App.3d 578, 580-581.

28       <sup>33</sup> Shapiro v. Sutherland (1998) 64 Cal.App.4th 1534, 1548; see Rest.2d Torts, §533, com. g; Civil  
Code §1711.

1 their conduct."<sup>34</sup>

2 Finally, a plaintiff can rely indirectly on both misrepresentations and "concealment."<sup>35</sup>

3 Indirect reliance is set out in the standard BAJI Jury Instruction on Fraud and Deceit:

4 "One who makes a misrepresentation...is subject to liability if he intends...that the  
5 misrepresentation will be passed on to another person and influence such person's  
6 conduct in the type of transaction involved." BAJI 12.50 (1996 revision) (bracketing  
7 removed).

8 According to the Comment to BAJI 12.50 (1996 revision), the instruction is based in part  
9 upon the Restatement (Second) of Torts. The cited Restatement section reads:

10 "The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss  
11 to another who acts in justifiable reliance upon it if the misrepresentation though not  
12 made directly to the other, is made to a third person and the maker intends...that its  
13 terms will be repeated or its substance communicated to the other, and that it will  
14 influence his conduct in the transaction or type of transactions involved."<sup>36</sup> Id.,  
15 Section 533.

16 These standards allowed the jury to find Philip Morris liable to Mr. Boeken for its  
17 misrepresentations and concealment to the public, who then influenced him.

18 **c. Reliance may be inferred**

19 The jury was entitled to infer Mr. Boeken's reliance on Philip Morris's deceit from his conduct  
20 consistent with such reliance. As Engalla held, a misrepresentation of a "material" fact creates "an  
21 inference of reliance."<sup>37</sup> Similarly, in Vasquez the Supreme Court held that "it is not necessary to  
22 show reliance upon false representations by direct evidence" because reliance "may be inferred  
23 from the circumstances," which may provide "much stronger and more satisfactory evidence" of

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24 <sup>34</sup> Shapiro, *supra*, 64 Cal.App.4th at p. 1548; Rest.2d Torts, § 533, com. d.

25 <sup>35</sup> See Evraets, *supra*, 29 Cal.App.4th at p. 791 n.5; Massei v. Lettunich (1967) 248 Cal.App.2d 68,  
26 73 (rule of indirect reliance is "applicable to nondisclosures as well as misrepresentations").

27 <sup>36</sup> According to Mirkin, *supra*, the case on which Defendant relies, Section 533 has been expressly  
28 applied by at least two California appellate opinions and its principle has been applied in at least  
nine additional opinions spanning the period 1925 to 1982. 5 Cal.4th at 1096. As noted at  
footnote 59 above, Mirkin itself, a 1993 California Supreme Court case, also approved this  
principle, distinguishing it from "fraud on the market."

<sup>37</sup> Engalla, *supra*, 15 Cal.4th at p. 977 (jury can "infer reliance" on material misrepresentation).

1  
2 reliance than "direct testimony to the same effect."<sup>38</sup> And in Occidental Land the Supreme Court  
3 held that an "inference of reliance arises" when the plaintiff's actions were "consistent with reliance  
4 on the representation."<sup>39</sup> Although Mirkin distinguished Vasquez and Occidental Land factually, it  
5 acknowledged their rule that "when the same material misrepresentations" are "communicated to  
6 each member of a class, an inference of reliance arises as to the entire class."<sup>40</sup>

7 Moreover, a jury can infer even that a plaintiff (or his agent) heard a widespread  
8 misrepresentation. In Toole v. Richardson-Merrell Inc. (1967) 251 Cal.App2d 689, the drug  
9 manufacturer's false safety claims appeared "widely" in "medical journals and periodicals," and the  
10 plaintiff's doctor read the defendant's "literature" and talked to its "salesmen" about the drug. Even  
11 though the doctor "did not testify to any specific statements" that he "relied upon" in prescribing the  
12 drug to the plaintiff, the court still held that it was a "reasonable inference" that the false  
13 representations "came to the attention of [the] doctor" and that he "relied" on them in "prescribing  
14 the drug." *Id.* at pp. 707-708.

15 Under these standards, the jury could reasonably infer that (1) because Philip Morris's  
16 misrepresentations were so widespread, they "came to the attention of" Mr. Boeken; and (2) Mr.  
17 Boeken relied on those misrepresentations.

18 **d. Reliance may rest on advertising's "cumulative impact."**

19 Reliance does not require, as defense counsel pretend to believe, recall of specific  
20 representations among the thousands which Mr. Boeken began to see as a child. Indeed, a plaintiff  
21 who never saw a misrepresentation himself could still justifiably rely upon a misrepresentation to  
22 a third party where the tortfeasor intended to influence him by representations made to others,

23  
24 <sup>38</sup> Vasquez v. Superior Court (1971) 4 Cal.3d 800, 814 (*quoting* 12 Williston on Contracts (3d ed.  
25 1970) 480: "Where representations have been made in regard to a material matter and action has  
26 been taken, in the absence of evidence showing the contrary, it will be presumed that the  
27 representations were relied on.").

26 <sup>39</sup> Occidental Land, Inc. v. Superior Court (1976) 18 Cal.3d 355, 363.

27 <sup>40</sup> Mirkin, *supra*, 5 Cal.4th at p. 1095. Moreover, in Engalla the Supreme Court reapproved  
28 Vasquez's inference-of-reliance rule. 15 Cal.4th at p. 977.

1 which they in turn passed on to Plaintiff. Philip Morris repeatedly and systematically, for many  
2 years, sought to target opinion leaders, childhood peer groups and slightly older children (whom  
3 younger children emulate). In addition, Defendant made representations to Mr. Boeken's specific  
4 friends and to his family. These representations filtered their way into Mr. Boeken's attitudes  
5 toward smoking. Indeed, he developed the very views that Defendant tried to foster: that starting  
6 to smoke was a necessary rite of passage into adulthood; that the hazards of smoking were  
7 questionable; that the motives of anti-tobacco advocates were "political" rather than health-based;  
8 that filter-tip and "light" cigarettes eliminated whatever hazards there were; etc. This is sometimes  
9 called "indirect reliance".

10 The Supreme Court in Children's Television upheld fraud claims involving reliance on false  
11 advertising's "cumulative impact." The defendants' television ads during children's programming  
12 allegedly misrepresented that sugared cereals were "healthful and nutritious" and that children who  
13 ate them were "bigger, stronger, more energetic, happier." But the children did not recall the  
14 "specific" false advertisements that made them want the defendants' cereals. Instead, they were  
15 influenced by the advertisements' "cumulative impact."<sup>41</sup> *Id.* at pp. 218-219.

16 This was sufficient under Children's Television: A "long-term advertising campaign may  
17 seek to persuade by cumulative impact, not by a particular representation on a particular date." *Id.*  
18 at p. 219. And this "cumulative impact" can also affect "adults," who also "will not often remember  
19 the date and exact message of the advertisements which induced them" to buy a product. *Id.*  
20 Hence, in reversing judgment on demurrer, the Court announced that plaintiffs can recover for fraud  
21 upon proof that they "acted in response to an advertising campaign *even if* they cannot recall the

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22  
23 <sup>41</sup> Note that "peer group" advertising for cigarettes worked similarly, with continuing impact upon  
24 children to this day. Based upon their exposure to thousands of images of cigarettes, children  
25 have formed the widely-shared perception that cigarette smoking is a necessary rite of passage  
26 into adulthood and helps demonstrate their developing identity, their independence and their  
27 gender roles. Each child receives such ideas in part directly from the often-subliminal effects of  
28 repetitive advertising. But, as Defendant realized was more important, each child receives these  
same ideas from other children, and in turn transmits them to other children, in peer group  
interactions. This phenomenon is effective not only among groups of similarly-aged children, but  
also is passed down by older to younger children, who in turn pass such ideas to still-younger  
children. Thus, "cool" images of 20-something smokers may be more effective with teenagers  
than with 20-somethings. This is also among the mechanisms by which pre-1970 advertising  
impacted children who started smoking after 1970.

1 specific advertisements." *Id.* The Court observed:

2 "...Defendants engaged in a nationwide, long-term advertising campaign designed  
3 to persuade children to influence their parents to buy sugared cereals. Adapted to  
4 its audience, the campaign sought to persuade less by direct representation than  
5 by imagery and example. While maintaining a constant theme, the particular  
6 advertisements changed frequently...."

7 "Plaintiffs base their third, fourth, fifth and sixth causes of action on the tort of  
8 fraud....' Plaintiffs' third cause of action...charges intentional misrepresentation; the  
9 fourth cause of action charges negligent misrepresentation; and the fifth cause of  
10 action charges fraudulent concealment...."

11 "Defendants also object that the complaint does not indicate that any particular child  
12 relied upon or even saw any particular television advertisement. They point out that  
13 although the complaint does assert that each of the adult plaintiffs purchased  
14 General Foods' products at a Safeway Store, it does not state which advertisements  
15 they, or their children, saw and relied upon.

16 "A specific statement of the advertisements seen and relied upon by the individual  
17 plaintiffs would serve to demonstrate...that they possess a valid cause of action....  
18 The realistic setting of the case, however, may make such specific pleading  
19 impossible. A long-term advertising campaign may seek to persuade by cumulative  
20 impact, not by a particular representation on a particular date." Children in particular  
21 are unlikely to recall the specific advertisements which led them to desire a product,  
22 but even adults buying a product in a store will not often remember the date and  
23 exact message of the advertisements which induced them to make that purchase.  
24 Plaintiffs should be able to base their cause of action upon an allegation that they  
25 acted in response to an advertising campaign even if they cannot recall the specific  
26 advertisements." 35 Cal.3d at 215-218.

27 This cumulative-impact rule must apply here to avoid giving Philip Morris a "practical  
28 immunity" for its misleading ads. Children's Television noted that, because the children were  
"unlikely to recall the specific advertisements," the cumulative-impact rule was necessary to avoid  
giving the defendants a "practical immunity from statutory and common law [fraud] remedies." 35  
Cal.3d at pp. 222-223. Likewise, Philip Morris's 1950s and 1960s ads targeted minors, who  
because of cancer's long latency (40 plus years for Mr. Boeken) are now also "unlikely to recall the  
specific advertisements" on which they relied in beginning to smoke. In order to avoid giving Philip  
Morris a "practical immunity" for its false advertising, this Court should recognize that the jury's  
reliance finding is supported by the ads' cumulative impact.

The testimony of Plaintiff's cigarette advertising and marketing expert Dr. Marvin Goldberg<sup>42</sup>

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<sup>42</sup> RT at 2523; 2652-2654; 2712-2713.

1 confirms that the cigarette industry spends billions of dollars per year to advocate cigarette use and  
2 induce cigarette consumption. This alone is powerful evidence of the effectiveness of advertising  
3 and its ability to induce reliance. This expenditure alone provides inferential evidence of Plaintiff's  
4 reliance. Indeed, at least one court virtually took judicial notice of these facts. Defense  
5 protestations similar to those made by Philip Morris here were summarily rejected by the District  
6 Court in Penn Advertising of Baltimore v. Mayor of Baltimore, (D.D. 1994) 862 F. Supp. 1402:

7 "This Court holds that it remains appropriate in the wake of Edenfield to accept the  
8 judicially-recognized proposition that advertising increases consumption.  
9 Furthermore, if advertising increases consumption among the general population,  
10 it is also reasonable to accept the proposition that advertising increases  
11 consumption among youths. If anything, this statement may be more applicable to  
12 the youthful population than to the adult population due to the impressionable nature  
13 of youngsters." Id. at 1410.

14 The jury's finding of reliance is supported by the cumulative-impact rule and the billions and  
15 billions of dollars Philip Morris has spent on advertising its cigarettes over the years.

16 **e. Mirkin did not limit the "cumulative impact" rule**

17 Plaintiff does not invoke the "fraud on the market" theory or, as Defendant sometimes calls  
18 it in its JNOV motion, "fraud in the air." That theory has been applied in securities fraud actions.  
19 It is used so a plaintiff -- even though he never heard or saw a representation, and had not even  
20 heard the substance of the representation repeated by a third party -- can demonstrate reliance and  
21 proximate cause by showing that the market price, at which he had purchased a security, was  
22 influenced by the fraudulent representation. See Mirkin v. Wasserman, (1993) 5 Cal.4th 1082.<sup>43</sup>  
23 A smoker who -- unlike Plaintiff here -- urged an expansion of this securities-law doctrine to  
24 cigarettes would claim:

25 "The cigarettes I purchased were more expensive because of representations that  
26 affected market price. I never heard the substance of the representations myself,  
27 neither directly nor indirectly (through third parties). I want my money back."<sup>44</sup>

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28 <sup>43</sup> Mirkin itself both explains the approved "indirect reliance" theory and distinguishes it from the  
disapproved "fraud on the market" theory. See 5 Cal.4th at 1095-1099.

<sup>44</sup> In other words, that the demand for cigarettes had increased relative to supply because other  
people in the market had heard and relied upon the ideas that cigarettes were a necessary "rite of  
passage," that health hazards were controversial, and that light cigarettes were less hazardous.  
This is hardly Plaintiff's claim here.

1 Contrary to Philip Morris's claim, the Supreme Court in Mirkin did not render Children's  
2 Television inapposite here. JNOV at 10-11. In Mirkin, the plaintiff stock purchasers alleged that  
3 the company had misrepresented its prospects for success, thereby artificially inflating the  
4 company's stock price to the plaintiffs' detriment. 5 Cal.4th at 1088. Mirkin held the plaintiffs' claim  
5 deficient because they had never heard the misrepresentations, directly or indirectly, instead  
6 claiming harm because they "relied" on the integrity of the stock price ("fraud on the market"). *Id.*  
7 at p. 1089. That is the extent of Mirkin's limitation of Children's Television: denying recovery when  
8 the cause of plaintiff's harm is the effect of the defendant's misrepresentation on the market.<sup>45</sup>  
9 Mirkin neither discussed nor limited the cumulative-impact rule.

10 Philip Morris is wrong to claim that Mr. Boeken's "theory" of recovery rests on "fraud on the  
11 market." He would be asserting a fraud on the market only if he saw no ads but claimed that he  
12 smoked solely because "lots of people smoked" (i.e., the "market" smoked). Instead, Mr. Boeken  
13 saw the ads and relied on (among other things) their cumulative impact.

14 **f. Mr. Boeken Relied on Philip Morris's Misrepresentations**

15 Mr. Boeken recalled a specific Industry denials that smoking causes cancer. Boeken Depo  
16 at 90-95. He also he recalled that the tobacco industry made numerous such denials over the  
17 years. Philip Morris argues that Plaintiff's testimony establishes that he did not rely on its  
18 misrepresentations. This is simply not true. Plaintiff Richard Boeken testified that he heard, relied  
19 on and believed Defendant's assertions of safety:

20 "Q Sometime in the mid- to late-1960's, I believe warnings went on the sides of  
21 packs of cigarettes. Now, that's my date, and I'm not putting that date on  
22 you. Do you recall at some time, well after you'd started smoking, that some  
23 warnings went on the sides of cigarette packages?

24 "A I recall that there was news that the cigarette companies had been required  
25 to put a warning.

26 "Q Required by whom?

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27 <sup>45</sup> In so doing Mirkin limited a *different statement* in Children's Television (not the cumulative-impact  
28 rule): that a plaintiff need not hear the misrepresentation (directly or indirectly) if the  
misrepresentation still "influenced" the plaintiff. *Id.* at p. 1098; Children's Television, *supra*, 35  
Cal.3d at p. 219.

1 "A The Government, the Surgeon General, had pushed it through that they had  
2 to put a warning on the side of cigarettes.

3 "Q All right. As you sit here today, do you know what that warning said?

4 "A No, I -- I really don't.

5 "Q What did you think about that warning?

6 "A I -- I didn't think anything. I thought it was political more than anything else.

7 "Q What do you mean by that, "political more than anything else"?

8 "A I had just thought it was political. I thought it was the Government, the  
9 Surgeon General, was on a vendetta of his own personal stride, and he  
10 accomplished this -- this small fete. I -- that's what I believed. I believed  
11 -- with cigarettes, I believed the cigarette advertisements. I mean, I didn't  
12 think there was anything wrong.

13 "Q Well, I don't know what you mean by you believe the cigarette  
14 advertisements?

15 "A I believed they were good for you. . . ." Boeken Depo. at 79-80.

16 "Q. Did you come into receipt of information from the tobacco industry which  
17 addressed the Surgeon General's warning?

18 "A Yes, I did.

19 "Q What information did you come into receipt of?

20 "A The information I received is that tobacco is not harmful, that it is not  
21 addictive, that it does -- does not cause health hazards, that it does not --  
22 there is no proof or scientific fact that it causes cancer, emphysema or any  
23 other lung or blood disease." Boeken Depo. at 82:22-25 83:1-6. (Emphasis  
24 added.)

25 "Q. When the cigarette industry put out information that you received that they  
26 disagreed that their products were harmful to health and when the tobacco  
27 industry put out information that you received that there was no proof that  
28 their products were harmful to health, did you trust them?

"A Yes. . . . Yes, I did. I've always trusted the tobacco industries that -- I've  
always trusted their judgment. I didn't believe that it was harmful, not to the  
degree that it was being stated by others." Ex. 12, Boeken Depo., p. 83:12-  
23.

"Q . . . [W]as it your understanding back then in the 70's that the tobacco  
industry agreed that their product was harmful, that they disagreed that their  
product was harmful or that they were scratching their head and saying,  
"Gee whiz, we don't know"?

"A They disagreed that their product was harmful.

"Q Did you believe them?

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“A Yes, I did.

“Q Did you rely on their denials?

“A. Yes, I did.” Boeken Depo., pp. 85:20-25; 86:1-6.<sup>46</sup>

Mr. Boeken smoked the macho and youth oriented brand that Philip Morris so actively promoted and which provided a measure of health reassurance. This was accomplished by the portrayal of independent and strong and agile and virile and healthy marines, athletes and, of course, cowboys. He switched to Marlboro "Lights" based upon that measure of health reassurance. Marlboro was among the most heavily advertised brands in the country during the time Mr. Boeken decided to buy them and at all times since. Even if Mr. Boeken was unaware of the subtle, cumulative effects of advertising there is every reason to infer his direct and indirect reliance upon Defendant's claims. To the extent that Mr. Boeken disbelieved health warnings about cigarettes (as he clearly did), where else in this society would he get the impression that cigarettes were not hazardous other than from the main source of misinformation and disinformation about smoking -- Philip Morris, the other cigarette manufacturers, and their trade associations?

From the widespread distribution of Philip Morris's false claims, under Toole, supra, the jury was entitled to infer that Mr. Boeken both heard and relied on those false claims, even if 35 years later he could not recall the specific location of any one false claim. In addition, under Engalla, Vasquez, and Occidental Land, the jury could infer that Mr. Boeken relied on Philip Morris's deceit because his conduct in starting and continuing to smoke was "consistent with" such reliance.

Moreover, under Restatement Section 533 the jury could reasonably find that Mr. Boeken indirectly relied on Philip Morris's deceit because Philip Morris "intended" that the adult public would "communicate" the "substance" of its false claims to children and "influence" their "conduct." And Philip Morris did not need to have Mr. Boeken "in mind" as its indirect target because it intended to defraud the public generally.<sup>47</sup>

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<sup>46</sup> See also Boeken Depo. at 80-83; 94-96; 232.

<sup>47</sup> Shapiro, supra, 64 Cal.App.4th at p. 1548; see Rest.2d Torts, § 533, com. g; Civil Code §1711.

1           **g.     Reliance on deceptive ads**

2           Mr. Boeken saw Philip Morris’s cigarette ads as a youngster and chose his brand,  
3 Marlboros, because of those ads:

4           “Q.     When it came time for you to pick the brand that you wanted, what  
5               brand did you pick?

6           “A     When I chose my brand of cigarettes, I started smoking Marlboros.

7           “Q     Why?

8           “ A     They were everywhere. They advertised everywhere. They  
9               represented very macho, sophisticated, hip way of smoking. It was  
              -- the message I had was that it was the one and only cigarette to  
              smoke, and I liked them.” Boeken Depo. at 40.

10          Mr. Boeken also testified that he saw numerous other cigarette advertisements.<sup>48</sup>

11                Under the cumulative-impact rule, Mr. Boeken was not required to "recall the specific  
12 advertisements" on which he relied. Thus, even though Mr. Boeken was "unlikely to recall the  
13 specific advertisements" on which he relied almost 40 years ago,<sup>49</sup> it was enough to prove that he  
14 "acted in response to [the Industry's] advertising campaign."

15                Ample evidence supported the jury's findings that Mr. Boeken relied on Philip Morris's  
16 misrepresentations and concealment.

17          2.     Philip Morris Committed Fraud by Concealment

18                Fraudulent concealment occurs when the defendant conceals a "material" fact that it has  
19 a "duty" to disclose to the plaintiff.<sup>50</sup> A fact is "material" if "a reasonable [person] would attach  
20 importance to its existence or nonexistence in determining his choice of action."<sup>51</sup> Materiality is "a  
21 jury question," becoming a matter of law only if "the fact misrepresented is so obviously unimportant  
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24           <sup>48</sup> Mr. Boeken identified numerous Marlboro advertisements that he saw and relied upon. See, e.g.,  
25 Ex.s . 8,002.01 - 8,002.89. He also testified concerning his reliance on these ads. Boeken Depo.  
              at 158-164.

26           <sup>49</sup> See, RT at 2569-2574.

27           <sup>50</sup> Marketing West v. Sanyo Fisher (USA) Corp. (1992) 6 Cal.App.4th 603, 612-613.

28           <sup>51</sup> Charpentier v. Los Angeles Rams (1999) 75 Cal.App.4th 301, 312-313; Rest.2d Torts, §538.

1 that the jury could not find that a reasonable [person] would have been influenced by it."<sup>52</sup>

2 A (nonfiduciary) defendant has a "duty to disclose" a material fact in three situations:<sup>53</sup> (1)  
3 Exclusive knowledge: When the defendant had "exclusive knowledge of material facts" that were  
4 not "known" or "accessible to" the plaintiff,<sup>54</sup> (2) Active concealment: When the defendant "actively  
5 conceal[ed]" or "suppress[ed]" a material fact from the plaintiff it is the "equivalent of a false  
6 representation; i.e., actual fraud",<sup>55</sup> or (3) Partial half-truths: When the defendant makes "partial  
7 representations" but "suppresses" other facts that "materially qualify the limited facts disclosed,"  
8 then the partial representation is a "misleading half-truth," even if the information given is "not  
9 false."<sup>56</sup>

10 For decades Philip Morris concealed its knowledge that smoking causes cancer. Philip  
11 Morris argues that it had no duty to warn consumers of its cigarettes about the dangers, because  
12 the risks of smoking were commonly known. However, the jury reasonably found that Philip Morris  
13 did have a duty to disclose:

14 **Exclusive knowledge:** Philip Morris knew that its research showed that smoking  
15 frequently caused lung cancer, its customers did not.

16 **Active concealment:** Philip Morris intentionally suppressed its knowledge from Mr.  
17 Boeken and the public by denial, misinformation, disinformation and a plan to create  
18 doubt.

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19 <sup>52</sup> Charpentier, *supra*, 75 Cal.App.4th at p. 313.

20 <sup>53</sup> Warner Constr. Corp. v. City of Los Angeles (1970) 2 Cal.3d 285, 294; Wilkins v. National  
21 Broadcasting Co. (1999) 71 Cal.App.4th 1066, 1082; LiMandri v. Judkins (1997) 52 Cal.App.4th  
22 326, 336, 337.

23 <sup>54</sup> Magpali v. Farmers Group, Inc. (1996) 48 Cal.App.4th 471, 482.

24 <sup>55</sup> Younan v. Equifax, Inc. (1980) 111 Cal.App.3d 498, 512-513 (defendants' "scheme" to falsely tell  
25 plaintiff that he would receive a physical exam, while actively concealing that "by prearrangement"  
26 the exam would be "dishonest and produce a false report of plaintiff's condition," was actionable  
27 fraud).

28 <sup>56</sup> Randi W. v. Muroc Joint Unified Sch. Dist. (1997) 14 Cal.4th 1066, 1082 (school district's  
recommendations of former employee were "affirmative misrepresentations" for concealing  
employee's history of sexual misconduct); Wilkins, *supra*, 71 Cal.App.4th at p. 1082; San Diego  
Hospice v. County of San Diego (1995) 31 Cal.App.4th 1048, 1055 n.4; see Andrade v. Jennings  
(1997) 54 Cal.App.4th 307, 330 n.14 ("One who is asked for or volunteers information must be  
truthful, and the telling of a *half-truth* calculated to deceive is fraud."); Marketing West, *supra*, 6  
Cal.App.4th at p. 613 (If a defendant "speaks at all he must make a full and fair disclosure.").

1           **Partial half-truths:** Philip Morris "undertook" to provide some information about  
2 smoking and cancer claiming that cigarettes were "not injurious," claiming no proof  
3 of cancer causation, and making misleading ad claims -- but suppressed its own  
4 research knowledge that "materially qualified" the information provided.

5           There a is major inconsistency in Philip Morris's contention that the health risks of smoking  
6 were "common knowledge" and, thus, it had no duty to warn consumers about said risks. On the  
7 one hand, Philip Morris repeatedly urges that Richard Boeken is barred from recovery of damages  
8 for his fatal lung cancer because the risks of smoking have long been a matter of common public  
9 knowledge and because of the presence of federally mandated warning labels on the packages of  
10 cigarettes purchased by Plaintiff. On the other hand, during the years that Mr. Boeken smoked,  
11 Philip Morris repeatedly asserted that it did not agree with the Surgeon General's conclusion that  
12 smoking causes lung cancer, that there was no proof of this fact, that the experts disagreed about  
13 it and that a controversy existed. (See, Part IIA above, "Philip Morris's Deception Regarding the  
14 Health Risks of Smoking," and the exhibits and testimony referenced therein.) Having asserted that  
15 causation has not been established (despite the presence of federal warning labels), Philip Morris  
16 cannot argue persuasively that its customers, including children such as the 10 and 13 year old  
17 Richard Boeken, knew more than it did and, by reason of their superior knowledge, are barred from  
18 recovering damages.

19           Mr. Boeken and the public did not know the gravity of smoking's hazards.<sup>57</sup> When Mr.  
20 Boeken started smoking in 1954, there were no warnings. The warning -"smoking causes lung  
21 cancer"-did not appear on cigarette packages until 1985, 31 years after Mr. Boeken began smoking  
22 and became addicted. The earlier, milder warnings that smoking "may be hazardous" or "is  
23 dangerous," were always subject to Philip Morris's, and the tobacco industry's efforts, to undermine  
24 them. By the 1960s Philip Morris and the Industry had buried the truth about smoking and cancer  
25 under an avalanche of falsehoods As Mr. Boeken's experts said, Philip Morris's scheme denied  
26 the ordinary consumer knowledge of the magnitude of smoking's true risks. Finally, addicted  
27 smokers (like Mr. Boeken) were particularly vulnerable to the Industry's false denials. Addicted  
28 smokers look for reasons to defend a choice to keep on smoking. RT 1995-1997.

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<sup>57</sup> See, e.g., RT 3118-3129; 3139-3140.

1           Although Philip Morris cites several cases for the proposition that "the health risks of  
2 smoking had become matters of public knowledge as of the 1950's or earlier" (JNOV at 12), judicial  
3 opinions based on different evidence do not bind Plaintiff in questions of fact. Indeed, many out-of-  
4 state cases have rejected the Industry's common-knowledge defense based on the effects of the  
5 Industry's fraud.<sup>58</sup> Finally, Philip Morris's cases do not establish that in the 1960's smoking's  
6 hazards were "common knowledge" as a matter of law:

7           1.     Wawanesa<sup>59</sup> is inapposite because (1) it did not involve smoking injuries, (2) the  
8 court's comment that tobacco's "noxiousness" was known before 1891 did not establish as a matter  
9 of law that in the 1960s the ordinary consumer knew that smoking *causes cancer*, and (3) this jury  
10 rejected Philip Morris's claim that the ancient sources cited in *Wawanesa* established public cancer  
11 knowledge.

12           2.     Allgood<sup>60</sup> is inapposite because (1) it does not show when plaintiff started smoking  
13 and thus does not show common knowledge when Mr. Boeken first smoked in 1954, and (2) unlike  
14 here, the plaintiff *produced no evidence* that smoking's hazards were not common knowledge.

15           3.     Paugh<sup>61</sup> is inapposite because the judge, in ruling on the pleadings, *considered no*  
16 *evidence* on public knowledge, instead (improperly) relying on *a prior case* to find common  
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18           <sup>58</sup> *E.g., Laborers Local 17 Health & Ben. v. Philip Morris* (S.D.N.Y. 1998) 7 F.Supp.2d 277, 291  
19 (denying dismissal motion, because, if defendants "suppressed" their "secret research into the  
20 dangers of tobacco" as alleged, they had "superior knowledge" of the "truth"); Burton v. R.J.  
21 Reynolds Tobacco Co. (D.Kan. 1995) 884 F.Supp. 1515, 1525-1526 (denying summary judgment  
22 by distinguishing *Paugh* and rejecting defendant's common-knowledge claim because (1) the  
23 Industry knew about and "purposefully manipulated" nicotine to boost addiction, and (2) "general  
24 common knowledge that cigarettes are dangerous" does not mean knowledge of the "extent and  
25 nature" of the danger); Gilboy v. American Tobacco Co. (La. 1991) 582 So.2d 1263, 1265  
(reversing summary judgment by rejecting common-knowledge defense because the "precise  
26 dangers have been widely disseminated *only in recent years*"); Dewey v. R.J. Reynolds Tobacco  
27 Co. (N.J. 1990) 577 A.2d 1239, 1254-1255 (reversing summary judgment because common-  
28 knowledge claim "completely ignore[d] the extensive efforts of the tobacco manufacturers to  
saturate the public with information" to "rebut" the true health claims); see Rogers v. R.J.  
Reynolds Tobacco Co. (Ind.App. 1990) 557 N.E.2d 1045 (reversing summary judgment by  
distinguishing *Roysdon* because the "ordinary consumer's knowledge" of smoking's hazards could  
not be determined as a matter of law).

59 Wawanesa Mut. Ins. Co. v. Matlock (1997) 60 Cal.App.4th 583, 587 n.3.

60 Allgood v. R.J. Reynolds Tobacco Co. (5th Cir. 1996) 80 F.3d 168, 171-172.

61 Paugh v. R.J. Reynolds Tobacco Co. (N.D. Ohio 1993) 834 F.Supp. 228, 231.

1 knowledge as a matter of law.

2 4. Wakeland<sup>62</sup> is inapposite because (1) the court ruled only that cigarette retailers did  
3 not have "superior knowledge" of smoking's hazards, (2) the statement was dicta, (3) the court  
4 lacked evidence of "public knowledge" of smoking's dangers by 1966, and (4) Mr. Boeken's experts  
5 presented contrary evidence on public knowledge.

6 In sum, rulings by other courts-based on different evidence or without any evidence-that  
7 some smoking hazards were publicly known at some point in time did not prevent this jury from  
8 finding, on overwhelming evidence, that in the 1960s and beyond, the link between smoking and  
9 cancer was not so commonly known that it negated the materiality of Philip Morris's  
10 misrepresentations and concealment.<sup>63</sup>

11 3. Mr. Boeken's Reliance was Justifiable.

12 A plaintiff justifiably relies if the defendant's deceit was "material," meaning that a person  
13 in the plaintiff's situation "would attach importance" to the deceit in "determining his choice of  
14 action."<sup>64</sup> This materiality determination is subjective, asking if the plaintiff was "justified in believing  
15 the [deceit] in the light of [his] own knowledge and experience."<sup>65</sup> Whether reliance was justifiable  
16 raises a question of fact for the jury, resolvable as a matter of law only if "the fact misrepresented"  
17 was "so obviously unimportant" that reliance was "preposterous."<sup>66</sup> Under the foregoing standards,  
18 substantial evidence showed that Mr. Boeken's reliance on Philip Morris's deceit was justified.

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22 <sup>62</sup> Wakeland v. Brown & Williamson Tobacco Corp. (S.D.Ala. 1998) 996 F.Supp. 1213, 1219.

23 <sup>63</sup> See, e.g., RT 2337-2339.

24 <sup>64</sup> Charpentier v. Los Angeles Rams (1999) 75 Cal.App.4th 301, 312-313; Rest.2d Torts, §538.

25 <sup>65</sup> Gray v. Don Miller Assocs., Inc. (1984) 35 Cal.3d 498, 503; see Blankenheim v. E.F. Hutton, Co.  
26 (1990) 217 Cal.App.3d 1463, 1474 (no "reasonable man" standard; an "[e]xceptionally gullible or  
ignorant" person can recover where "persons of normal intelligence would not have been misled").

27 <sup>66</sup> Seeger v. Odell (1941) 18 Cal.2d 409, 415; Charpentier, *supra*, 75 Cal.App.4th at p. 313;  
28 Blankenheim, *supra*, 217 Cal.App.3d at p. 1474; accord Alliance Mortgage, *supra*, 10 Cal.4th at p.  
1239.

1 First, although Philip Morris claims that Mr. Boeken's reliance was not justifiable as a matter  
2 of law in light of his own knowledge, the jury was entitled to resolve this fact question against Philip  
3 Morris because Philip Morris had vigorously denied, undermined and created doubt about  
4 smoking's health risks. There is an inherent inconsistency in Philip Morris's position: Having  
5 asserted for decades that causation has not been established, Philip Morris cannot argue  
6 persuasively that members of the general public had superior knowledge, and thus are deprived  
7 of legal recourse. Moreover, Mr. Boeken's reliance was not unjustifiable as a matter of law because  
8 "the fact[s] misrepresented" were not "so obviously unimportant" that reliance was "preposterous."

9 Second, the arrival of the first mild warnings in 1966 did not make Mr. Boeken's reliance  
10 unjustifiable because he started smoking and became addicted before the warnings ever appeared.  
11 Moreover, the jury could reasonably find that until 1985 the warnings were too equivocal ("may be  
12 hazardous") or too vague ("is dangerous") to render reliance on Philip Morris's deceit  
13 "preposterous," especially for an addicted smoker. Indeed, in Cipollone v. Liggett Group, Inc.  
14 (1992) 505 U.S. 504, the U.S. Supreme Court, by allowing post-warning fraud claims, necessarily  
15 recognized that the required warnings did not foreclose justifiable reliance on the Industry's fraud.

16 The jury's fraud verdicts were correct.

#### 17 **B. AMPLE EVIDENCE SUPPORTS THE PRODUCT LIABILITY VERDICT**

18 A product is defective if it failed to perform as safely as an ordinary consumer of the product  
19 would expect when the product is used in a manner reasonably foreseeable by the defendants: or  
20 if there was a risk of danger inherent in the design which outweighed the benefits of the design.  
21 Barker v. Lull Engineering Co. (1978) 20 Cal.3d 413; BAJI 9.00.5.

22 Philip Morris seeks to prevent Plaintiff from proceeding under any test for design defect  
23 under the doctrine of strict liability, even though it is the manufacturer of a product.

24 The jury was instructed that Marlboros were "defective in design" if (1) they "failed to  
25 perform as safely as an ordinary consumer would expect when used in an intended or reasonably  
26 foreseeable manner;" (2) if the benefit of the design was outweighed by the risks of the design; or

27  
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1 (3) Philip Morris failed (before July 1, 1969)<sup>67</sup> to warn that Marlboros posed a danger that was  
2 "known or knowable" to Philip Morris.<sup>68</sup> The jury found Philip Morris's cigarettes defective under  
3 (1) the consumer expectations standard; (2) the risk-benefit standard; and (3) the failure-to-warn  
4 standard. The evidence supported each of those findings. Philip Morris's claims are without merit.

5  
6 1. The Ordinary Consumer Did Not Know of the Health Risks Associated with Smoking When Mr.  
7 Boeken Began Smoking, Because of the Massive Conspiracy Engaged in by Defendant Denying  
8 Them

9 Plaintiff presented ample evidence that the "ordinary consumer" of the 1960s did not expect  
10 that smoking causes cancer.<sup>69</sup> By the 1960s Philip Morris and the Industry had buried the truth  
11 about smoking and cancer under an avalanche of falsehoods.<sup>70</sup> As Mr. Boeken's experts testified,  
12 Philip Morris's scheme denied the ordinary consumer knowledge of smoking's true risks.  
13 Additionally, addicted smokers (like plaintiff) were particularly vulnerable to the Industry's false  
14 denials.

15 Philip Morris argues that to have seen the general warnings regarding cigarettes or to have  
16 read watered down labels of danger on the cigarette package is equal to "expectations" that  
17 cigarettes are dangerous.<sup>71</sup> While this may or may not be true in the usual case, it is not and should

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18 <sup>67</sup> Federal preemption limited Mr. Boeken's failure-to-warn claim to Philip Morris's misconduct before  
19 July 1, 1969.

20 <sup>68</sup> Anderson v. Owens-Corning Fiberglass Corp. (1991) 53 Cal.3d 987, 1004.

21 <sup>69</sup> As asbestos cases show, a jury can determine consumers' "expectations" about a product's safety  
22 30 to 40 years ago. *E.g.*, Arena v. Owens-Corning Fiberglass Corp. (1st Dist., Div. 1, 1998) 63  
23 Cal. App.4th 1178, 1185-1187 (discussing applicability of consumer expectations test to asbestos  
24 latent-disease cases); Morton v. Owens-Corning Fiberglass Corp. (1st Dist., Div. 2 1995) 33  
25 Cal.App.4th 1529, 1534-1535.

26 <sup>70</sup> See, e.g., Exs. 54.00; 270.00; 340.00; 342.00; 363.00; 456.00; 514.00; 648.00; 2,340.00;  
27 9,455.00; 9,456.00; 10,019.00. Reporter's Transcript ("RT") at 2690-2699.

28 <sup>71</sup> Even accepting this proposition as true, the federally mandated warning label on cigarette  
packages from 1970 until 1984 merely stated that "The Surgeon General has Determined that  
Cigarette Smoking is Dangerous to Your Health." So, under Defendant's argument, consumers of  
its products merely expected that smoking cigarettes would be dangerous to their health.  
However, relying on the warning label, they clearly did not expect that serious disease, and death,  
could result from use of the product; that addiction or habituation was a likely consequence of  
continued use; that smokers were at a special risk for cancer, heart disease, and addiction when  
smoking is begun at an early age; that excessive use, brought vastly increased risks, and that

1 not be the case where the manufacturer has conducted a massive and fraudulent public relations  
2 campaign to specifically convince consumers that the warnings on the product's labels are false.

3 Philip Morris cannot now take the position that Mr. Boeken should not have believed what it said!

4 Whether or not ordinary consumers, including addicted cigarette smokers, were basing their  
5 "knowledge" of the health risks of smoking on the fraud being consistently committed by Philip  
6 Morris was a question of fact for the jury; a question which was resolved in Mr. Boeken's favor.

7 Tobacco products were devoid of any cautionary labeling or warnings whatsoever before  
8 1966, when the Federal Cigarette Labeling and Advertising Act required the following text on all  
9 packages of cigarettes: "Caution: Cigarette Smoking May Be Hazardous to Your Health."

10 This vague cautionary label failed to be an adequate warning for several reasons:

- 11 1. The warning was much too weak. The term "may be hazardous" suggests that the  
12 issue is debatable and that, in fact, it may not hazardous.
- 13 2. The warning failed to give consequences. There is no indication that serious  
14 disease, and death, could result from use of the product.
- 15 3. There was no warning of the magnitude or severity of the risk.
- 16 4. There was no warning of addiction or habituation as a likely consequence of  
17 continued use.
- 18 5. The warning never advised minors or their guardians of the special risk for cancer,  
19 heart disease, and addiction when smoking is begun at an early age.
- 20 6. The warning failed to advise that excessive use, brought vastly increased risks, and  
21 that persons who chose to smoke would be advised to moderate their consumption.
- 22 7. The warning never advised of the harmful ingredients of tobacco smoke, the fact  
23 that many ingredients were known carcinogens, nor the fact that many ingredients  
24 had never been tested adequately for carcinogenic potential.
- 25 8. The warning was neutralized by the commercial advertisements and public  
26 statements of the tobacco industry, denying health risks, and even making claims  
27 of modest health benefits.

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persons who chose to smoke would be advised to moderate their consumption; nor that many  
ingredients in cigarette smoke were known carcinogens, nor the fact that many ingredients had  
never been tested adequately for carcinogenic potential.

1 Thus, prospective users were never offered adequate information on which to base their  
2 decisions about smoking. Additionally, Philip Morris and the other cigarette companies conducted  
3 a public relations campaign to misinform the public, hide and misrepresent scientific research on  
4 smoking and health, and to create doubt in the minds of the public that smoking was hazardous.

5 Contrary to Philip Morris's claim, compliance with government regulations does not bar  
6 liability for a design defect.<sup>72</sup> As the Louisiana Supreme Court stated in Gilboy v. American Tobacco  
7 Co. (La. 1991) 582 So.2d 1263:

8 "While exposure to cigarette smoke can, to some extent, be avoided, the precise  
9 dangers have been widely disseminated only in recent years. It was not until 1966  
10 that cigarette sales were accompanied by a mild warning: "Caution: Cigarette  
11 Smoking May Be Hazardous To Your Health." A smoker who acquired the habit  
12 which caused his cancer before that warning should qualify as a reasonably prudent  
13 consumer." Id. at 1256. (Emphasis added.)

14 "Although warnings of the danger of cigarette smoking have been mandated by  
15 Federal law since 1966, defendants paradoxically assert that the health risks of  
16 smoking had been so widely known that there was no duty to warn prior to that time.

17 "Because of a continuing compromise between the congressional interest in  
18 protecting the public health and the congressional interest in protecting the tobacco  
19 industry, the warnings mandated by the Labeling Act have not fully reflected the  
20 dangers of smoking cigarettes. Compare the 1967 Surgeon General's report with  
21 the 1985 warning." Id. at 1266.

22 Richard Boeken started smoking as a child and became addicted to cigarettes soon  
23 thereafter. He quite understandably and reasonably fell victim to the promotional efforts of cigarette  
24 manufacturers, including Defendant, portraying cigarette smoking as "cool," reflective of  
25 independence from authority, macho, sexy, socially desirable and even safe. Boeken Depo. at 80-  
26 84.

27 Although Defendant supposedly complied with federal labeling laws, which mandated health  
28 warnings on cigarette packages commencing in 1969 those federal laws still left the cigarette  
29 companies accountable to the public for certain kinds of tortious conduct, including strict liability.  
30 Cipollone; Castano v. American Tobacco Co. (E.D.La. 1994) 870 F. Supp. 1425 [strict liability  
31 claims were not preempted]; Cantley v. Lorillard Tobacco Co., Inc. (Ala. 1996) 681 So.2d 1057

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<sup>72</sup> McLaughlin v. Sikorsky Aircraft (1983) 148 Cal.App.3d 203, 208.

1 [design defect claims not preempted.]

2 Finally, Defendant's cited cases are inapposite. In Papike and Haddix, the tampon warnings  
3 "clearly set forth the risk of acquiring TSS [toxic shock syndrome]."<sup>73</sup> And Lescs is inapposite  
4 because, unlike the 1969 Cigarette Labeling Act, FIFRA preempted consumer expectations  
5 claims.<sup>74</sup> In Papike the Court held, with no analysis nor any citation to any authority to support its  
6 position, that: "Tambrands' warnings met the federal requirements and Papike's design defect  
7 claim therefore fails the "consumer expectation" test. . . ." Id. at 743.

8 However, in Papike, unlike the situation here, there was no evidence whatsoever that the  
9 defendant in any way disavowed the accuracy of the federally mandated warning label or in any  
10 way disputed the risks involved with the use of its product. Indeed, no evidence at all was  
11 presented by the plaintiff on the issue of consumer expectation. Rather, she contended that  
12 defendant's product was defectively designed because "it contains a layer of viscose rayon, which  
13 . . . amplifies toxin production." Under the evidence presented in Papike there was no basis for the  
14 court to conclude consumers had any safety expectations other than what was on the warning  
15 label. That is not the case here. Plaintiff presented substantial evidence showing how Philip Morris  
16 intentionally, deliberately, and fraudulently manipulated consumer's expectations concerning the  
17 safety of its products.

18 Philip Morris fails to acknowledge the many out-of-state cases *rejecting* the tobacco  
19 industry's common-knowledge defense. See, e.g., Laborers Local 17 Health & Ben. v. Philip Morris  
20 (S.D.N.Y. 1998) 7 F. Supp.2d 277, 291 (denying dismissal motion because if defendants  
21 "suppressed" their "secret research into the dangers of tobacco" as alleged, they had "superior  
22 knowledge" of the "truth"); Burton v. R.J. Reynolds Tobacco Co. (D.Kan. 1995) 884 F.Supp. 1515,  
23 1525-1526 (distinguishing *Roysdon* and *Paugh* to deny summary judgment, rejecting defendant's  
24 common-knowledge claim because (1) tobacco companies knew about and "purposefully  
25 manipulated" nicotine to boost addiction, and (2) "general common knowledge that cigarettes are

26 \_\_\_\_\_  
27 <sup>73</sup> Papike v. Tambrands, Inc. (9th Cir. 1997) 107 F.3d 737; Haddix v. Playtex Family Prods. Corp.  
(7th Cir. 1998) 138 F.3d 681.

28 <sup>74</sup> Lescs v. Dow Chemical Co. (W.D.Va. 1997) 976 F.Supp. 393.

1 dangerous" does not mean knowledge of the "extent and nature" of the danger); Grinnell v.  
2 American Tobacco Co. (Tex.App. 1994) 883 S.W.2d 791, 802 (reversing summary judgment  
3 because evidence of the industry's "disinformation campaign" defeated defendants' claim that the  
4 "dangers and hazards" of smoking were "common knowledge"); Gilboy v. American Tobacco Co.  
5 (La. 1991) 582 So.2d 1263, 1265 (reversing summary judgment by rejecting common-knowledge  
6 defense because the "precise dangers have been widely disseminated only in recent years");  
7 Dewey v. R.J. Reynolds Tobacco Co. (N.J. 1990) 577 A.2d 1239, 1254-1255 (reversing summary  
8 judgment because tobacco companies' common-knowledge claim "completely ignore[d] the  
9 extensive efforts of the tobacco manufacturers to saturate the public with information" to "rebut" the  
10 true health claims, a "rebuttal" proven successful by public opinion "surveys"); Rogers v. R.J.  
11 Reynolds Tobacco Co. (Ind.App.2 Dist. 1990) 557 N.E.2d 1045 (reversing summary judgment  
12 because the "ordinary consumer's knowledge" of smoking's hazards could not be determined as  
13 a matter of law).

14 This Court should follow the lead of the numerous other Courts that have examined the  
15 issue and reject Philip Morris's contention that "common knowledge" concerning the dangers of  
16 cigarettes bars smoker's claims. Under the circumstances of this case, consumer expectation  
17 concerning the safety of Philip Morris's cigarettes was not conclusively set by the federally  
18 mandated warning labels.

19 2. The Risk/Benefit Test Was Properly Applied to Philip Morris's Cigarettes

20 Philip Morris argues that the risk/benefit test is not applicable to "inherently dangerous"  
21 products such as cigarettes. In effect, it is arguing that the former version of Civil Code Section  
22 1714.45, which is based on Comment i to the Restatement (Second) of Torts, should still be applied  
23 to tobacco products. This proposition is, of course, patently untrue.

24 The original version of Civil Code Section 1714.45, which became effective January 1, 1988,  
25 and the Restatement of Torts (Second), Section 402 cmt (i)<sup>75</sup> exempted a manufacturer or seller

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27 <sup>75</sup> Unlike Comment i to the Second Restatement, the Restatement Third does not preclude liability for  
any particular group of products:

28 "Common and widely distributed products such as alcoholic beverages, firearms, and

1 from liability in product liability actions if (1) the product was inherently unsafe and was known to  
2 be unsafe by the ordinary consumer, and (2) the product was a common consumer product  
3 intended for personal consumption, such as sugar, castor oil, alcohol, tobacco, and butter.<sup>76</sup>  
4 However, this is no longer the law in California for tobacco cases.

5 Civil Code Section 1714.45 was amended effective January 1, 1998. The new code section  
6 deletes tobacco from the illustrative list of common consumer products and also specifies that  
7 tobacco manufacturers are not exempt from product liability actions, which certainly includes  
8 actions based on design defect. Section 1714.45, as amended, also declares that there is no  
9 statutory bar or categorical defense to tobacco-related personal injury, wrongful death, or other tort  
10 claims against tobacco manufacturers by smokers or others and that such claims "which were or  
11 are brought shall be determined on their merits."

12 The current version of Civil Code Section 1714.45 states:

13 "(a) In a product liability action, a manufacturer or seller shall not be liable if both  
14 of the following apply:

15 (1) The product is inherently unsafe and the product is known to be unsafe by

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16 above-ground swimming pools may be found to be defective only upon proof of the  
17 requisite conditions in Subsection (a), (b), or (c). If such products are defectively  
18 manufactured or sold without reasonable warnings as to their danger when such warnings  
19 are appropriate, or if reasonable alternative designs could have been adopted, then liability  
20 under sections 1 and 2 may attach." Restatement (Third) of Torts: Products Liability §2  
21 cmt. d.

22 <sup>76</sup> The former version of Civil Code Section 1714.45 stated:

23 "(a) In a product liability action, a manufacturer or seller shall not be liable if:

24 (1) The product is inherently unsafe and the product is known to unsafe by the ordinary  
25 consumer who consumes the product with the ordinary knowledge common to the  
26 community; and

27 (2) The product is a common consumer product intended for person consumption,  
28 such as sugar, castor oil, alcohol, tobacco and butter, as identified in comment i to Section  
402A of the Restatement (Second) of Torts.

(b) For the purposes of this section, the term "product liability action" means any action  
for injury or death caused by a product, except that the term does not include an action  
based on a manufacturing defect or breach of an express warranty.

(c) This section is intended to be declarative and does not alter or amend existing  
California law, including Cronin v. J.B.E. Olson Corp., (1972) 8 Cal.3d 121 and shall apply  
to all product liability actions pending on, or commenced after, January 1, 1988."

1 the ordinary consumer who consumes the product with the ordinary knowledge  
2 common to the community.

3 (2) The product is a common consumer product intended for personal  
4 consumption, such as sugar, castor oil, alcohol and butter, as identified as identified  
5 in comment i to Section 402A of the Restatement (Second) of Torts.

6 (b) This section does not exempt the manufacture or sale of tobacco products  
7 by tobacco manufacturers and their successors in interest from product liability  
8 actions, but does exempt the sale or distribution of tobacco products by any other  
9 person, including, but not limited to, retailers or distributors.

10 © For purposes of this section, the term `product liability action' means any  
11 action for injury or death caused by a product, except that the term does not include  
12 an action based on a manufacturing defect or breach of an express warranty.

13 (d) This section is intended to be declarative of and does not alter or amend  
14 existing California law, including Cronin v. J.B.E. Olson Corp. (1972) 8 Cal.3d 121,  
15 and shall apply to all product liability actions pending on, or commenced after,  
16 January 1, 1988.

17 (f) It is the intention of the Legislature in enacting the amendments to  
18 subdivision (a) and (b) of this section adopted at the 1997-98 Regular Session to  
19 declare that there exists no statutory bar to tobacco-related personal injury, wrongful  
20 death, or other tort claims against tobacco manufacturers and their successors in  
21 interest by California smokers or others who have suffered or incurred injuries,  
22 damages, or costs arising from the promotion, marketing, sale, or consumption of  
23 tobacco products. It is also the intention of the Legislature to clarify that such claims  
24 which were or are brought shall be determined on their merits, without imposition of  
25 any claim of statutory bar or categorical defense.

26 (g) This section shall not be construed to grant immunity to a tobacco industry  
27 research organization." (Emphasis added.)

28 The California Legislature, by their amendment of Civil Code Section 1714.45, has  
determined that for public policy reasons, manufacturers of tobacco products are no longer exempt  
from product liability actions, even if their product is "inherently dangerous".

The current Restatement of the Law Third, Tort: Products Liability states:

"Early in the development of products liability law, courts held that a claim based on  
design defect could not be sustained if the dangers presented by the product were  
open and obvious. Subsection (b) [of Restatement of the Law Third, Torts: Product  
Liability] does not recognize the obviousness of design-related risk as precluding a  
finding of defectiveness. The fact that a danger is open and obvious is relevant to  
the issue of defectiveness, but does not necessarily preclude a plaintiff from  
establishing that a reasonable alternative design would have reduced or prevented  
injury to the plaintiff." Restatement of the Law Third, Torts: Products Liability,  
comment d, p. 20. (emphasis added.).

Clearly, manufacturers of tobacco products are no longer exempt from liability for the injuries  
caused by their products and the risk/benefit test may be appropriately applied to cigarettes, just

1 as it is appropriately applied to other products in design defect cases.

2 **a. There are “Reasonable Alternative Cigarette Designs that Could have Reduced**  
3 **Plaintiff’s Risk of Injury**

4 Philip Morris argues that it cannot be held liable under the risk/benefit test for products  
5 liability because there is no reasonable alternative design<sup>77</sup> that would make cigarettes completely  
6 safe. However, this is not the standard set forth in the Restatement of the Law Third, Torts:  
7 Products Liability upon which Defendant is apparently relying:

8 Under Section 2 of the Restatement of the Law Third, Torts: Products Liability:

9 "A product is defective when, at the time of sale or distribution, it contains a  
10 manufacturing defect, is defective in design, or is defective because of inadequate  
instructions or warnings. A product: . . .

11 "(b) is defective in design when the foreseeable risks of harm posed by the  
12 product could have been **reduced** or avoided by the adoption of a reasonable  
13 alternative design by the seller or other distributor, or a predecessor in the  
commercial chain of distribution, and the omission of the alternative design renders  
the product not reasonably safe; . . ."

14 Plaintiff’s experts testified that there were reasonable alternative cigarette designs that  
15 would have **reduced** the dangers of smoking.

16 Plaintiff’s expert William Farone is a Ph.D. in physical chemistry who was employed by  
17 Philip Morris from 1976 through 1984. He was the Director of Applied Research for Phillip Morris  
18 during that period of time. His job duties included directing the research by which Philip Morris was  
19 investigating the toxicity of tobacco and his job took him into close personal contact with all of the  
20 higher executives of the defendant Philip Morris. RT 1463-1465. Dr. Farone ran a research  
21 division which varied in size over time from 50 to ask many as 250 people. His job included  
22 cigarette design.<sup>78</sup>

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24 <sup>77</sup> Reasonable alternative designs can be demonstrated by expert testimony, even in the absence of  
25 a manufactured prototype utilizing the alternative design. Restatement of the Law Third, Torts:  
26 Products Liability, Section 2, Comment f. Two California opinions have discussed some of the  
27 concepts underlying the "reasonable alternative design" element of the restatement (Third) and  
**determined that California law did not require proof of a reasonable alternative design.** See  
Soule v. General Motors (1994) 8 Cal.4th 548; Arena v. Owens Corning Fiberglass (1988) 63  
Cal.App.4th 1178.

28 <sup>78</sup> RT at 1479-1480.

1 Dr. Farone testified that the technology exists to reduce the key carcinogenic compounds  
2 in cigarettes and that some can be virtually eliminated. He testified that the Philip Morris method  
3 of air curing "bright tobacco" to replace "burly tobacco" could be replaced. Additionally, Dr. Farone  
4 testified that Philip Morris could reduce the use of burly tobacco, and eliminate the use of additives.  
5 And further, Defendant could use more expanded tobacco; and could decrease additives and sizing  
6 on reconstituted tobacco. He described modifications that can be used with unfiltered as well as  
7 filtered cigarettes. Further, he testified to the placement of ventilation holes within the cigarette rod  
8 and methods reducing tar. He testified that all of these changes in tobacco processing would result  
9 in a safer product and the excess danger of Philip Morris's cigarettes as designed would be  
10 substantially eliminated. Dr. Farone's testimony included his expert opinion that Defendant has  
11 not used even the most rudimentary or basic techniques which could be used to reduce the  
12 potential hazards of its products.<sup>79</sup>

13 Plaintiff's expert, Neal Benowitz, also testified as to the existence of a safer alternative  
14 design. Dr. Benowitz testified that cigarettes could be manufactured with reduced nicotine content,  
15 thereby reducing their addictiveness and allowing smokers to quit more easily when they so  
16 desired.<sup>80</sup>

17 Mr. Boeken testified that although he tried to quit smoking several times, he was addicted  
18 and unable to do so:

19 "Q Have you ever tried to quit smoking?

20 "A Yes, I have.

21 "Q Have you ever been as successful in trying to quit smoking as you were in trying to  
quit heroine?

22 "A No, I have not. . . .

23 "Q . . . [W]hich has been more addictive in your life? Cigarettes or heroine?

24 "A Cigarettes have been more addictive in my life than heroine." Boeken Depo. at  
184:16-20; 185:3-6.

25 Had Philip Morris implemented Dr. Farone's and/or Dr. Benowitz' design recommendation,  
26

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27 <sup>79</sup> See, e.g., RT 1524-1525; 1536-1538; 1574-1577; 1594-1598; 1601-1604.

28 <sup>80</sup> RT 2032-2037.

1 its products would have contained virtually no carcinogens and/or would not have been addictive

2 3. Mr. Boeken Would Have Utilized "Safer" Cigarettes if They Had Been Available

3 Contrary to Philip Morris's assertion that Mr. Boeken would not have utilized safer cigarettes  
4 had they been available, he testified as follows:

5 "Q. Previously in your testimony, you mentioned [Marlboro] Lights. Do you remember  
6 that?

7 "A Yes, I do.

8 "Q Can you remember when you switched to Lights?

9 "A About 1984, '85, I'm pretty -- as they came out, I don't know -- I don't know the exact  
10 year. As they came out, I got myself to switch down.

11 "Q Why?

12 "A Bronchitis.

13 Q When you say "down," what do you mean by "down"

14 A Well, they were supposed to be low, low tar, low nicotine, milder, less harmful to  
15 your throat." Ex. 12, Boeken Depo. p. 210:11-24.

16 Mr. Boeken switched to cigarettes that he believed to be less harmful. Thus, had Philip  
17 Morris utilized the safer design alternatives testified to by Dr. Farone and/or Dr. Benowitz, the jury  
18 was entitled to infer that Mr. Boeken would have utilized them, just as he switched to Marlboro  
19 Lights based upon Defendant's representations concerning the increased safety of low-tar and/or  
20 "light" cigarettes.

21 **C. CIVIL CODE SECTION 1714.45 DOES NOT BAR PLAINTIFF'S CLAIMS**

22 It is inconceivable that the Legislature is powerless to revoke an immunity that would never  
23 have been granted in the first place, but for a decades-long course of fraudulent conduct  
24 perpetuated by an entire industry upon the American public. Such an interpretation of the 1998  
25 amendment to Civil Code Section 1714.45 would fly in the face of the fundamental maxims of  
26 jurisprudence that "[n]o one can take advantage of his own wrong" (Civ. C. §3517) and that "[f]or  
27 every wrong there is a remedy." Civ. C. §3523. Yet this is the result of applying the interpretation  
28 of Civil Code Section 1714.45 to the facts of this case, once again urged by Philip Morris.

From 1988 through 1997 former Civil Code section 1714.45 barred only "products liability"

1 suits by consumers who smoked with "knowledge" that cigarettes were "inherently unsafe." The  
2 former version of Civil Code Section 1714.45 was given retroactive effect by the Court even though  
3 the Legislature did not expressly declare it to be retroactive. See, American Tobacco Co. v.  
4 Superior Court (1989) 208 Cal. App.3d 480.

5 In 1997 the California Legislature amended Civil Code Section 1714.45 (the "1998  
6 Amendment") to repeal the tobacco industry's immunity from personal injury suits because:

7 "Evidence has now become available showing tobacco companies may have  
8 deliberately manipulated the level of nicotine, a powerfully addictive substance, in  
9 tobacco products so as to create and sustain addiction in smokers. In addition,  
10 evidence shows the tobacco companies have systematically suppressed and  
11 concealed material information and waged an aggressive campaign of  
12 disinformation about the health consequences of tobacco use."

13 Thus, the very basis for the 1998 Amendment by the Legislature is the recently available  
14 evidence concerning the cigarette industry's past misconduct.

15 In enacting the 1998 Amendment the California Legislature clearly expressed its intent that  
16 personal injury actions were to be allowed based on the cigarette industry's past conduct.

17 "(f) It is the intention of the Legislature in enacting the amendments to subdivisions  
18 (a) and (b) of this section adopted at the 1997-98 Regular Session to declare that  
19 there exists no statutory bar to tobacco-related personal injury, wrongful death, or  
20 other tort claims against tobacco manufacturers and their successors in interest by  
21 California smokers or others who have suffered or incurred [note the Legislature's  
22 use of the past tense indicating the Legislature's intent to allow claims based on the  
23 tobacco industry's past misconduct] injuries, damages, or costs arising from the  
24 promotion, marketing, sale, or consumption of tobacco products. It is also the  
25 intention of the Legislature to clarify that such claims which were [past tense] or are  
26 brought shall be determined on their merits, without the imposition of any claim of  
27 statutory bar or categorical defense. Civ. C. §1714.45(f).

28 However, despite this plain language allowing claims by California smokers who "have  
suffered or incurred injuries, damages, or costs" in the past (and, thus, necessarily as a result of  
the tobacco industry's past conduct), and clarifying that claims which "were or are brought shall be  
determined on the merits without the imposition of any claim of statutory bar," Philip Morris argues  
that the statutory bar to suits against tobacco companies conferred by the former version of Civil  
Code Section 1714.45 forever bars claims by California smokers based on any tobacco company  
conduct prior to January 1, 1998, no matter how reprehensible. Clearly this is not the result  
intended by the Legislature and this result should not be sanctioned by this Court.

1 IV.

2 **LEGISLATIVE HISTORY OF CIVIL CODE SECTION 1714.45**

3 California Civil Code Section 1714.45 was adopted in 1987 following a back room deal  
4 fueled by tobacco money and The Tobacco Institute. The comprehensive 1987 tort reform  
5 legislation, including Civil Code Section 1714.45, was passed the next day and signed in record  
6 time, without committee hearings and without significant legislative history. See, American Tobacco  
7 Co. v. Superior Court (1989) 208 Cal. App.3d 480, 487 n. 3.

8 In 1994 the State of Minnesota filed suit against the tobacco industry. This trial is now  
9 history, but its legacy will carry on because of the revelations contained in the millions of pages of  
10 previously secret internal tobacco industry documents made public in that trial. These documents  
11 reveal that for decades, the industry knew and internally acknowledged that smoking causes  
12 cancer; that nicotine is an addictive drug and that cigarettes are the ultimate nicotine delivery  
13 device; that nicotine addiction can be perpetuated and even enhanced through cigarette design  
14 alterations and manipulations; and that "health-conscious" smokers could be captured by low-tar,  
15 low-nicotine products, all the while ensuring the marketplace viability of their products. Despite this  
16 knowledge, the tobacco manufacturers engaged in a long-term strategy of creating doubt and  
17 controversy concerning the health risks of smoking, which was the centerpiece of the industry's  
18 defense for decades.

19 Because of the revelations of the tobacco industry's past fraud and manipulation of nicotine  
20 levels, Senate Bill 67 was introduced by then Senator Quentin Kopp. The Comment in the Senate  
21 Judiciary Committee analysis dated April 8, 1997 explains the intent of Senate Bill 67:

22 "According to the author's office, this bill is intended to restore products liability law  
23 as it relates to tobacco products prior to the enactment of Civil Code Section  
24 1714.45. In support of the Amendment, he writes: 'Evidence has now become  
25 available showing tobacco companies may have deliberately manipulated the level  
26 of nicotine, a powerfully addictive substance, in tobacco products so as to create  
and sustain addiction in smokers. In addition, evidence shows the tobacco  
companies have systematically suppressed and concealed material information and  
waged an aggressive campaign of disinformation about the health consequences  
of tobacco use.

27 "In support, the California Medical Association, one of the main participants in the  
28 tort liability reform package of 1987, writes: 'At the time, it was not anticipated that  
the California courts would interpret this provision [Section 1714.45] so broadly.

1 Over the last decade, we have also learned much regarding the addictive nature of  
2 tobacco and the industry's intentional efforts to mislead the public on the health  
3 effects of tobacco. This, coupled with the court's broad interpretation of the  
California statute, has precipitated the need to change that statute and remove  
tobacco's liability protections.

4 "The Amendment would leave tobacco manufacturers and suppliers subject to  
5 products liability claims by users of the product. . . ." (Emphasis added.)

6 The Comment expressed concern that SB 67 might be deemed a prospective Amendment  
7 only:

8 "Some concern has been expressed that SB 67 would apply only to causes of action  
9 arising on or after January 1, 1998, assuming it is enacted this year. [*Plaintiff's claim*  
10 *accrued after January 1, 1998 so, even under the version of the statute initially*  
11 *proposed, the claim would be proper and the demurrer would have had to have*  
12 *been denied.*] In the absence of specific language in the legislation specifying the  
13 retroactive application, a measure will operate prospectively only upon its  
14 enactment."

15 On April 16, 1997, a mere week after concerns were expressed regarding the retroactivity  
16 of the amendments, the Senate proposed a subdivision (d) [which ultimately became subdivision  
17 (f)] which provided a statement of intent concerning the 1997 amendments:

18 "It is the intention of the Legislature in enacting the amendments to this section  
19 adopted at the 1997 to 1998 Regular Session to declare that there exists no  
20 statutory bar, or immunity from, tobacco-related personal injury, wrongful death, or  
21 other tort claims by California smokers or others who have suffered or incurred  
22 injuries, damages or costs arising from the promotion, marketing, sale, or  
23 consumption of tobacco products. It is also the intention of the Legislature to clarify  
24 that such claims which were or are brought shall be determined on their merits,  
25 without the imposition of any claim of statutory bar or categorical defense."  
26 (Emphasis added.)

27 The July 3, 1997 Floor Alert from Senator Kopp to all Assembly members explained the  
28 need for Senate Bill 67. According to that Floor Alert, "without SB 67 individual Californians are  
legally foreclosed from any remedy." That Alert states, in part:

"SB 67, as most of you undoubtedly know, simply restores California common law  
respecting product liability for tobacco manufacturers, as the law existed for years  
and years prior to January 1, 1988. It does no more and no less than that. . . .

"Secondly, the national settlement of state attorneys general, in which Attorney  
General Dan Lungren was the participating lawyer for the people of California and  
a signatory, establishes a \$4,000,000,000 per year fund to pay actual damages to  
persons injured or suing for payment of uncompensated damages from tobacco  
use.... Without SB 67, no Californian can qualify for reimbursement from the  
\$4,000,000,000 annual fund. [*Again, note the use of the past tense indicating the*  
*Legislature's intent that recovery be allowed based on the tobacco industry's past*  
*conduct.*]

1 “Thirdly, class actions by individuals representing a class of injured smokers are  
2 barred by the national settlement. Thus, as a practical matter, without SB 67  
individual Californians are legally foreclosed from any remedy.

3 “Finally, any such claimant must still overcome the hurdle of assumption of risk,  
4 which has been a successful defense for tobacco manufacturers in most cases  
nationally and pre-1988 in California. These cases are thus, difficult, but we should  
5 at least furnish individual Californians, (the people we represent) the possibility of  
reimbursement of actual personal losses. (Emphasis added.)

6 Then Governor Pete Wilson signed Senate Bill 67 on September 29, 1997, explaining that  
7 in recent years, tobacco products manufacturers and sellers enjoyed legal protection from product  
8 liability actions seeking damages suffered by consumers and third parties as a result of tobacco  
9 use. The Governor further explained that “the enactment of AB 1603 (Bustamante, D-Fresno)  
10 earlier this year removed the barrier to public entities pursuing tobacco product liability actions that  
11 are base on the defectiveness of the product, fraud or misconduct. Senate Bill 67 goes a step  
12 further and removes any remaining barrier to tobacco product liability actions, including those  
13 brought by individuals, while also protecting tobacco distributors and retailers from this litigation.”

14 The current version of Section 1714.45 of the Civil Code states:

15 “(a) In a product liability action, a manufacturer or seller shall not be liable if both of  
16 the following apply:

17 “(1) The product is inherently unsafe and the product is known to be unsafe by the  
ordinary consumer who consumes the product with the ordinary knowledge common  
18 to the community.

19 “(2) The product is a common consumer product intended for personal consumption,  
such as sugar, castor oil, alcohol, and butter, as identified in comment i to Section  
20 402A of the Restatement (Second) of Torts.

21 “(b) This section does not exempt the manufacture or sale of tobacco products by  
tobacco manufacturers and their successors in interest from product liability actions,  
22 but does exempt the sale or distribution of tobacco products by any other person,  
including, but not limited to, retailers or distributors.

23 “(c) For purposes of this section, the term “product liability action” means any action  
24 for injury or death caused by a product, except that the term does not include an  
action based on a manufacturing defect or breach of an express warranty.

25 “(d) This section is intended to be declarative of and does not alter or amend  
26 existing California law, including Cronin v. J.B.E. Olson Corp. (1972), 8 Cal.3d 121,  
and shall apply to all product liability actions pending on, or commenced after,  
27 January 1, 1988.

28 “(e) This section does not apply to, and never applied to, an action brought by a  
public entity to recover the value of benefits provided to individuals injured by a

1 tobacco-related illness caused by the tortious conduct of a tobacco company or its  
2 successor in interest, including, but not limited to, an action brought pursuant to  
3 Section 14124.71 of the Welfare and Institutions Code. In the action brought by a  
4 public entity, the fact that the injured individual's claim against the defendant may  
5 be barred by a prior version of this section shall not be a defense. This subdivision  
6 does not constitute a change in, but is declaratory of, existing law relating to tobacco  
7 products.

8 “(f) It is the intention of the Legislature in enacting the amendments to subdivisions  
9 (a) and (b) of this section adopted at the 1997-98 Regular Session to declare that  
10 there exists no statutory bar to tobacco-related personal injury, wrongful death, or  
11 other tort claims against tobacco manufacturers and their successors in interest by  
12 California smokers or others who have suffered or incurred injuries, damages, or  
13 costs arising from the promotion, marketing, sale, or consumption of tobacco  
14 products. It is also the intention of the Legislature to clarify that such claims which  
15 were or are brought shall be determined on their merits, without the imposition of  
16 any claim of statutory bar or categorical defense.

17 “(g) This section shall not be construed to grant immunity to a tobacco industry  
18 research organization.”

19 1. Because Mr. Boeken's Cancer was Diagnosed After the 1998 Amendment Became  
20 Effective, the 1998 Amendment Governs His Claims and the Issue of Retroactivity is  
21 Irrelevant

22 Plaintiff was first diagnosed with lung cancer caused by smoking Philip Morris's cigarettes  
23 after the effective date of the 1998 Amendment to Civil Code Section 1714.45. Thus, as set forth  
24 below, his cause of action against the Philip Morris accrued after the effective date of the 1998  
25 Amendment and the 1998 Amendment governs this action.

26 Philip Morris argues that applying the 1998 Amendment to its pre-1998 conduct would be  
27 an unconstitutional retroactive denial of a vested right in violation of due process. However, a  
28 statute is not being applied retroactively if the cause of action accrued after the effective date of the  
statute, as is the case here. See, Buttram v. Owens-Corning Fiberglass Corp. (1997) 16 Cal.4th  
520. Additionally, “[e]ven though a statute in some respects deals with a prior event or transaction,  
its actual effect may be prospective, and its operation valid.” 7 Witkin Summary of California Law  
(9<sup>th</sup> ed. 1988) Constitutional Law p. 675 §486. As stated by the United States Supreme Court:

“Although we have long embraced a presumption against statutory retroactivity, for  
just as long we have recognized that, in many situations, a court should `apply the  
law in effect at the time it renders its decision [citation omitted] even though that law  
was enacted after the events that gave rise to the suit. . . .”

“Even absent specific legislative authorization, application of new statutes passed

1  
2 after the events in suit is unquestionably proper in many situations. When the  
3 intervening statute authorizes or affects the propriety of prospective relief,  
4 application of the new provision is not retroactive. . . .” Landgraf v. USI Film  
5 Products (1994) 511 U.S. 244, 273.

6 The California Supreme Court is in accord:

7 “. . . [T]he critical question for determining retroactivity usually is whether the last act  
8 or event necessary to trigger application of the statute occurred before or after the  
9 statute’s effective date. [citation omitted] A law is not retroactive `merely because  
10 some of the facts or conditions upon which its application depends came into  
11 existence prior to its enactment.” People v. Grant (1999) 20 Cal.4th 150, 157.  
12 (Emphasis added.) See, also, Romo v. Estate of Bennett (1979) 97 Cal. App.3d  
13 304, 307-308 (a new statute applies to all claims which accrued after the effective  
14 date of the statute).

15 In Buttram v. Owens-Corning Fiberglass Corp. (1997) 16 Cal.4th 520 the California  
16 Supreme Court created a bright-line rule whereby claims for latent diseases, like cancer or  
17 asbestosis, "accrue" when the plaintiff is *diagnosed* with the disease, and such claims are governed  
18 by the law in effect on the date of accrual.

19 “. . . [I]n . . . a suit for personal injuries arising from a latent disease . . . applying the  
20 law in effect when the plaintiff is first diagnosed with the disease, or when the  
21 symptoms of the disease first become manifest, will not work a retroactive  
22 application of [a statute].” Buttram v. Owens-Corning Fiberglass Corp. (1997) 16  
23 Cal.4th 520, 534-535.

24 In Buttram, the court held that for the specific and limited purpose of determining whether  
25 Proposition 51 applies, a cause of action for damages resulting from a latent disease accrues when  
26 the plaintiff is diagnosed with the disease or otherwise discovers his illness or injuries. The court  
27 reasoned that to rule otherwise would thwart rather than effectuate the purpose of the tort reform  
28 measures adopted through the passage of Proposition 51, given the decades-long latency period  
involved. The Court further stated that as a practical matter to rule otherwise would make the now  
disfavored joint and several liability applicable far into the future. The same reasoning pertains here.

Here, as in Buttram, as a practical matter the interpretation of the 1998 Amendment urged  
by the Philip Morris would make the now disfavored immunity applicable far into the future. This  
result is not the result compelled by application of the 1998 Amendment to Plaintiff’s claims, nor is  
the result intended by the Legislature.

It is undisputed that Plaintiff was first diagnosed with lung cancer after Civil Code Section

1 1714.45 was amended to remove any immunity Philip Morris might have enjoyed under the prior  
2 version of the statute. Therefore, Plaintiff's causes of action accrued after the effective date of the  
3 1998 Amendment and the current version of 1714.45 applies to this action. Thus, applying the  
4 1998 Amendment to Plaintiff's claims is not an unconstitutional retroactive denial of a vested right.  
5 Hence, the 1998 Amendment, declaring that there exists "no statutory bar" to any claims against  
6 the tobacco industry and that such claims must be "determined on the merits" governs this action.

7 2. The Legislature Evidenced Clear Intent to Allow Claims Arising from *Past Misconduct* if the  
8 Claim Accrued After the Effective Date of the 1998 Amendment

9 "[A] court should ascertain the intent of the Legislature so as to effectuate the purpose of  
10 the law." Skeketee v. Lintz, Williams, & Rothberg et al. (1985) 38 Cal.3d 46, 51. The court should  
11 look to the text of the statute, giving usual, ordinary meaning to the language employed in framing  
12 the statute. Id. at 52. Significance should be given to every word, phrase, sentence and part of the  
13 act in ascertaining legislative purpose, and should avoid a construction that would render some  
14 words meaningless or surplusage. Id. "In construing statutes, the use of verb tense by the  
15 Legislature is considered significant." Hughes v. Board of Architectural Examiners (1998) 17  
16 Cal.4th 763, 776. Finally, the statutory language "must be construed in context, keeping in mind  
17 the nature and obvious purpose of the statute where they appear." Skeketee at 52.

18 ". . . Although legislative enactments are generally presumed to operate  
19 prospectively and not retroactively, . . . this presumption does not defy rebuttal. We  
20 have explicitly subordinated the presumption against the retroactive application of  
21 statutes to the transcendent canon of statutory construction that the design of the  
22 Legislature be given effect. . . . The central inquiry, therefore, is whether the  
23 Legislature intended the amendment . . . to operate retroactively. In re Marriage of  
24 Bouquet (1976) 16 Cal.3d 583, 587.

25 The key subsection in the 1998 Amendment reads:

26 "(f) It is the intention of the Legislature in enacting the amendments to subdivisions  
27 (a) and (b) of this section adopted at the 1997-98 Regular Session to declare that  
28 there exists no statutory bar to tobacco-related personal injury, wrongful death, or  
other tort claims against tobacco manufacturers and their successors in interest by  
California smokers or others who have suffered or incurred injuries, damages, or  
costs arising from the promotion, marketing, sale, or consumption of tobacco  
products. It is also the intention of the Legislature to clarify that such claims which  
were or are brought shall be determined on their merits, without the imposition of  
any claim of statutory bar or categorical defense. Civ. C. §1714.45(f).

The Legislature expressed its intent to allow claims based on past tobacco industry

1 misconduct in several ways. First, the Legislature removed "tobacco" from the list of "common  
2 consumer products" to which the statute applies and stated that the Section 1714.45 now "does not  
3 exempt the manufacture or sale of tobacco products by tobacco manufacturers . . . from products  
4 liability actions." Civ. C. §1714.45 (a), (b).

5 Next, the Legislature stated in new subdivision (f) that "no statutory bar" exists for those who  
6 "have suffered or incurred" injuries or for "claims that were or are brought". The use of the past  
7 tense in the phrase "have suffered or incurred" indicates that the Legislature intended that the 1998  
8 Amendment to allow claims based on past industry misconduct. Were the statute intended to apply  
9 to only to future misconduct, the Legislature would not have included language indicating that past  
10 injuries, which are necessarily caused by past conduct, were within the scope of the 1998  
11 Amendment. Reading this language in conjunction with the broad language which states that the  
12 1998 Amendment is intended to remove "any statutory bar" to suit against tobacco companies,  
13 compels the conclusion that the 1998 Amendment allows plaintiffs whose causes of action against  
14 the tobacco industry accrue after the effective date of the statute, to base those causes of action  
15 on past industry misconduct.

16 Clearly, the 1998 Amendment applies to claims based on the tobacco industry's past  
17 misconduct, as long as the Plaintiff's cause of action therefore accrued after the effective date of  
18 the amendment.

19 3. Legislative History Supports Plaintiff's Interpretation of the 1998 Amendment

20 The evidence which courts use to assist them in making the determination of legislative  
21 intent comes from the legislative documents which were generated before, during and after the bill  
22 in question moved through the legislative process. 7 Witkin, *Summary of California Law;*  
23 *Constitutional Law* (9<sup>th</sup> edition, 1988) at page 151 §97.

24 ". . . [W]e must address 'all pertinent factors' when attempting to divine the  
25 legislative purpose. A wide variety of factors may illuminate the legislative design,  
26 'such as context, the object in view, the evils to be remedied, the history of the times  
and of legislation upon the same subject, public policy and contemporaneous  
construction. . . ." In re Marriage of Bouquet (1976) 16 Cal.3d 583, 587.

27 The express purpose of Senate Bill 67, enacted as the 1998 Amendment, was to remedy  
28

1 the tobacco industry's past fraud.<sup>81</sup> But this remedy could be effective only by applying the  
2 Amendment to remove the industry's immunity for past failure to warn and past manipulation of  
3 consumers' expectations about the safety of cigarettes.<sup>82</sup> By contrast, the Philip Morris's claim that  
4 the 1998 Amendment applies only prospectively—thus barring claims for pre-1998  
5 misconduct—defeats this legislative purpose.

6 4. Philip Morris Never Had a Vested Right Warranting Due Process Protection

7 Philip Morris erroneously claims that the former immunity was a "vested right" warranting  
8 due process protection. Philip Morris cites Morris and Garcia as holding that an "immunity" from  
9 suit can be a "vested right" subject to due process protection.<sup>83</sup> These cases are distinguishable  
10 because they both analyzed the Legislature's attempt to retroactively repeal a long-standing rule  
11 of law, and neither involved a temporary, fraudulently obtained immunity that was amended to  
12 return the law to its prior state. There can be no due process violation when a defendant's course  
13 of conduct is in violation of state civil law, such as is the case here:

14 “As to the constitutionality of such a retroactive application of the statute, . . . there  
15 can be no due process objection when the defendant's course of conduct is in  
16 violation of the longstanding public policy . . . or in contravention of state civil or  
17 criminal law.” United States v. Perry (1970) 431 F.2d. 1020, 1024.

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18 <sup>81</sup> The bill's author, Senator Kopp, told both the Senate and the Assembly that the "problem or  
19 deficiency in the present law" that SB 67 "seeks to remedy" was the industry's *past*  
20 misconduct—nicotine "manipulat[ion]" and "suppress[ion]" and "conceal[ment]" of health  
information. See *Bouquet, supra*, 16 Cal.3d at pp. 589-590 (courts can consider the author's  
arguments to the Legislature in favor of a bill).

21 <sup>82</sup> The Legislature intended to allow California smokers to recover for "unreimbursed" medical  
22 expenses and lost wages for *past* smoking injuries that necessarily resulted from *past* misconduct:

23 “Hundreds of millions of dollars are spent annually . . . to mitigate the health effects of  
24 tobacco . . . . Thousands of people die each year because of the effects of tobacco . . . .  
*Meritorious claims* against tobacco products could significantly reduce the amount of  
consumption of tobacco products and reduce health care costs for all Californians.”

25 But, because of the long latency period for smoking-related illnesses, present "meritorious claims"  
26 are necessarily based on *past* smoking. Hence, such claims can only be brought if the 1998  
27 Amendment confers liability for the tobacco industry's past misconduct in defrauding consumers,  
failing to warn of cigarettes' hazards, and manipulating consumers' expectations.

28 <sup>83</sup> Morris v. Pacific Electric Ry. Co. (1935) 2 Cal.2d 764, 768; In re Marriage of Garcia (1998) 67  
Cal.App.4th 693, 698-699.

1 Philip Morris has no "vested right" in the temporary immunity because it obtained it  
2 fraudulently. To hold that the tobacco companies had a vested right in the temporary immunity of  
3 former section 1714.45 would be to sanction Defendant's fraud.

4 5. Applying the 1998 Amendment to Defendants' Past Misconduct is Consistent with Due  
5 process

6 Vested rights are not immutable; the state, exercising its police power, may impair such  
7 rights when considered reasonably necessary to protect the health, safety, morals and general  
8 welfare of the people.

9 "... The vesting of property rights, consequently, does not render them immutable.  
10 'Vested rights, of course may be impaired 'with due process of law' under many  
11 circumstances. The state's inherent sovereign power includes the so-called 'police  
12 power' right to interfere with vested property rights whenever reasonably necessary  
13 to the protection of the health, safety, morals, and general well-being of the people.  
14 . . . The constitutional question, on principle, therefore, would seem to be, not  
15 whether a vested right is impaired by a . . . law change, but whether such change  
16 reasonably could be believed to be sufficiently necessary to the public welfare as  
17 to justify the impairment.' . . ." In re Marriage of Bouquet (1976) 16 Cal.3d 583, 592-  
18 593.<sup>84</sup>

19 In Nelson v. Flintkote Co. (1985) 172 Cal. App.3d 727 the defendants argued, just as Philip  
20 Morris does here, that application of a remedial statute to impose liability for their past conduct  
21 "would constitute an impermissible retroactive revival of a barred cause of action in violation of their  
22 vested right of immunity from liability." Nelson v. Flintkote Co. (1985) 172 Cal. App.3d 727, 730-  
23 731. The Court of Appeal disagreed:

24 "... [E]ven if we were to interpret application of section 340.2 to the case herein as  
25 impairing a vested property right in immunity to suit by reviving an otherwise barred  
26 cause of action, such application would not be beyond the Legislature's power.  
27 Although California law generally attempts to protect vested property rights against  
28 interference from retroactive application of laws, such vested rights are not  
sacrosanct or immutable. . . .Retroactive legislation, though frequently disfavored,  
is not absolutely proscribed. . . . It is justified where, as here, such retroactive

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84 To determine whether the due process clause is contravened, the courts must balance the *state's interest* versus the *defendant's reliance*:

- (a) **State interest:** 'the significance of the state interest served by the law'; and 'the importance of the retroactive application of the law to the effectuation of that interest';
- (b) **Reliance interest:** 'the extent of reliance upon the former law'; 'the legitimacy of that reliance'; 'the extent of actions taken on the basis of that reliance'; and 'the extent to which the retroactive application of the new law would disrupt those actions.' See, Bouquet, supra; In re Marriage of Buol (1985) 93 Cal.3d 157.

1 application reasonably could be believed to be necessary to serve the public  
2 welfare. . . .

3 "The state certainly has an interest in protecting innocent asbestosis victims from  
4 toxic tortfeasors. Asbestosis may take up to 35 years to develop from first  
5 exposure. . . .

6 ". . . Nor can the alleged toxic tortfeasors claim they are entitled to psychological  
7 protection from surprise suits when most knew or should have known back in the  
8 1950's of the toxic nature of the materials they were supplying. . . . `This is not a  
9 case where [defendants'] conduct would have been different if the present rule had  
10 been known and the change foreseen. Additionally, they could not reasonably have  
11 been relying on the `discovery' rule. . . ." Nelson v. Flintkote Co. (1985) 172 Cal.  
12 App.3d 727, 734-736.

13 Just as in Nelson, supra, the state's interest in allowing consumers to sue "toxic tortfeasors,"  
14 i.e., the tobacco companies, for their reprehensible past misconduct is very "significant." As shown  
15 above, Senator Kopp brought the 1998 Amendment to the Legislature to "remedy" the "problem"  
16 that the tobacco companies' massive fraud had led to an undeserved immunity from products-  
17 liability suits. Longstanding Supreme Court authority also shows that the State has a significant  
18 interest in protecting consumers from fraud<sup>85</sup> and from defective products.<sup>86</sup> Moreover, the *only* way  
19 to protect these consumer interests is by applying the 1998 Amendment to past misconduct. If the  
20 Amendment does not apply to past misconduct, then all it did was allow consumers who start  
21 smoking in 1998 to sue for injuries that will not manifest for at least 20 more years. Such a result  
22 would not serve the Legislature's purpose of providing the smokers who were defrauded by the  
23 tobacco companies over the past five decades with a remedy for that fraud. Hence, the state  
24 interest in retroactive application is very high.<sup>87</sup>

25 By contrast, Philip Morris's reliance interest is nonexistent. Before former section 1714.45  
26 was enacted in 1988, the tobacco companies had no immunity. Hence, when Philip Morris was  
27 defrauding the public from 1954 to 1987—when the vast majority of its misconduct giving rise to this  
28

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25 <sup>85</sup> See Civil Code §§ 1709 (liability for fraud), 3294 (punitive damages for fraud).

26 <sup>86</sup> See, e.g., Barker v. Lull Engineering Co., Inc. (1978) 20 Cal.3d 413.

27 <sup>87</sup> Moreover, the 1998 Amendment does nothing more than repeal the fraudulently induced statutory  
28 immunity. It does not affect any "common law defenses, such as assumption of the known risk." ,  
Exh. 1, A.3., p. 2. Hence, the 1998 Amendment does not strip the tobacco industry of any long-  
standing, non-fraudulently-induced defenses that it had prior to 1988.

1 action took place—Philip Morris did not rely on anything. At most Philip Morris could claim reliance  
2 from 1988 to 1997, but its has failed to show any reliance whatsoever, let alone any "actions"  
3 based on any reliance. From 1988 to 1997, Philip Morris did not act any differently in California  
4 than it did in other states where their conduct was not immune. Instead, Philip Morris continued  
5 to defraud the public equally in all states. Thus, under the Supreme Court's factors, the State's  
6 interest substantially outweighs the tobacco industry's reliance interest and application of the 1998  
7 Amendment to the Philip Morris's past misconduct comports with due process.

8 Applying the 1998 Amendment to the Philip Morris's past misconduct does not, as  
9 Defendant contends, penalize tobacco companies for conduct that was not even "tortious" when  
10 it occurred. From the 1950's to 1988, when the vast majority of Defendant's misconduct occurred,  
11 that conduct was all tortious. Moreover, the former immunity rendered nontortious only marketing  
12 of "unadulterated" tobacco to "voluntary" smokers who "knew" of smoking's hazards.<sup>88</sup> Because  
13 (1) Defendant's fraud kept consumers from knowing or believing smoking's true hazards, and (2)  
14 nicotine manipulation and addiction made smoking not "voluntary," all of Defendant's conduct was  
15 tortious.<sup>89</sup> This fact defeats Defendant's claim that applying the 1998 Amendment to their past  
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17 <sup>88</sup> Richards v. Owens-Illinois, Inc. (1997) 14 Cal. 4th 985.

18 <sup>89</sup> The immunity granted under the former version of Civil Code section 1714.45 is limited. Even in a  
19 classic product liability action, a demurrer to a plaintiff's action could not be sustained if a smoker  
20 could demonstrate under Richards v. Owens-Illinois, Inc., 14 Cal. 4th 985 (1997) that he or she  
21 was either not a voluntary smoker or was not aware of all the risks. Plaintiff was not a "knowing"  
22 and "voluntary" smoker, because when he began smoking neither she nor ordinary consumer  
23 knew of smoking's hazards, instead believing Philip Morris's fraudulent misrepresentations that  
24 cigarettes were "not injurious" and its "deceptive" advertising claims that smoking was a healthy  
25 activity. Second, Plaintiff did not encounter smoking's risks "voluntarily" because (a) he started as  
26 a *minor*, lacking the "maturity" to make a voluntary decision to smoke, and (b) he was soon  
27 *addicted*, which prevented his continued smoking from being voluntary. Hence, the former  
28 immunity can not bar Plaintiff's claims.

In City and County of San Francisco v. Philip Morris Inc. (N.D. Cal. 1997) 957 F.Supp. 1130,  
1140, the Court, in deciding an action brought by various counties against cigarette  
manufacturers, held that "California law recognizes a distinction between claims based on  
fraudulent conduct and claims based on defects in a product." (Emphasis added.) The Court  
approvingly cited Khan v. Shiley (1990) 217 Cal. App.3d 848, which recognized the distinction  
between fraud actions and actions based on smoking and health. Based on this distinction, the  
Court found that plaintiffs' state law fraud and special duty claims were not barred by the former  
version of Civil Code Section 1714.45. City and County of San Francisco, *supra*, 957 F.Supp. at  
1140.

1 misconduct would violate the "ex post facto clauses" of the state and federal constitutions by  
2 supposedly allowing punitive damage liability to be imposed for conduct that was not even "tortious"  
3 when it occurred.

4 For the foregoing reasons, none of Plaintiff's causes of action are barred by Civil Code  
5 Section 1714.45.

6 6. Ample Evidence Supported the Punitive Damage Award

7 As set forth above, and more particularly, in Plaintiff's Opposition to Philip Morris's Motion  
8 for New Trial, Mr. Boeken produced clear and convincing evidence of Philip Morris's massive fraud  
9 on the American public, including Mr. Boeken, which has resulted in the deaths of approximately  
10 400,000 Americans annually and which will soon result in Mr. Boeken's death from lung cancer.

11 The appellate courts of the State of California have unequivocally held that a plaintiff in a  
12 product liability action has a right to recover punitive damages. The court in G.D. Searle & Co. v.  
13 Superior Court (1975) 49 Cal.App.3d 22, stated:

14 In California the award of damages by way of example or punishment is controlled  
15 by Civil Code section 3294, which authorizes that kind of award against the  
16 tortfeasor who has been guilty of 'oppression, fraud, or malice, express or implied.'  
17 A product liability action . . . may furnish the occasion for the award, provided that  
18 the supplier's conduct satisfies the exemplary damage criterion of the particular  
19 jurisdiction. 49 Cal.App.3d 22, 32.

20 The vast majority of federal courts that have addressed the issue have declined to strike  
21 punitive damage awards merely because they constitute repetitive punishment for the same  
22 conduct. Dunn v. Hovic, supra, at 1385, citing numerous asbestos cases rejecting this argument.  
23 State courts as well have rejected such a contention, both on due process and common law tort  
24 grounds.

25 We believe, to the contrary, that unless a particular defendant has made the  
26 showing requisite to a finding of a due process violation as to it, the lower courts  
27 have an obligation to follow existing legal principles. In this connection, we note that  
28 while the debate on punitive damages has raged in commentary and even among  
judges, the Supreme Court of the United States has had various opportunities in  
recent years to restrict or redirect punitive damages awards, and it has pointedly  
failed to do so. ...We would be intrepid indeed were we to use this case as a  
vehicle to iterate a blanket policy judgment against punitive damages in asbestos  
cases in light of the Supreme Court's studied silence on the policy issue. Dunn v.  
Hovic, (3rd Cir 1993) 1 F 3d 1371, 1388.

The Supreme Court of the United States has upheld punitive damages as constitutional as

1 long as procedural safeguards are in place. Pacific Mutual Life Ins. Co. v. Haslip (1991) 111 S.Ct.  
2 1032. TXO Production Corp. v. Alliance Resources Corp. (1993) 509 U.S. 443. The California  
3 process of determining the validity of punitive damage awards complies with the due process  
4 requirements of the Federal Constitution. Wollersheim v. Church of Scientology (1992) 10  
5 Cal.App.4th 370; Hilgedick v. Koehring Finance Corp. (1992) 12 Cal.App.4th 330.

6 Numerous California cases approve punitive damage awards against manufacturers who  
7 consciously disregard their product's known risk of severe injury or death.<sup>90</sup> This case differs only  
8 in that Philip Morris's misconduct was far more reprehensible and harmed far more people.

9 The California punitive scheme creates a three-step hurdle. First, the jury must determine  
10 by clear and convincing evidence that the defendants' conduct was malicious, oppressive or  
11 fraudulent. This is a higher burden of proof than under the Alabama scheme upheld in Haslip,  
12 which only required proof by a preponderance of the evidence. Haslip, supra, at 1046 n.11. The  
13 jury herein found by clear and convincing evidence that defendants conduct was malicious,  
14 oppressive or fraudulent.

15 The jury was properly instructed to decide whether "clear and convincing evidence" showed  
16 that Philip Morris had acted with "oppression, malice, or fraud,"<sup>1</sup> defined as follows:

17 Oppression: "despicable conduct that subjects a person to cruel and unjust hardship,  
18 in conscious disregard of that person's rights."

19 Malice: conduct "intended . . . to cause injury to the plaintiff or despicable conduct  
20 which is carried on . . . with a willful and conscious disregard for the rights or safety of others."

21 Fraud: "an intentional misrepresentation, deceit, or concealment of a material fact  
22 known to the defendant with the intention . . . [of] depriving a person of property or legal rights or  
23

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24 <sup>90</sup> E.g., Hasson v. Ford Motor Company, supra, 32 Cal.3d at pp. 402-403 (car manufacturer knew of  
25 brake-loss problem but deliberately failed to warn or to research the problem); West v. Johnson &  
26 Johnson Prods., Inc. (1985) 174 Cal.App.3d 831 (tampon manufacturer ignored 150 complaints of  
27 toxic shock syndrome over five-year period); Hilliard v. A.H. Robins Co. (1983) 148 Cal.App.3d  
28 374, 397 (defendant continued to market IUD after learning of its hazards); Vossler v. Richards  
Mfg. Co. (1983) 143 Cal.App.3d 952 (defendant concealed improper sizing of prosthetic knee  
implant); Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d 757, 818 (defendant ignored crash  
tests showing that injury was a "virtual certainty"); Toole, supra, 251 Cal.App.2d at p. 689 (drug  
manufacturer falsified laboratory findings to the FDA).

1 otherwise causing injury."<sup>91</sup>

2 The jury was properly instructed (1) that Philip Morris's misconduct was "despicable" if it was  
3 "so vile, base, contemptible, miserable, wretched, or loathsome that it would be looked down upon  
4 and despised by ordinary, decent people," and (2) that Philip Morris acted with "conscious disregard  
5 of the rights or safety of others" if it was "aware of the probable dangerous consequences of [its]  
6 conduct and wilfully and deliberately fail[ed] to avoid those consequences."<sup>92</sup> Philip Morris does  
7 not challenge any of these instructions. The jury followed these proper instructions and found there  
8 was clear and convincing evidence that Philip Morris had acted with "oppression, malice or fraud"  
9 and, consequently, awarded punitive damages against Philip Morris.

10 The second procedural safeguard is that the jury must then make a second separate finding  
11 that punitive damages should be awarded. The question put to the jury is, "Shall punitive damages  
12 be assessed against defendants?" This enables the jury to award punitive damages or not,  
13 emphasizing that punitive damages are discretionary and not mandatory, even after the jury's  
14 finding of clear and convincing evidence of malice, fraud or oppression.

15 The third procedural safeguard is the charge to the jury. BAJI 14.72.2, states:

16 You must now determine whether you should award punitive damages against  
17 defendant(s) for the sake of example and by way of punishment. Whether punitive  
18 damages should be imposed, and if so, the amount thereof, is left to your sound  
19 discretion, exercised without passion or prejudice.

19 If you determine that punitive damages should be assessed against a defendant,  
in arriving at the amount of such an award, you must consider:

20 (1) The reprehensibility of the conduct of the defendant.

21 (2) The amount of punitive damages which will have a deterrent  
22 effect on the defendant in the light of defendant's financial condition.

23 (3) That the punitive damages must bear a reasonable relation to  
the injury, harm, or damage actually suffered by the plaintiff.

24 This jury instruction has been found to meet the requirements of Haslip. See, Wollersheim  
25 and Hilgedick, supra.

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27 <sup>91</sup> See, Civil Code § 3294, subd. (c); Tomaselli v. Transamerica Ins. Co. (1994) 25 Cal.App.4th  
1269, 1286-1287.

28 <sup>92</sup> See Tomaselli, supra, 25 Cal.App.4th at p. 1287.

1 Philip Morris offers for a sale a product it knows will eventually kill a large proportion of those  
2 who use it. The risk of harm posed by its cigarettes is "highly unreasonable" because it is a risk  
3 of serious disease and death, and because it is highly probable that the lifelong smoker will suffer  
4 that harm. Philip Morris has willfully and consciously disregarded that unreasonable risk because  
5 it made vast fortunes doing so while denying the harm those cigarettes continue to cause. Philip  
6 Morris's disregard of the health, safety and welfare of its consumers is willful and conscious, as  
7 their internal documents show a willing exploitation of the psychological and physiological needs  
8 of young and old smokers alike.

9 It is hard to conceive of a more appropriate factual situation for the imposition of punitive  
10 damages. Philip Morris's reaction to the bad news that smoking causes lung cancer did not involve  
11 a mere lack of action: it involved massive cover-up, deception and misrepresentations. Philip  
12 Morris traded human health for enormous wealth. In this case, Philip Morris got what it deserved.

13 **V.**

14 **CONCLUSION**

15 For the foregoing reasons, the Defendant Philip Morris Incorporated's Motion for Judgment  
16 Notwithstanding the Verdict should be denied.

17 Dated: July 26, 2001

LAW OFFICES OF MICHAEL J. PIUZE

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19 By: \_\_\_\_\_  
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