

1 LAW OFFICES OF MICHAEL J. PIUZE
Michael J. Piuze, SBN 51342
2 Holly Hostrop, SBN 108403
Geraldine Weiss, SBN 168455
3 11755 Wilshire Blvd., Suite 1170
Los Angeles, California 90025
4 Telephone: (310) 312-1102
Facsimile: (310) 473-0708
5

6 Attorneys for Plaintiffs
7

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, INC., et al.,)
15 Defendants.)
16 _____)

Case No. BC 226593

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO PHILIP MORRIS,
INC.'S DEMURRER**

Date: June 7, 2000
Time: 8:30 a.m.
Dept: 55
Complaint Filed: May 16, 2000

Judge: Honorable Cesar C. Sarmiento

FILED CONCURRENTLY HEREWITH:

OPPOSITION TO PHILIP MORRIS,
INC.'S MOTION TO STRIKE
PORTIONS OF PLAINTIFF'S
COMPLAINT; APPENDIX OF NON-
CALIFORNIA AUTHORITIES;
REQUEST FOR JUDICIAL NOTICE;
DECLARATION OF MICHAEL J.
PIUZE; [PROPOSED] ORDER; AND
PROOF OF SERVICE

24 //
25 //
26 //
27 //
28 //

1 **TABLE OF CONTENTS**

2

3 TABLE OF AUTHORITIES3

4 I. INTRODUCTION.....5

5 II. LEGISLATIVE HISTORY OF CIVIL CODE SECTION 1714.45.....6

6 III. LEGAL ARGUMENT.....10

7 A. Because Plaintiff’s Cancer Was Diagnosed After The 1998
8 Amendment Became Effective, The 1998 Amendment Governs
His Claims.....10

9 B. The 1998 Amendment Applies To This Action Because It “Clarifies”
10 California Law.....11

11 C. The Legislature Evidenced Clear Intent To Allow Claims Arising From Past
Fraudulent Misconduct.....12

12 1. The Legislative History of the 1998 Amendment
13 Compels the Conclusion that the Legislature Intended for it to
Apply Retroactively.....14

14 D. Retroactive Application of Section 1714.45 Satisfies Due Process.....15

15 1. Even if the tobacco companies' immunity under the former
16 Section 1714.45 was a "vested right," the Legislature's
retroactive Amendment of that right was still consistent with
17 due process.....16

18 E. The Former Immunity Barred Only *Product Liability* Actions By
Voluntary and *Knowing* Smokers.....19

19 F. Plaintiff’s Fourth Cause Of Action For Deceit/Fraudulent Concealment Is
20 Pled With The Requisite Specificity.....20

21 G. Plaintiff Has Clearly Pleaded Conspiracy.....21

22 H. Plaintiff’s Claim For Breach Of Express Warranty Is Not Barred..... 21

23 I. Plaintiff’s Claims For Punitive Damages Are Proper.....22

24 IV. CONCLUSION.....22

TABLE OF AUTHORITIES

FEDERAL AND STATE CASES

1
2
3 American Tobacco Co. v. Superior Court (1989) 208 Cal.App.3d 480. **5,6**
4 Barker v. Lull Engineering Co., Inc. (1978) 20 Cal.3d 413 **18**
5 Becker v. Volkswagen of America, Inc. (1975) 52 Cal. App.3d 794 **22**
6 Bennett v. Suncloud, (1997) 56 Cal.App.4th 91, 97 **19**
7 Buttram v. Owens-Corning Fiberglas Corp. (1997) 16 Cal.4th 520. **10,11**
8 City and County of San Francisco v. Philip Morris Inc. (N.D. Cal. 1997) 957 F.Supp. 1130
9 1140 **19,20**
10 Com. v. Payne, 31 Cal. 2d 210, 214 **12**
11 Cronin v. J.B.E. Olson Corp. (1972), 8 Cal.3d 121 **9,12**
12 Evangeltos v. Superior Court (1988) 44 Cal.3d 1188, 1209. **14**
13 Hauter v. Zogarts (1975) 14 Cal.3d 104, 112-13. **21**
14 Hughes v. Board of Architectural Examiners (1998) 17 Cal.4th 763, 776. **13**
15 In re Marriage of Bouquet, 16 Cal.3d 583, 587 (1976). **13,14,17**
16 In re Marriage of Garcia (1998) 67 Calliope.4th 693, 698-699. **15,16**
17 Khan v. Shiley, Inc., (1990) 217 Cal.App.3d 848, 855-58 **19**
18 Landgraf v. USI Film Products (1994) 511 U.S. 244, 273. **10**
19 Morris v. Pacific Electric Ry. Co. (1935) 2 Cal.2d 764, 768; **16**
20 Nelson v. Flintkote Co. (1985) 172 Cal. App.3d 727 **17**
21 People v. Grant (1999) 20 Cal.4th 150, 157. **10**
22 Richards v. Owens-Illinois, Inc., 14 Cal. 4th 985 (1997) **19**
23 Romo v. Estate of Bennett (1979) 97 Cal. App.3d 304, 307-308. **11**
24 Skeketee v. Lintz, Williams, & Rothberg et al. (1985) 38 Cal.3d 46, 51 **12,13**
25 Tietz v. Los Angeles Unified School District (1965) 238 Cal.App.2d 905, 913 **21**
26 United States v. Perry (1970) 431 F.2d. 1020, 1024 **16**
27 Unruh v. Truck Insurance Exchange (1972) 7 Cal.3d 616, 631. **21**
28 Velasquez v. Fibreboard Paper Products Corp. (1979) 97 Cal. App.3d 881, 887 **11**
Western Security Bank, 15 Cal. 4th at 244 **12**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STATUTES, CODES AND TREATISES

7 Witkin Summary of California Law (9th ed. 1988) Constitutional Law [10,11](#)

BAJI 9.00.5. 9.19. [19,20](#)

California Senate Bill 67 [7-8, 10,14,15](#)

California AB 1603 [8](#)

Civil Code Section 1709 [18](#)

Civil Code Section 1714.45 [5-7, 9-16, 18-20](#)

Civil Code Section 2313 [21](#)

Civil Code Section 3294 [18](#)

Civil Code Section 3517 [5](#)

Civil Code Section 3523. [5](#)

Restatement (Second) of Torts, Section 402A, Comment i. [9](#)

Welfare and Institutions Code Section 14124.71 [9](#)

1 **INTRODUCTION**

2 It is inconceivable that the Legislature is powerless to revoke an immunity that would
3 never have been granted in the first place, but for a decades-long course of fraudulent conduct
4 perpetuated by an entire industry upon the American public. Such an interpretation of Civil
5 Code Section 1714.45 would fly in the face of the fundamental maxims of jurisprudence that
6 “[n]o one can take advantage of his own wrong” (Civ. C. §3517) and that “[f]or every wrong
7 there is a remedy.” Civ. C. §3523. Yet this is the result of applying the interpretation of Civil
8 Code Section 1714.45 urged by Defendant Philip Morris, Incorporated (“Philip Morris”) to the
9 facts of this case.

10 From 1988 through 1997 former Civil Code section 1714.45 barred **only "products**
11 **liability"** suits by consumers who smoked with "**knowledge**" that cigarettes were "**inherently**
12 **unsafe.**" See, Ex. 2. The former version of Civil Code Section 1714.45 was given retroactive
13 effect by the Court **even though the Legislature did not expressly declare it to be**
14 **retroactive.** See, American Tobacco Co. v. Superior Court (1989) 208 Cal.App.3d 480.

15 In 1997 the California Legislature amended Civil Code Section 1714.45 (the “1998
16 Amendment”) **to repeal the tobacco industry’s immunity from personal injury suits**
17 **because:**

18 “Evidence has now become available showing **tobacco companies may**
19 **have deliberately manipulated the level of nicotine, a powerfully**
20 **addictive substance, in tobacco products so as to create and sustain**
21 **addiction in smokers.** In addition, evidence shows the tobacco companies
22 have **systematically suppressed and concealed material information and**
23 **waged an aggressive campaign of disinformation** about the health
24 consequences of tobacco use.” See Exhibit 1, #3, page 2-3.

25 Thus, **the very basis for the 1998 Amendment** by the Legislature is the recently available
26 evidence concerning the cigarette industry’s **past conduct.**

27 In enacting the 1998 Amendment the California Legislature clearly expressed its **intent**
28 that personal injury actions were to be allowed based on the cigarette industry’s **past**
29 **conduct.**

30 “(f) It is **the intention of the Legislature** in enacting the amendments to
31 subdivisions (a) and (b) of this section adopted at the 1997-98 Regular Session
32 to declare that there exists **no statutory bar** to tobacco-related personal injury,
33 wrongful death, or other tort claims against tobacco manufacturers and their

1 successors in interest by California smokers or others who have **suffered** or
2 **incurred** [note the Legislature's use of the **past tense** indicating the
3 **Legislature's intent** to apply the amendments **retroactively**] injuries,
4 damages, or costs arising from the promotion, marketing, sale, or consumption
5 of tobacco products. It is also the intention of the Legislature to clarify that such
6 claims which **were** [**past tense**] or are brought shall be determined on their
7 merits, without the imposition of any claim of **statutory bar** or categorical
8 defense. Civ. C. §1714.45(f).

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

17 **II. LEGISLATIVE HISTORY OF CIVIL CODE SECTION 1714.45**

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

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

1 which was the centerpiece of the industry's defense for decades.

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

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

16 "In support, the California Medical Association, one of the main participants in
17 the tort liability reform package of 1987, writes: 'At the time, it was not
18 anticipated that the California courts would interpret this provision [Section
19 1714.45] so broadly. Over the last decade, we have also learned much
20 regarding the **addictive nature of tobacco and the industry's intentional**
21 **efforts to mislead** the public on the health effects of tobacco. This, coupled
22 with the court's broad interpretation of the California statute, has precipitated
23 the need to change that statute and remove tobacco's liability protections.

24 "The Amendment would leave tobacco manufacturers and suppliers subject to
25 products liability claims by users of the product. . . ." (Emphasis added.) See,
26 Exhibit 1, #3, page 2-3.

27 The Comment expressed concern that SB 67 might be deemed a prospective
28 Amendment only:

29 "**Some concern has been expressed that SB 67 would apply only to**
30 **causes of action arising on or after January 1, 1998, assuming it is**
31 **enacted this year.** [The claim of Plaintiff Richard Boeken arose **after** January
32 1, 1998 so, even under the version of the statute initially proposed, his claim
33 would be proper and Philip Morris' demurrer would have had to have been
34 denied.] In the absence of specific language in the legislation specifying the
35 retroactive application, a measure will operate prospectively only upon its
36 enactment." See, Exhibit 1, #3, page 3.

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

41 "It is the **intention** of the Legislature in enacting the amendments to this section
42 adopted at the 1997 to 1998 Regular Session to **declare that there exists no**
43 **statutory bar, or immunity from**, tobacco-related personal injury, wrongful
44 death, or other tort claims by California smokers or others who **have suffered**

1 **or incurred** injuries, damages or costs arising from the promotion, marketing,
2 sale, or consumption of tobacco products. It is also the intention of the
3 Legislature to **clarify** that such claims which **were or are brought** shall be
4 **determined on their merits, without the imposition of any claim of**
5 **statutory bar or categorical defense.**” (Emphasis added.) See, Exhibit 1,
6 #1c.

7 The July 3, 1997 **Floor Alert** from Senator Kopp to all Assembly members explained
8 the need for Senate Bill 67. According to that Floor Alert, "without SB 67 individual
9 Californians are legally foreclosed from any remedy." See, Exhibit 1, #10, documents A-1 and
10 A-2. That Alert states, in part:

11 SB 67, as most of you undoubtedly know, simply restores California common
12 law respecting product liability for tobacco manufacturers, as the law existed for
13 years and years prior to January 1, 1988. It does no more and no less than that.
14 (See page 4, lines 14-22 of the bill itself.) ...

15 Secondly, the national settlement of state attorneys general, in which Attorney
16 General Dan Lungren was the participating lawyer for the people of California
17 and a signatory, establishes a \$4,000,000,000 per year fund to pay actual
18 damages to persons **injured** or suing for payment of **uncompensated**
19 damages from tobacco use.... Without SB 67, no Californian can qualify for
20 **reimbursement** from the \$4,000,000,000 annual fund. [Again, note the use of
21 the **past tense** indicating retroactive intent]

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

25 Finally, any such claimant must still overcome the hurdle of assumption of risk,
26 which has been a successful defense for tobacco manufacturers in most cases
27 nationally and pre-1988 in California. **These cases are thus, difficult, but we**
28 **should at least furnish individual Californians, (the people we represent)**
the possibility of reimbursement of actual personal losses. (Emphasis
added.) See Exhibit 1, #10, documents A-1 and A-2.

Then Governor Pete Wilson signed Senate Bill 67 on September 29, 1997, explaining
that in recent years, tobacco products manufacturers and sellers enjoyed legal protection from
product liability actions seeking damages suffered by consumers and third parties as a result
of tobacco use. The Governor further explained that “the enactment of AB 1603 (Bustamante,
D-Fresno) earlier this year removed the barrier to public entities pursuing tobacco product
liability actions that are base on the defectiveness of the product, fraud or misconduct. Senate
Bill 67 goes a step further and **removes any remaining barrier to tobacco product**
liability actions, including those brought by individuals, while also protecting tobacco
distributors and retailers from this litigation.” See, Exhibit 1, #12.

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

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

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

6 “(2) The product is a common consumer product intended for personal consumption,
7 such as sugar, castor oil, alcohol, and butter, as identified in comment i to Section
8 402A of the Restatement (Second) of Torts.

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

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

16 “(d) This section is intended to be declarative of and does not alter or amend existing
17 California law, including Cronin v. J.B.E. Olson Corp. (1972), 8 Cal.3d 121, and **shall
18 apply to all product liability actions pending on, or commenced after, January
19 1, 1988.**

20 “(e) This section does not apply to, and never applied to, an action brought by a public
21 entity to recover the value of benefits provided to individuals injured by a
22 tobacco-related illness caused by the tortious conduct of a tobacco company or its
23 successor in interest, including, but not limited to, an action brought pursuant to Section
24 14124.71 of the Welfare and Institutions Code. In the action brought by a public entity,
25 the fact that the injured individual's claim against the defendant may be barred by a
26 prior version of this section shall not be a defense. This subdivision does not constitute
27 a change in, but is declaratory of, existing law relating to tobacco products.

28 “(f) **It is the intention of the Legislature in enacting the amendments to
subdivisions (a) and (b) of this section adopted at the 1997-98 Regular Session
to declare that 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.**

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

“**SEC. 2 The legislature hereby finds and declares that to the extent that the
common law rules as to product liability actions with respect to tobacco were
superseded by the version of section 1714.45 of the Civil Code added by
Chapter 1498 of the Statutes of 1987, this act restores those common law rules
with respect to the manufacture or sale of tobacco products by tobacco
manufacturers and their successors-in-interest. See, Exhibit 3 (Section 2 of
Senate Bill 67 was not codified.)**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III. LEGAL ARGUMENT

The legal standard on demurrer is well known to the Court.

E. Because Plaintiff’s Cancer Was Diagnosed After The 1998 Amendment Became Effective, The 1998 Amendment Governs His Claims

Philip Morris argues that applying the current version of Civil Code Section 1714.45 to its pre-1998 conduct would be an unconstitutional retroactive denial of a vested right in violation of due process. However, **a statute is not being applied retroactively if the cause of action arose after the effective date of the statute**, as is the case here. See, Buttram v. Owens-Corning Fiberglas 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 (9th ed. 1988) Constitutional Law p. 675 §486.¹

“ . . . [T]he critical question for determining retroactivity usually is **whether the last act or event necessary to trigger application of the statute occurred before or after the statute’s effective date.** [citation omitted] A law is not retroactive `merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment.” People v. Grant (1999) 20 Cal.4th 150, 157. (Emphasis added.)

Plaintiff Richard Boeken was diagnosed with lung cancer, a latent disease, in **1999**, over a year after the effective date of the 1998 amendment to Civil Code Section 1714.45. Thus, the last event necessary to trigger application of the statute, Plaintiff’s diagnosis of lung cancer, occurred after the statute’s effective date and the 1998 Amendment should apply to

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

1 Plaintiff's claim.

2 In Buttram v. Owens-Corning Fiberglas Corp. (1997) 16 Cal.4th 520 the California
3 Supreme Court created a bright-line rule whereby claims for latent diseases, like cancer or
4 asbestosis, "accrue" when the plaintiff is *diagnosed* with the disease, and **such claims are**
5 **governed by the law in effect on the date of accrual.**²

6 ". . . [I]n . . . a suit for personal injuries arising from a latent disease . . . **applying**
7 **the law in effect when the plaintiff is first diagnosed with the disease**, or
8 when the symptoms of the disease first become manifest, **will not work a**
9 **retroactive application** of [a statute]." Buttram v. Owens-Corning Fiberglas
10 Corp. (1997) 16 Cal.4th 520, 534-535.

11 In sum, under *Buttram*, Plaintiff's claims "accrued" after the 1998 Amendment was
12 effective. Hence, the 1998 Amendment, declaring "**no statutory bar**" to any claims against
13 the tobacco industry, governs Plaintiff's claims and Defendants' demurrer must be overruled.

14 **F. The 1998 Amendment Applies To This Action Because It**
15 **"Clarifies" California Law**

16 It is black letter law that "**When a statute provides that it clarifies or declares**
17 **existing law, it is indicative of legislative intent that the statute applies to all existing**
18 **causes of action from the date of its enactment, and the court must give effect to this**
19 **intention** unless there is some constitutional objection." 7 Witkin Summary of California Law
20 (9th ed. 1988, 1999 Supp. to Vol. 7) Constitutional Law p. 305 §486. Here, clarification of
21 California law is precisely what the statute says it is doing and precisely what the statute is
22 doing:

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

27 "(f) . . . It is also the intention of the Legislature to **clarify** that such claims which were
28 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(d), (f).

29 ²See, also, Velasquez v. Fibreboard Paper Products Corp. (1979) 97 Cal. App.3d 881, 887 ("We agree
30 that in a negligence or strict liability action, **discovery is the appropriate test for determining accrual**
31 **of a cause of action for a progressive disease.** . . ."); Romo v. Estate of Bennett (1979) 97 Cal. App.3d
32 304, 307-308. (The Court of Appeal held that a statute applies to all claims which **accrued after the**
33 **effective date of the statute**)

1 Even if this Court believes that the 1998 Amendment does more than clarify California
2 law, the 1998 Amendment still must be applied retroactively so as to hold Philip Morris liable
3 for their decades of wrongful misconduct. As the California Supreme Court has held:

4 “[I]f the court does not accept the Legislature's assurance that an unmistakable
5 change in the law is merely a “clarification,” **the declaration of intent may
6 still effectively reflect the Legislature's purpose to achieve a
7 retrospective change.** Whether a statute should apply retrospectively or only
8 prospectively is, in the first instance, a policy question for the legislative body
9 enacting the statute. Thus, **where a statute provides that it clarifies or
10 declares existing law, “[i]t is obvious that such a provision is indicative
11 of a legislative intent that the amendment apply to all existing causes of
12 action from the date of its enactment.** In accordance with the general rules
13 of statutory construction, we must give effect to this intention. . . .” Western
14 Security Bank, supra, 15 Cal. 4th at 244 (quoting California Emp. etc. Com. v.
15 Payne, 31 Cal. 2d 210, 214 (1947); other citations omitted; emphasis added)

16 Whether the 1998 Amendment merely “clarifies” California law as stated by the
17 Legislature, or is taken as clear of indication of Legislative intent to apply the new law
18 retroactively, the 1998 Amendment applies to this action and Philip Morris’ demurrer should
19 be overruled.

20 **G. The Legislature Evidenced Clear Intent To Allow Claims Arising**
21 **From Past Fraudulent Misconduct**

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

The Legislature's intention to apply a law retrospectively will override any presumption
that statutes apply prospectively. In re Marriage of Bouquet, 16 Cal.3d 583, 587 (1976).

“. . . Although legislative enactments are generally presumed to operate

1 prospectively and not retroactively, . . . this presumption does not defy rebuttal.
2 We have explicitly subordinated the presumption against the retroactive
3 application of statutes to the **transcendent canon of statutory construction**
4 **that the design of the Legislature be given effect. . . . The central inquiry,**
5 **therefore, is whether the Legislature intended the amendment . . . to**
6 **operate retroactively.** In re Marriage of Bouquet (1976) 16 Cal.3d 583, 587.

7 The key subsection in the 1998 Amendment reads:

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

18 The Legislature expressed its intent to apply the 1998 Amendment retroactively in
19 several ways. First, the Legislature removed "tobacco" from the list of "common consumer
20 products" to which the statute applies and stated that the Section 1714.45 now "does not
21 exempt the manufacture or sale of tobacco products by tobacco manufacturers . . . from
22 products liability actions." Civ. C. §1714.45 (a), (b).

23 Next, the Legislature stated in new subdivision (f) that "no statutory bar" exists for those
24 who "**have suffered or incurred**" injuries or for "claims that **were** or are brought". The use
25 of the past tense in the phrase "have suffered or incurred" indicates that the Legislature
26 intended that the 1998 Amendment to apply retroactively. Were the statute intended to apply
27 to only to future misconduct, the Legislature would not have included language indicating that
28 past injuries, which are necessarily caused by past conduct, were within the scope of the 1998
Amendment. Reading this language in conjunction with the broad language which states that
the 1998 Amendment is intended to remove "any statutory bar" to suit against tobacco
companies, compels the conclusion that the 1998 Amendment applies retroactively.

Finally, 1714.45(d) of the current statute states the 1998 Amendment "shall apply to all
product liability actions pending on, or commenced after, January 1, 1988." (**Not 1998**).

The Legislature indicated a clear intent to apply the 1998 Amendment retroactively and
this Court must carry out that intent and overrule Philip Morris' Demurrer.

1. The Legislative History of the 1998 Amendment Compels the Conclusion that the Legislature Intended for it to Apply Retroactively

If the Legislative history of a bill clearly indicates that it was intended to apply retroactively, it must be given retroactive application to effectuate the intention of the Legislature. See, Evangelatos v. Superior Court (1988) 44 Cal.3d 1188, 1209. The evidence which courts use to assist them in making the determination of legislative intent comes from the legislative documents which were generated before, during and after the bill in question moved through the legislative process. 7 Witkin, *Summary of California Law; Constitutional Law* (4th edition, 1988) at page 151.

“... [T]he statutory language does not furnish the only resource at our disposal. . . . **[W]e [have] clothed . . . amendment[s] . . . with retroactive effect despite the silence of its language on the issue and the presumption against retroactive application.** We explained: ‘The rule of construction, however, is not a straightjacket. Where the Legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent. It is to be applied only if after, considering all pertinent factors, it is determine that it is impossible to ascertain the legislative intent.’ . . .

“... [W]e must address ‘all pertinent factors’ when attempting to divine the legislative purpose. A wide variety of factors may illuminate the legislative design, ‘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.

The *express purpose* of Senate Bill 67, enacted as the 1998 Amendment, was to remedy the tobacco industry's *past* fraud.³ But this remedy could be effective only by applying the Amendment retroactively to remove the industry's immunity for *past* failure to warn and *past* manipulation of consumers' expectations about the safety of cigarettes.⁴ By contrast, Philip Morris's claim that the 1998 Amendment applies only

³The bill's author, Senator Kopp, told both the Senate and the Assembly that the "problem or deficiency in the present law" that SB 67 "seeks to remedy" was the industry's *past* misconduct) nicotine "manipulat[ion]" and "suppress[ion]" and "conceal[ment]" of health information. RJN Exh. 1, pp. SP-30 to SP-31; 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).

⁴The Legislature intended to allow California smokers to recover for "unreimbursed" medical expenses and lost wages for *past* smoking injuries that necessarily resulted from *past* misconduct:

“Hundreds of millions of dollars are spent annually . . . to mitigate the health effects of

1 prospectively) thus barring claims for pre-1998 smoking or pre-1998 misconduct) defeats this
2 legislative purpose.

3 The "problem" that the 1998 repeal intended to "remedy" was that the Legislature had
4 granted the tobacco industry an immunity *before* the Legislature learned that the industry
5 "deliberately manipulated" nicotine levels to "create and sustain addiction" and "suppressed
6 and concealed" health information in an "aggressive campaign of disinformation." RJN Exh.
7 1, 4., pp. SP-30 to SP-31. But when the Legislature learned of the industry's past wrongdoing
8 it repealed the immunity to reinstate claims based on this *past* fraud and deception. In this
9 light, **to deny retroactive effect to the statute, giving the tobacco industry the benefit
10 of the former immunity, would give the tobacco industry the benefit of its fraud.**

11 **H. Retroactive Application of Section 1714.45 Satisfies Due Process**

12 Philip Morris erroneously claims that the former immunity was a "vested right"
13 warranting due process protection. Philip Morris cites *Morris* and *Garcia*, under which an
14 "immunity" from suit can be a "vested right" subject to due process protection.⁵ These cases
15 are distinguishable because they both analyzed the Legislature's attempt to retroactively
16 Amend a long-standing rule of law, and neither involved a temporary, *fraudulently*
17 *obtained* immunity that was Amended to return the law to its prior state. There can be no due
18 process violation when a defendant's course of conduct is in violation of state civil law, such
19 as is the case here:

20 "As to the constitutionality of such a retroactive application of the statute, . . .

21 _____
22 tobacco Thousands of people die each year because of the effects of tobacco
23 *Meritorious claims* against tobacco products could significantly reduce the amount of
consumption of tobacco products and reduce health care costs for all Californians."

24 But, because of the long latency period for smoking-related illnesses, present "meritorious claims"
25 are necessarily based on *past* smoking. Hence, such claims can only be brought if the 1998 Amendment
26 applies retroactively, allowing liability for the tobacco industry's past misconduct in defrauding consumers,
failing to warn of cigarettes' hazards, and manipulating consumers' expectations. RJN Exh. A.1., p. 3.

27 ⁵*Morris v. Pacific Electric Ry. Co.* (1935) 2 Cal.2d 764, 768; *In re Marriage of Garcia* (1998) 67
28 Calliope.4th 693, 698-699. The holding in *Morris* was explicitly based on the fact that the Legislature had
failed to include any retroactivity provision in the statute. In the present case, the Legislature indicted its
intent to apply the 1998 Amendment retroactively. In *Garcia* the court only held that absent an indication
that the law is to operate retroactively the court will not abridge the substantive rights of parties.

1 there can be no due process objection when the defendant's course of conduct
2 is in violation of the longstanding public policy . . . or in contravention of state
civil or criminal law." United States v. Perry (1970) 431 F.2d. 1020, 1024.

3 This Court should hold that the tobacco companies had no "vested right" in the
4 temporary immunity because they obtained it fraudulently. **To hold that the tobacco**
5 **companies had a vested right in the temporary immunity of former section 1714.45**
6 **would be to sanction the defendants' fraud.**

7 1. Even if the tobacco companies' immunity under the former section 1714.45 was a
8 "vested right," the Legislature's retroactive Amendment of that right was still consistent
with due process.

9 "Vested rights are *not immutable*; the state, exercising its police power, *may impair*
10 such rights when considered reasonably necessary to protect the *health, safety, morals and*
11 *general welfare of the people.*" If a retroactive application is "necessary to subserve a
12 sufficiently important state interest," then due process is satisfied.⁶

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

24 To determine "whether a retroactive law contravenes the due process clause," the
25 courts must consider six factors that balance the *state's interest* versus the *defendant's*
26 *reliance*:

- 27 (a) **State interest:** (1) 'the significance of the state interest served by the law'; and
28 (2) 'the importance of the retroactive application of the law to the effectuation
of that interest';
- (b) **Reliance interest:** (3) 'the extent of reliance upon the former law'; (4) 'the
legitimacy of that reliance'; (5) 'the extent of actions taken on the basis of that
reliance'; and (6) 'the extent to which the retroactive application of the new law

⁶*Buol, supra*, 39 Cal.3d at p. 761.

1 would disrupt those actions.⁷
2 In Nelson v. Flintkote Co. (1985) 172 Cal. App.3d 727 the defendants argued, just as
3 Philip Morris does here, that application of a remedial statute to impose liability for their past
4 conduct **“would constitute an impermissible retroactive revival of a barred cause of**
5 **action in violation of their vested right of immunity from liability.”** Nelson v. Flintkote Co.
6 (1985) 172 Cal. App.3d 727, 730-731. The Court of Appeal disagreed:

7 “. . . [E]ven if we were to interpret application of section 340.2 to the case herein
8 as impairing a vested property right in immunity to suit by reviving an otherwise
9 barred cause of action, such application would not be beyond the Legislature’s
10 power. Although California law generally attempts to protect vested property
11 rights against 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 application reasonably could be believed to be
necessary to serve the public welfare. . . .

12 **“The state certainly has an interest in protecting innocent asbestosis**
13 **victims from toxic tortfeasors. Asbestosis may take up to 35 years to**
develop from first exposure. . . .

14 **“. . . Nor can the alleged toxic tortfeasors claim they are entitled to**
15 **psychological protection from surprise suits when most knew or should**
16 **have known back in the 1950's of the toxic nature of the materials they**
17 **were supplying. . . .`This is not a case where [defendants’] conduct**
18 **would have been different if the present rule had been known and the**
19 **change foreseen.** Additionally, they could not reasonably have been relying
20 on the `discovery' rule. . . .” Nelson v. Flintkote Co. (1985) 172 Cal. App.3d
21 727, 734-736.

22 Just as in Nelson, supra, the state's interest in allowing consumers to sue “toxic
23 tortfeasors,” i.e., the tobacco companies, for their grievous fraud is very "significant." As
24 shown above, Senator Kopp brought the 1998 Amendment amendments to the Legislature
25 to "remedy" the "problem" that the tobacco companies' massive fraud had led to an
undeserved immunity from products-liability suits. Longstanding Supreme Court authority also
shows that the State has a significant interest in protecting consumers from fraud⁸ and from
defective products.⁹ Moreover, **the only way to protect these consumer interests is by**

26 ⁷ *Buol*, supra, 39 Cal.3d at 761; *Bouquet*, supra, 16 Cal.3d at p. 592.

27 ⁸ See Civil Code §§ 1709 (liability for fraud), 3294 (punitive damages for fraud).

28 ⁹ See, e.g., *Barker v. Lull Engineering Co., Inc.* (1978) 20 Cal.3d 413.

1 **applying the 1998 Amendment retroactively.** If the Amendment is not retroactive, then all
2 it did was allow consumers who start smoking in 1998 to sue for injuries that will not manifest
3 for at least 20 more years. Such a result would not serve the Legislature's purpose of
4 protecting the smokers who were defrauded by the tobacco companies over the past five
5 decades. Hence, the state interest in retroactive application is very high.¹⁰

6 By contrast, the **Philip Morris's reliance interest is nonexistent.** Before former
7 section 1714.45 was enacted in 1988, the tobacco companies had no immunity. Hence,
8 when Philip Morris was defrauding the public from 1954 to 1987) when the vast majority of its
9 misconduct giving rise to this action took place) Philip Morris did not rely on anything. At most
10 Philip Morris could claim reliance from 1988 to 1997, *but Philip Morris has failed to show any*
11 *reliance whatsoever*, let alone any "actions" based on any reliance. From 1988 to 1997,
12 Philip Morris did not act any differently in California than it did in other states where its conduct
13 was not immune. Instead, **Philip Morris continued to defraud the public equally in all**
14 **states.** Thus, under the Supreme Court's factors, the State's interest substantially outweighs
15 the tobacco industry's reliance interest and retroactive application of the 1998 Amendment
16 comports with due process.

17 //

18

19 **I. The Former Immunity Barred Only Product Liability Actions By**
20 **Voluntary and Knowing Smokers**¹¹

21

22 ¹⁰Moreover, the 1998 Amendment does nothing more than Amendment the fraudulently induced
23 statutory immunity. It does not affect any "common law defenses, such as assumption of the known risk."
24 RJN, Exh. 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.

25 ¹¹The immunity granted under the former version of Civil Code section 1714.45 is limited. Even in a
26 classic product liability action, a demurrer to a plaintiff's action could not be sustained if a smoker could
27 demonstrate under *Richards v. Owens-Illinois, Inc.*, 14 Cal. 4th 985 (1997) that he or she was either **not a**
28 **voluntary smoker or was not aware of all the risks.** Plaintiff was not a "knowing" and "voluntary"
smoker, because when he began smoking neither he nor the ordinary consumer knew of smoking's
hazards, instead believing Philip Morris's fraudulent misrepresentations that cigarettes were "not injurious"
and its "deceptive" advertising claims that smoking was a healthy activity. Second, Plaintiff did not
encounter smoking's risks "voluntarily" because (a) he started as a *minor*, lacking the "maturity" to make a
voluntary decision to smoke, and (b) he was soon *addicted*, which prevented his continued smoking from

1 Both versions of Civil Code §1714.45(c) define a "product liability action" as "any
2 action for injury or death caused by a product." Product liability actions are actions in which
3 a defective product and personal injuries or damages to purchasers, users, or bystanders are
4 required elements. See Khan v. Shiley, Inc., (1990) 217 Cal.App.3d 848, 855-58 (holding that
5 fraud action exists where product liability action does not); BAJI 9.00.5. 9.19. At issue is
6 defendants' conduct. Products, injury and damages are not directly involved. Khan, supra,
7 217 Cal.App.3d at 857, ("Unlike the other theories, in which the safety and efficacy of the
8 product is assailed, the fraud claim impugns defendants' *conduct*." See, also Bennett v.
9 Suncloud, (1997) 56 Cal.App.4th 91, 97 (recognizing in dicta the distinction between a
10 product liability cause of action and an action based on the state's unfair competition laws).
11 Similarly, the elements of the civil conspiracy cause of action do not touch directly on
12 defendants' products or injuries or deaths; again, the issue is conduct.

13 In City and County of San Francisco v. Philip Morris Inc. (N.D. Cal. 1997) 957 F.Supp.
14 1130, 1140, the Court, in deciding an action brought by various counties against cigarette
15 manufacturers, held that "**California law recognizes a distinction between claims based**
16 **on fraudulent conduct and claims based on defects in a product.**" (Emphasis added.)
17 The Court approvingly cited Khan v. Shiley,¹² which recognized the distinction between fraud
18 actions and actions based on smoking and health. Based on this distinction, the Court found
19 that plaintiffs' **state law fraud and special duty claims were not barred by the former**
20 **version of Civil Code Section 1714.45.** City and County of San Francisco, supra, 957
21 F.Supp. at 1140. No California appellate court has ruled otherwise. Thus, Plaintiff's causes

22
23 _____
24 being voluntary. Hence, the former immunity can not bar Plaintiff's claims.

25 ¹²The Court of Appeal recognized this distinction between a product-liability claim and a fraud claim in
26 Khan v. Shiley. The plaintiff's artificial heart valve (manufactured by the defendant) had a "propensity to
27 fracture" but had not yet fractured or otherwise malfunctioned. *Id.* at p. 851. The plaintiff claimed emotional
28 distress from knowing that her valve might malfunction. Although the court held that the plaintiff had no
product-liability claim because the *product* had not yet caused her damage, the court recognized her viable
fraud claim for injuries *caused by the defendant's conduct*. *Id.* at p. 857. Hence, even though the product
was *not defective*, the defendant could be liable for *defrauding* the plaintiff into using the product to her
detriment.

1 of action for fraud are not barred even by the former version of Section 1714.45 and the
2 Demurrer must be overruled as to those causes of action.

3 **J. Plaintiff's Fourth Cause Of Action For Deceit/Fraudulent**
4 **Concealment Is Pled With The Requisite Specificity**

5 The law is well-settled that a party has a duty to disclose known facts where one party
6 knows of material facts and also knows that such facts are neither known or readily accessible
7 to the other party. See, BAJI 12.36 (92 Rev., 8th Ed.) The law is also well-settled that a party
8 is who is under no duty to speak, but nevertheless does so, and does not speak honestly or
9 makes misleading statements or suppresses facts which materially qualify those stated, is
10 liable for fraudulent concealment. See, BAJI 12.37 (92 Rev., 8th Ed.)

11 Unbelievably, Philip Morris argues that Plaintiff has failed to allege sufficient facts to
12 show that Defendants had a duty to disclose the health risk of smoking, **a duty that they**
13 **explicitly and publically undertook time and again, commencing in 1954 and**
14 **continuing to the present.** Indeed, Plaintiff's complaint is replete with facts supporting such
15 a duty on the part of Philip Morris. See, e.g., Plaintiff's Complaint ¶¶1, 2, 3, 37, 40, 41, 42,
16 43, 44, 50, 51, 52, 55, 56, 57, 58, 59, 60, 65, 80, 81, 82, 83, 84, 85. Additionally, once again,
17 Philip Morris misstates the law to this Court, relying on the **former** version of 1714.45 (without
18 so identifying it), for the absurd proposition that ". . . every tobacco consumer is charged with
19 knowledge that cigarettes are `unsafe.'" Defendants Memo. of P & A at p.12. This is simply
20 not true. Plaintiff has fully alleged that, due to Philip Morris' flagrant fraud and deceit, he was
21 unaware of the health risks of smoking when he started smoking as a minor, well before any
22 warning labels were placed on cigarette packages.. See, e.g., ¶¶23, 24, 51, 86. The
23 demurrer should be overruled.

24 **K. Plaintiff Has Clearly Pleaded Conspiracy**

25 A cause of action for conspiracy arises out of the **commission** of some wrongful act
26 by one or more of the conspirators with damage resulting from it. Unruh v. Truck Insurance
27 Exchange (1972) 7 Cal.3d 616, 631. The conspiracy allegations must show tortious acts that,
28 without the conspiracy, would give rise to a right of action. Tietz v. Los Angeles Unified School

1 District (1965) 238 Cal.App.2d 905, 913.

2 Plaintiff's cause of action for conspiracy against Defendants consists of three-prongs:
3 First, the tobacco manufacturers, including Philip Morris, agreed falsely to represent to Plaintiff
4 and others that questions about smoking and health would be answered by a new, unbiased,
5 and trustworthy source. Second, they misrepresented, suppressed and confused the facts
6 about the health dangers of smoking, including addiction. Third, while waging a public
7 relations war based on deception, the tobacco industry also participated in an abuse of the
8 legal process likely unmatched in American jurisprudence in that the tobacco company
9 lawyers controlled research to the point of both promoting projects designed to create doubt
10 about whether smoking causes cancer and protecting through privileges industry projects that
11 might carry a risk of a negative result. Now, the Defendants ask the Court to reward them by
12 finding that because they succeeded for so long they can never be held accountable. This
13 Court should deny the invitation.

14 **L. Plaintiff's Claim For Breach Of Express Warranty Is Not Barred**

15 An express warranty is created by an affirmation of fact or a promise concerning
16 goods. See Com. C. §2313(1)(a). An express warranty of **safety**, such as repeatedly made
17 by Philip Morris, is generally held to be one of fact--a description of an important characteristic
18 of the product. Hauter v. Zogarts (1975) 14 Cal.3d 104, 112-13. These statements convinced
19 and reassured the public that smoking was acceptable and harmless, and generally deceived
20 wide portions of the public so they would initiate and continue cigarette use. All of these
21 affirmations of fact and promises by Philip Morris were false and a breach of Defendant's
22 many express warranties concerning the safety of its cigarettes and their claimed
23 "commitment to the public's health."

24 Additionally, Plaintiff's breach of express warranty cause of action is not time-barred.
25 Personal injury actions based upon breach of warranty are governed by the one-year statute
26 of limitations set forth in C.C.P. §340. Becker v. Volkswagen of America, Inc. (1975) 52 Cal.
27 App.3d 794. However, contrary to Plaintiff's complaint was filed less than one year from the
28 date of Plaintiff's diagnosis and, thus, his cause of action for breach of express warranty is not

1 time-barred.

2 **I. Plaintiff's Claims For Punitive Damages Are Proper**

3 Plaintiff's claim for punitive damages incorporates by reference each and every cause
4 of action contained in Plaintiff's complaint, thereby properly alleging that Plaintiff is entitled to
5 punitive damages on each and every cause of action of Plaintiff's complaint. Each of
6 Plaintiffs' causes of action against the Defendants is proper and Defendants' demurrers
7 thereto must be denied. Therefore, Defendants' demurrers to Plaintiffs' claim for punitive
8 damages must also be denied. Alternatively, Plaintiff requests leave of Court to amend his
9 complaint to include punitive damages allegations within each and every cause of action.

10 **IV. CONCLUSION**

11 For the foregoing reasons, Defendants' Demurrer should be overruled.

12
13 Dated: May 26, 2000

THE LAW OFFICES OF MICHAEL J. PUIZE

14

15

By: _____
MICHAEL J. PUIZE
Attorney for Plaintiff

16

17

18

19

20

21

22

PROOF OF SERVICE
Boeken v. Philip Morris, Inc., et al.
Case No. BC 226593

23

24 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

25 I am employed in the County of Los Angeles, State of California. I am over the age of
26 18 and not a party to the within action; my business address is 11755 Wilshire Boulevard,
Suite 1170, Los Angeles, California 90025.

27

28 On May 30, 2000, I served the foregoing document described as **PLAINTIFF'S
MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PHILIP MORRIS,
INC.'S DEMURRER** on the interested parties in this action by placing:

1 _____ the original to the propounding party and a true copy to all other parties; or
2 XX a true copy thereof enclosed in a sealed envelope addressed as follows:

3 **See Attached Service List**

4 (X) By Envelope - by placing () the original (X) a true copy thereof enclosed in sealed
5 envelopes addressed as above and delivering such envelopes:

6 (X) By Mail: As follows: I am "readily familiar" with this firm's practice of collection and
7 processing correspondence for mailing. Under that practice, it would be deposited with United
8 States Postal Service on that same day with postage thereon fully prepaid at Los Angeles,
California in the ordinary course of business. I am aware that on motion of party served,
service is presumed invalid if postal cancellation date or postage meter date is more than 1
day after date of deposit for mailing in affidavit.

9 () By Personal Service: I delivered such envelope by hand to the addressee(s) above.

10 () By Federal Express: I caused such envelope to be delivered by Federal Express
11 delivery service to the offices of the addressee.

12 () By Facsimile Transmission: On _____, I caused the above-named document to be
13 transmitted by facsimile transmission telephonically to the offices of the addressee(s) at the
14 facsimile number(s) so indicated above. The transmission was reported as complete and
without error. A copy of the transmission report properly issued by the transmitting facsimile
machine is attached hereto.

15 Executed on May 30, 2000, at Los Angeles, California.

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

17 () (Federal) I declare that I am employed by the office of a member of the bar or of this court
18 at whose direction the service was made.

19 _____
20 Ellen Girma

21 **SERVICE LIST**

22 Boeken v. Philip Morris, Inc., et al.
23 Case No. BC 226593

24 Maurice A. Leiter, Esq.
25 John L. Carlton, Esq.
26 Angel L. Tang, Esq.
27 Arnold & Porter
28 777 South Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
TEL (213) 243-4000
FAX (213) 243-4199
Attorneys for Defendant Philip Morris, Inc.

1 Tejas B. Patel, Esq.
John Hill & Associates
2 2050 West 190th Street, Suite 200
Torrance, CA 90504
3 TEL (310) 782-2599
FAX (310) 782-0200
4 **Attorneys for Defendant International House of Pancakes, Inc.**

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28