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

Case No. BC 226593

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO PHILIP MORRIS,
INC.'S MOTION TO STRIKE
PORTIONS OF PLAINTIFF'S
COMPLAINT**

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 DEMURRER; APPENDIX OF
NON-CALIFORNIA AUTHORITIES;
REQUEST FOR JUDICIAL NOTICE;
DECLARATION OF MICHAEL J.
PIUZE; [PROPOSED] ORDER; AND
PROOF OF SERVICE

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STATUTES, CODES AND TREATISES

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I. INTRODUCTION

Plaintiff Richard Boeken is dying of lung cancer caused by smoking cigarettes manufactured by Defendant Philip Morris, Incorporated ("Philip Morris". Plaintiff's complaint contains causes of action for negligence, strict liability, false representation, fraudulent concealment, civil conspiracy, breach of express warranty, unfair competition/unlawful business practices (Business & Professions Code Sections 17200 et seq.), negligent false and misleading advertising (Business & Professions Code Sections 17500-17572), intentional false and misleading advertising (Business & Professions Code Sections 17500-17572) and requests punitive damages as to all causes of action.

Philip Morris improperly seeks to be granted a "line item veto" **over the most damning allegations of tortious conduct Plaintiff made against it in his complaint**, arguing that said allegations should be stricken because they are supposedly preempted by the 1969 Cigarette Labeling Act. Either Philip Morris has misread the Cigarette Labeling Act and the United States Supreme Court's decision in Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504 or it purposefully misleading this Court.

The only claims to which preemption applies are *post-1969 failure to warn through advertising and promotional activities*. Contrary to Philip Morris' assertions in its moving papers, **none** of Plaintiff's claims against it, **nor any of the allegation paragraphs which Philip Morris is moving to strike, are based on post-1969 failure to warn through advertising and promotional activities**, the only claims to which preemption applies. All other causes of action and allegations, including all of those alleged by Plaintiff, are preserved, including:

8. All pre-1970 claims, including failure to warn claims;
9. All claims for strict liability, for any year;
10. All claims for misrepresentation, express warranty, intentional fraud and fraudulent concealment, for any year;
11. All claims for conspiracy, or gross negligence, for any year; and

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12. All post-1969 claims for failure to warn, **providing they are not based on advertising and promotion.**

Defendants' Motion to Strike must be denied because none of Plaintiff's causes of action, nor the allegations contained therein, are preempted.

II. STATEMENT OF FACTS

Tobacco products were devoid of cautionary labels or any warnings whatsoever before 1966 (although published scientific evidence at that time had established that cigarettes posed serious risks for lung cancer, other cancers, cardiovascular diseases, and addiction.)

In 1966 the Federal Cigarette Labeling and Advertising Act required the following text on all packages of cigarettes:

CAUTION: CIGARETTE SMOKING MAY BE HAZARDOUS TO YOUR HEALTH

In 1969 Federal law changed the required text slightly, substituting "Warning" for "Caution" and "Is Dangerous" for "May be Hazardous."¹

In 1984 the warning was changed to the current four rotating warnings.

Despite the fact that warning labels were not required until 1966, Philip Morris has known for decades that its products eventually injure or kill consumers when used exactly as intended. In fact, cigarette smoking causes more than 85% of all lung cancer. Cigarette smoking is also associated with cancers of the lip, mouth, larynx, and esophagus, as well as with chronic obstructive pulmonary disease.

In 1954, after independent researchers published studies showing the link between exposure to cigarette smoke and cancer, the cigarette manufacturers, including Philip Morris, agreed to orchestrate a public relations campaign to promote cigarettes and to protect themselves from these and other expected attacks through a vast conspiracy of deceit. They were able to do so because a mere six tobacco companies (now five, with the merger of American and Brown & Williamson) together controlled virtually 100% of the cigarette market in the United States.

To accomplish their public relations goals, the tobacco companies set up the "Tobacco

¹15 U.S.C. §§1331-1340.

1 Industry Research Committee" ("TIRC"), later known as the "Council for Tobacco Research"
2 (CTR"), as a supposedly independent scientific body. In 1954, they pledged publicly, through
3 TIRC, aid and assistance to research efforts into all phases of tobacco use and health. They
4 expressly undertook an interest in the public's health as paramount (they said) to every other
5 consideration. Throughout the ensuing decades, including testimony to Congress as late as
6 1994, the tobacco companies, including Philip Morris, either directly or through trade
7 associations, emphasized their special responsibility to determine and disclose the facts
8 about smoking and health. But they never intended to carry out that responsibility, nor did they
9 do so.

10 Instead, as they were ignoring the responsibility that they had publicly undertaken, the
11 cigarette manufacturers, including Philip Morris, individually and through trade associations
12 publicly claimed that research did not establish that smoking causes chronic diseases such
13 as cancer, emphysema, or heart disease, that there was still a question about smoking and
14 health, and that studies showing that smoking causes disease were flawed. Additionally, the
15 tobacco companies denied that nicotine was addictive and that they attempted to and did
16 manipulate levels of nicotine in their products to create and sustain addiction.

17 This public posturing is made all the more reprehensible by the knowledge underlying
18 the public statements. Internal tobacco industry documents now reveal the industry's long-
19 standing knowledge of carcinogens in tobacco smoke, of the contribution of smoking to lung
20 cancer, and of the addictive nature of the nicotine in cigarettes. They knew that outside
21 evidence compelled the conclusion -- accepted even by their own scientists -- that cigarette
22 smoking causes lung cancer. Yet the companies refused to publicly acknowledge that fact.
23 And although they determined which components of cigarette smoke caused disease and
24 developed safer cigarettes, they did not release the research or market the cigarettes, for to
25 do either would be to admit that existing cigarettes were not safe and a safer alternative could
26 be produced.

27 In addition, despite its knowledge of the severe health risks of smoking, Philip Morris,
28 individually and in concert with the other cigarette manufacturers, carefully and intentionally,

1 developed and fostered a shared perception among childhood peer groups that smoking
2 cigarettes was a necessary rite of passage into adult life. They cynically viewed the child as
3 a requisite customer -- only the child could replace the adult consumer who finally quit
4 smoking, by reason of death or otherwise. They intended that one child would encourage
5 other children in the belief that smoking cigarettes would ensure popularity. They carefully
6 tracked the success of those efforts. They developed increasingly sophisticated marketing
7 and other methods to maintain and expand childhood smoking. They adjusted nicotine levels
8 to addict "the beginner" (their word). These efforts violated the juvenile laws of California²

9 The extraordinary facts underlying Plaintiff's complaint demonstrates that Plaintiff states
10 proper, indeed compelling, grounds for recovery.

11 **III. LEGAL ARGUMENT**

12 The legal standard on motions to strike is well known to this Court.³

13 Defendants claim that the allegations at issue "amount to nothing more than 'irrelevant
14 . . . or improper matter' and should be stricken." Philip Morris seeks, in effect, to be granted
15 the "line item veto" **over the most damning allegations of tortious conduct Plaintiff**
16 **made against it in his complaint.** There is no legal authority for this attempt. Philip Morris
17 is impermissibly attempting to use the motion as a "scalpel," excising supposedly "irrelevant,
18 false or improper" matters from certain allegation paragraphs within the various causes of
19 action pursuant to Code of Civil Procedure Section 436(d), because they are allegedly
20 preempted by the Cigarette Labeling Act. Nothing could be further from the truth.

21 To the extent that Philip Morris wishes to argue that the cited allegation paragraphs and
22 portions thereof are false, irrelevant or improper (C.C.P. §436(a)), it has utterly failed to show
23 that Plaintiff's Complaint on its face, or based on any matter properly judicially noticed, makes
24

25 ²Penal Code Sections 272 and 308
26

27 ³**Motions to strike are not favored in California.** They must be used "cautious[ly] and sparing[ly] . .
28 . [The Courts] have no intention of creating a procedural 'line item veto' for the civil defendant." PH II, Inc. v.
Superior Ct. (Ibershof) (1995) 33 Cal. App.4th 1680, 1683. The policy of law for motions to strike, as for
demurrers, is to construe the pleadings "liberally . . . with a view to substantial justice." C.C.P. §452.

1 any kind of showing of falsity, irrelevance or impropriety as required by C.C.P. §437.⁴ Indeed,
2 as discussed below, the cited allegation paragraphs are both relevant and proper, because
3 the causes of action in which they are alleged are not preempted by the Cigarette Labeling
4 Act, despite Philip Morris' assertion otherwise.

5 **A. Defendants Bear the Burden of Establishing Preemption**

6 There is a long-standing presumption against federal preemption of the exercise of the
7 power of the states. See, e.g., New York State Dep't of Social Servs. v. Dublino (1973) 413
8 U.S. 405, 413-14. Thus, **the party claiming preemption bears the burden of proof** and
9 must establish that Congress has clearly and unmistakably manifested its intent to supersede
10 state law. Bravman v. Baxter Healthcare Corp. (S.D.N.Y. 1994) 842 F.Supp. 747, 753.

11 **B. Cipollone and Express Preemption**

12 Any preemption of state law in cigarette cases comes from the 1969 Cigarette
13 Labeling Act and its **express preemption** provision:

14 "(a) No statement relating to smoking and health, other than the statement
15 required by section 1333 of this title, shall be required on any cigarette
package.

16 "(b) **No requirement or prohibition based on smoking and health shall be**
17 **imposed under State law with respect to the advertising or promotion**
18 **of any cigarettes** the packages of which are labeled in conformity with the
provisions of this chapter. 15 U.S.C. 1334.

19 There has been considerable confusion about the nature and scope of preemption in
20 the lower courts. This is not surprising given the difficult nature of the subject and the hard-to-
21 digest Cipollone opinion. Indeed, Justice Blackmun stated in a concurring opinion, "I can only
22 speculate as to the difficulty lower courts will encounter in attempting to implement the court's
23 decision." Cipollone v. Liggett Group, Inc. (1992) 505 U. S. 504. Despite the confusion in the
24 federal and state courts, one thing is very clear: Cipollone is the law on preemption in cigarette
25 cases. Amplified and supported by the U.S. Supreme Court in Medtronic, Inc. v. Lohr (1996)

26
27 ⁴"Falsity" must appear from the face of the complaint or judicially noticed matters and may not be
28 established by extrinsic evidence. Garcia v. Sterling (1985) 176 Cal. App.3d 17, 21. "Irrelevant" or
immaterial allegations are those not essential to the claims, or supported by an otherwise sufficient claim
or defense. C.C.P. §431.10(b).

1 518 U.S. 470,⁵ it is the last and only U.S. Supreme Court Opinion on the Cigarette Labeling
2 Acts.

3 Understanding Cipollone is critical to understanding the issues raised by Philip Morris
4 as to the nature and scope of preemption, because Philip Morris urges to the Court various
5 species of *implied preemption*, whereas Cipollone **expressly rejects implied preemption**
6 **in cigarette cases.**

7 1. Cipollone Specifically Rejected the “Implied Preemption” Analysis Urged by Philip Morris

8 Philip Morris in this case, and the Third Circuit’ Opinion in Cipollone, advanced the
9 **discredited doctrine of implied preemption.** Under this discredited theory, any evidence
10 that so much as implies that the post-1970 warning label is inadequate is supposedly to be
11 rejected. This is an incorrect reading of Cipollone, which expressly rejected the implied
12 preemption theory that was the holding of the Third Circuit. (Cipollone’s lower court.)⁶

13 "The Federal Cigarette Labeling and Advertising Act . . . expressly preempts
14 all common law damage claims — such as Plaintiff’s claims in this action —
15 that would impose, **either directly or indirectly**, additional smoking and health
16 warning requirements on the advertising and promotion of cigarettes after July
17 1, 1969.” Philip Morris’ Memo at 1:13-17.

18 The Third Circuit opinion in Cipollone is instructive, because it illustrates the doctrine
19 of implied preemption **that was expressly overruled** by the Supreme Court:

20 “In our preemption decision, **we applied the doctrine of implied preemption**
21 and held that in light of section 1331’s declaration of Congressional purpose the
22 Act preempts . . . state law damage actions relating to smoking and health that
23 challenge either the adequacy of the warning on cigarette packages or the
24 propriety of a party’s actions with respect to the advertising and promotion of
25 cigarettes. . . .” 789 F.2d at 187.

26 Note that the Third Circuit’s implied preemption ruling, that preemption applies
27

28 ⁵The United States Supreme Court explained in Medtronic, Inc. v. Lohr (1996) 518 U.S. 470, 116 S.Ct.
2240, that the preemptive reach of the Cigarette Labeling Acts is limited:

29 “The pre-emptive statute in Cipollone was targeted at a limited set of state requirements --
30 those `based on smoking and health’-- and then **only at a limited subset of the possible**
31 **applications of those requirements — those involving the `advertising or promotion**
32 **of any cigarettes which are labeled in conformity with the provisions of’** the federal
33 statute.” Id. at 518 U.S. 470, 488; 116 S. Ct. 2240, 2252.

⁶Cipollone v. Liggett Group, Inc. (3rd. Cir. 1990) 893 F.2d 541.

1 whenever there is an implied challenge to the adequacy of the label, is exactly the concept
2 urged by Philip Morris and **rejected by the United States Supreme Court.**⁷ Implied
3 preemption is, in fact, the law for other types of legislation, **but not for the Cigarette Act.**

4 a. Implied Preemption Rejected

5 The United States Supreme Court in Cipollone begins its analysis with a discussion
6 of preemption in general, stating that the "purpose of Congress" is the ultimate test:

7 "Article VI of the constitution provides that the laws of the United States shall be
8 the supreme law of the land; . . . any thing in the constitution or laws of any state
9 to the contrary notwithstanding." Art. VI, cl. 2. Thus ... it has been settled that
10 state law that conflicts with federal law is without effect. ... Consideration of
11 issues arising under the supremacy clause start[s] with the assumption that the
12 historic police powers of the states **[are] not to be superseded by . . .**
13 **Federal act unless that [is] the clear and manifest purpose of congress.**
14 Accordingly, **the purpose of Congress is the ultimate touchstone of**
15 **pre-emption analysis."** Id. at 516. [citations omitted, emphasis supplied]

16 Next Cipollone discusses the three types of preemption: express, implied, and area
17 preemption:

18 "Congress' intent may be **explicitly stated** in the statute's language ["express
19 preemption"] or **implicitly contained** in its structure and purpose ["implied
20 preemption"]. In the absence of an express congressional command, state law is
21 pre-empted if that law **actually conflicts** with federal law, or if federal law so
22 thoroughly occupies a legislative field as to make reasonable the inference that
23 Congress left no room for the states to supplement it ["area preemption"]. Id.
24 [citations omitted]

25 It is clear that the Supreme Court classified the Third Circuit's analysis as implied
26 preemption, and then **rejected it**:

27 "The [Third Circuit] court's ultimate ruling that petitioner's claims were **impliedly**
28 **pre-empted** effective January 1, 1966, reflects the fact that the 1969 act did not
alter the statement of purpose in Section 2, which was critical to an **implied**
preemption analysis." Id. at 517.

Next Cipollone states that the express preemption of the Cigarette Labeling Acts

⁷The Third Circuit's implied preemption decision also barred claims for fraudulent misrepresentation, express warranty, and conspiracy to defraud "to the extent they sought to challenge the defendant's advertising, promotional, and public relations activities after January 1, 1966." F.2d 541, 582. According to the Third Circuit implied preemption analysis, any claim that directly or indirectly challenges a tobacco manufacturer's advertising, promotional, and public relations activities after January 1, 1966 is preempted. **The United States Supreme Court overruled this and reinstated conspiracy, misrepresentation and express warranty claims, even though such claims might well imply that the warning labels were inadequate.**

1 **excludes** the implied preemption analysis, under the doctrine of "expressio unius est exclusio
2 alterius," which means roughly "a statement of one is an exclusion of the alternate." Thus, the
3 Cipollone court concludes, only **express preemption** in §5 of the Cigarette Labeling Acts
4 applies.

5 "When congress has considered the issue of pre-emption and has included in
6 the enacted legislation a provision explicitly addressing that issue, and when
7 that provision provides a reliable indicium of congressional intent with respect
8 to state authority," there is **no need to infer congressional intent to**
9 **pre-empt state laws from the substantive provisions" of the legislation.**
10 Such reasoning is a variant of the familiar principle of expressio unius est
11 exclusio alterius: **Congress' enactment of a provision defining the**
12 **pre-emptive reach of a statute implies that matters beyond that reach are**
13 **not pre-empted.** In this case, the other provisions of the 1965 and 1969 acts
14 offer no cause to look beyond §5 of each act. **Therefore, we need only**
15 **identify the domain expressly pre-empted by each of those sections."**
16 Id.

17 Thus, the Supreme Court considered and rejected implied preemption holding that:

18 **"In our opinion, the pre-emptive scope of the 1965 act and the 1969 act is**
19 **governed entirely by the express language in Sect 5 of each act." Id. at 517.**

20 How does the rejection of implied preemption in favor of express preemption affect the
21 ultimate conclusion about what is preempted? The Supreme Court discussed the test of
22 express preemption as it applies to the Cigarette Labeling Act, which is "whether the legal
23 duty that is the predicate of the common law damages action constitutes a 'requirement or
24 prohibition based on smoking and health . . . imposed under State law with respect to . . .
25 advertising or promotion:" Id. at 524.

26 "That the pre-emptive scope of §5(b) cannot be limited to positive enactments
27 does not mean that section pre-empts all common law claims. For example, as
28 respondents concede, §5(b) does not generally pre-empt state-law obligations
to avoid marketing cigarettes with manufacturing defects [strict liability] or to
use a demonstrably safer alternative design for cigarettes."... For purposes of
§5(b), the common law is not of a piece.

"Nor does the statute indicate that any familiar subdivision of common law
claims is or is not pre-empted. We therefore cannot follow petitioner's passing
suggestion that §5(b) pre-empts liability for omissions but not for acts, or that
§5(b) pre-empts liability for unintentional torts but not for intentional torts.
Instead we must fairly but -- in light of the strong presumption against
pre-emption -- narrowly construe the precise language of | 5(b) and we
must look to each of petitioner's common law claims to determine
whether it is in fact pre-empted. The central inquiry in each case is
straightforward: we ask whether the legal duty that is the predicate of
the common law damages action constitutes a "requirement or

1 prohibition based on smoking and health . . . imposed under State law
2 with respect to . . . advertising or promotion," giving that clause a fair but
narrow reading." Id. at 523.

3 Applying that test, what claims did the Cipollone court find were preempted, and what
4 were not?

5 2. Only Post-1969 Claims for Failure to Warn in "Advertising and Promotion" Are
6 Preempted

7 Cipollone states that **preemption bars only "claims" that assert that post-1969**
8 **advertising or promotions should have included better warnings:**

9 "Thus, insofar as **claims under either failure-to-warn theory require a**
10 **showing that respondent's post-1969 advertising or promotions should**
11 **have included additional, or more clearly stated, warnings, those claims**
12 **are pre-empted.** The Act does **not**, however, preempt petitioner's claims that
rely solely on respondent's testing or research practices or other actions
unrelated to advertising or promotion. Id. at 524.

13 3. Pre-1970 Claims Are Never Preempted

14 The first Federal act regarding tobacco was the 1965 Act (effective 1966), which
15 required a cautionary label on packages. The second Act was passed in 1969 (effective
16 1970) and changed the label somewhat. (The current caution labels were required in the 1984
17 Act.) In the Cipollone case the defense contended the earlier (1965) act preempted the post-
18 1966 claims. The court ruled that **the 1965 act did not preempt any claims**, but that the
19 1969 act preempted **some** post-1970 claims, and left others standing.

20 Plaintiff began smoking prior to 1970, and those portions of all counts which relate to
21 activities prior to 1970 are not pre-empted and must remain in the case.

22 4. Strict Liability Claims Are Never Preempted

23 Claims of design defect are **not preempted** by the Supreme Court in Cipollone:

24 "That the pre-emptive scope of section 5(b) cannot be limited to positive
25 enactments does not mean that section pre-empts all common law claims. For
26 example, as respondents concede, **section 5(b) does not generally pre-**
empt `state-law obligations to avoid marketing cigarettes with
manufacturing defects or to use a demonstrably safer alternative design
for cigarettes." 112 S.Ct. at 2621.

27 Thus, Plaintiff's cause of action for strict liability is not preempted and Philip Morris'
28 Motion to Strike various allegations contained within that cause of action must be denied.

1 5. Breach of Express Warranty Claims Are Not Preempted

2 The Supreme Court also held that express warranty claims are not preempted:

3 "A manufacturer's liability for breach of an express warranty derives from, and
4 is measured by, the terms of that warranty. Accordingly, the "requirements"
5 imposed by a express warranty claim are not imposed under state law," but
6 rather imposed by the warrantor. n23 If, for example, a manufacturer expressly
7 promised to pay a smoker's medical bills if she contracted emphysema, the
8 duty to honor that promise could not fairly be said to be imposed under state
9 law," but rather is best understood as undertaken by the manufacturer itself.
10 While the general duty not to breach warranties arises under state law, the
11 particular "requirement . . . based on smoking and health . . . with respect to
12 the advertising or promotion [of] cigarettes" in an express warranty claim arises
13 from the manufacturer's statements in its advertisements. **In short, a common
14 law remedy for a contractual commitment voluntarily undertaken should
15 not be regarded as a requirement . . . imposed under State law" within
16 the meaning of §5(b).**

17 "That the terms of the warranty may have been set forth in advertisements rather
18 than in separate documents is **irrelevant to the preemption issue . . .**
19 because, although the breach of warranty claim is made `with respect to . . .
20 advertising' it does not rest on a duty imposed under state law. Accordingly, **to
21 the extent that petitioner has a viable claim for breach of express
22 warranties made by respondents, that claim is not preempted** by the
23 1969 Act." Id. at 526-527.

24 6. Fraudulent Misrepresentation and Fraudulent Concealment Claims Are Not Preempted

25 The Supreme Court also held that claims for fraudulent misrepresentation of material
26 fact, and for fraudulent nondisclosure or concealment, or any other state law proscriptions on
27 intentional fraud are not preempted.

28 "Petitioner's second theory, as construed by the district court, alleges
29 **intentional fraud and misrepresentation both by false representation of
30 a material fact [and by] conceal[ment of] a material fact.** The predicate of
31 this claim is a state law duty not to make false statements of material fact or to
32 conceal such facts. Our pre-emption analysis requires us to determine whether
33 such a duty is the sort of requirement or prohibition proscribed by §5(b). Id. at
34 528.

35 The Supreme Court made it very clear that fraudulent misrepresentation claims, even
36 those based on advertising, are not preempted:

37 **"Moreover, petitioner's fraudulent misrepresentation claims that do arise
38 with respect to advertising and promotions (most notably claims based
39 on allegedly false statements of material fact made in advertisements)
40 are not pre-empted by §5(b). Such claims are not predicated on a duty
41 based on smoking and health" but rather on a more general obligation
42 -- the duty not to deceive.** This understanding of fraud by intentional
43 misstatement is appropriate for several reasons. First, in the 1969 act,

1 **congress offered no sign that it wished to insulate cigarette**
2 **manufacturers from longstanding rules governing fraud.** To the contrary,
3 both the 1965 and the 1969 acts explicitly reserved the FTC's authority to
4 identify and punish deceptive advertising practices -- an authority that the ftc
5 had long exercised and continues to exercise. See §5(c) of the 1965 act; §7(b)
6 of the 1969 act; see also nn.7, 9, supra. **This indicates that congress**
7 **intended the phrase relating to smoking and health" (which was**
8 **essentially unchanged by the 1969 act) to be construed narrowly, so as**
9 **not to proscribe the regulation of deceptive advertising."** *Id.* at 528-529.

10 Philip Morris repeatedly cites Cipollone as holding that fraudulent concealment claims
11 are preempted. Philip Morris is grossly mistaken.

12 **"Section 5(b) pre-empts only the imposition of state law obligations with**
13 **respect to the advertising or promotion" of cigarettes. Petitioner's**
14 **claims that respondents concealed material facts are therefore not**
15 **pre-empted insofar as those claims rely on a state law duty to disclose**
16 **such facts through channels of communication other than advertising**
17 **or promotion.** Thus, for example, if state law obliged respondents to disclose
18 material facts about smoking and health to an administrative agency, §5(b)
19 would not pre-empt a state law claim based on a failure to fulfill that obligation."
20 *Id.* at 528.

21 Although the "example" offered by the Supreme Court is disclosure to an administrative
22 agency, the Cipollone case itself offered the "example" controlling this case: the tort law duty
23 not to avoid making deceptive statements and/or to avoid concealing critical facts when
24 circumstances would dictate that such facts should be disclosed.⁸

25 Philip Morris has repeatedly tried to assert⁹ -- in this case and many, many others --
26 that the plaintiff's fraudulent misrepresentation claims or concealment claims are merely failure
27 to warn claims in disguise. As the Court can see from the Supreme Court's decision quoted
28 above, Philip Morris is grossly mistaken. See, also, Burton v. R.J. Reynolds Tobacco Co., 884
F. Supp. 1515 (D. Kan. 1995); Witherspoon v. Philip Morris, Inc., 964 F.Supp. 455 (DC D.C.
1997). Therefore, Plaintiff's fraudulent concealment claims and claims that Philip Morris

29 ⁸Cipollone was, of course, a tort case brought under New Jersey law, not an administrative action. The
30 fraud claims were **not** held to be preempted when the case was remanded for retrial.

31 ⁹Defendant cites a Fifth Circuit decision, Allgood v. R.J. Reynolds Tobacco Company, 80 F.3d 168 (5th
32 Cir. 1996) as holding that fraudulent concealment and fraudulent suppression claims, as well as claims that
33 Defendants neutralized the effect of the federally mandated warnings through their advertising and
34 promotional efforts, are preempted because they are "failure to warn claims" presented differently. As can
35 be seen from the quote above, this just isn't so.

1 misrepresented information and also suppressed information from the public, including
2 Plaintiffs, are not pre-empted and Philip Morris' motion to strike must be denied.

3 7. Conspiracy to Misrepresent or Conceal Material Facts Is Not Preempted

4 Finally, the Supreme Court approved of the conspiracy claim:

5 "Petitioner's final claim alleges a conspiracy among respondents to
6 misrepresent or conceal material facts concerning the health hazards of
7 smoking. n28 The predicate duty underlying this claim is a duty not to conspire
8 to commit fraud. For the reasons stated in our analysis of petitioner's intentional
9 fraud claim, this duty is not pre-empted by | 5(b) for it is not a prohibition based
10 on smoking and health" as that phrase is properly construed. Accordingly, **we**
11 **conclude that the 1969 Act does not pre-empt petitioner's conspiracy**
12 **claim."** *Id.* at 530.

13 Once again Philip Morris misstated the law so clearly set forth by the Supreme Court
14 in Cipollone by stating that the Court held that Plaintiffs' conspiracy count is pre-empted. It
15 plainly is not. See also, Castano v. The American Tobacco Co. et. al, 870 F. Supp. 1425
16 (E.D. La. 1994) and Burton v. R.J. Reynolds Tobacco Co., 884 F. Supp. 1515 (D. Kan. 1995).

17 8. Even Post-1969 Failure to Warn Claims Are Not Preempted to the Extent that They
18 Are Not Based on Advertising and Promotional Activities Related to Smoking and
19 Health

20 Based on the express language in the labeling act and in Cipollone, **failure to warn**
21 **claims and other claims cannot be preempted to the extent that they are not based**
22 **on advertising and promotional activities related to smoking and health.** This exception
23 is based on express preemption. To hold otherwise is to embrace the discredited doctrine
24 of implied preemption. Defendant's tortious activities that are not based on its cigarette
25 "advertising or promotion" are not preempted. The Cipollone court stated:

26 "[I]nsofar as claims under either failure to warn theory require a showing that
27 respondents' post-1969 advertising or promotions should have included
28 additional, or more clearly stated, warnings, those claims are pre-empted. **The**
act does not, however, pre-empt petitioner's claims that rely solely on
respondents' testing or research practices or other actions unrelated to
advertising or promotion." *Id.* at 524-525.

Furthermore, the decision protects state law claims that charge violation of duty to
disclose facts "through channels of communication other than advertising and promotions:"

"The concealment allegations, insofar as they rely on **a state law duty to**
disclose material facts through channels of communication other than
advertising and promotions, do not involve an obligation with respect to

1 those activities within Section 5(b)'s [the preemption section's] meaning." Id.

2 a. The "state law duty to disclose material facts through channels of
3 communication other than advertising and promotions" arises through
4 voluntary assumption of duty.

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

13 Cipollone does not extend preemption to duties that arise *through the actions of the*
14 *defendant*, rather than through state law alone. Cipollone also stated that duties that are
15 "undertaken" by the defendants are not considered preempted:

16 "[A] common law remedy for a contractual commitment voluntarily undertaken
17 should not be regarded as a requirement . . . imposed under State law" within
18 the meaning of § 5(b)." Cipollone. at 526.

19 Philip Morris both prior to and after 1970, and continuing to this day, engaged in a
20 consistent, intensive pattern of nonpromotional advocacy. The post-1970 advocacy
21 statements of Defendants *create* a duty **because they constitute an "undertaking."** One
22 who undertakes to communicate with the public has a duty to do it non-negligently. This
23 principle applies even if the party had no duty to communicate in the first place.

24 //

25 b. Defendant's Own Public Advocacy Does Not Contain Federal Warnings, and
26 Thus Cannot be Considered "Advertising or Promotion" Under the Labeling
27 Acts and Plaintiff's Causes of Action based Thereon Are Not Preempted

28 The Cigarette Labeling Acts required a specific warning on all advertising and
29 promotion. Section 1333 of the 1984 Act required specific warnings on "packages,
30 advertisements, and billboards." 15 U.S.C. §1333(a). Thus, the Act requires federally-
31 mandated health warnings on all packaging or advertising. Any "advertising" must have a

1 federally-mandated health warning. So, can a cigarette manufacturer buy space in a
 2 newspaper to advocate a public position or a scientific issue **without** including the health
 3 warning? The answer is: **yes**, apparently. Philip Morris has published numerous "advocacy
 4 pieces" over the years, **none of which have the federally-required warnings**. Similarly,
 5 over the years Philip Morris authored *press releases, annual reports to shareholders*, and
 6 various other public statements which offered material facts on the health effects of cigarettes
 7 and challenged scientific data on health hazards. These were unaccompanied by the Federal
 8 warning and therefore were not considered by Philip Morris to be "advertisements." Thus,
 9 Plaintiff's claims based on these "advocacy pieces" are not preempted.

10 Philip Morris' advocacy activities can also be seen as violations of the "duty not to
 11 deceive" which is also not preempted under Cipollone:

12 "Moreover, petitioner's fraudulent misrepresentation claims that do arise with
 13 respect to advertising and promotions (most notably claims based on allegedly
 14 false statements of material fact made in advertisements) are not pre-empted
 15 by | 5(b). Such claims are not predicated on a duty based on smoking and
 16 health" but rather on a more general obligation -- **the duty not to deceive.**" Id.
 17 at 528-529.

18 **IV. CONCLUSION**

19 The following is a table of the *Cipollone* Court's conclusions on preemption:

Claim	Basis	Preempted ?	Reference
All pre-1970 claims, including failure to warn, strict liability, misrepresentation	various state law bases	NO	"[W]e conclude that section 5 of the 1965 Act only pre-empt state and federal rulemaking bodies from mandating particular cautionary statements and did not pre-empt state law damages actions." <i>Cipollone at 519-520.</i>

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Post 1969 failure to warn	"requirements or prohibitions based on smoking and health in advertising or promotion"	YES	"Petitioner's claims are preempted to the extent that they rely on a state-law requirement or prohibition . . . with respect to . . . advertising or promotion. Thus, insofar as claims under either failure-to-warn theory require a showing that respondents' post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are preempted." <u>Id.</u> at 524.
Express Warranty	duty voluntarily undertaken	NO	"While the general duty not to breach warranties arises under state law, the particular "requirement . . . based on smoking and health . . . with respect to the advertising or promotion [of] cigarettes" in an express warranty claim arises from the manufacturer's statements in its advertisements" and "is not preempted by the 1969 Act." <u>Id.</u> at 526-527.
Misrepresentation	Duty "not to deceive"	NO	"[P]etitioner's fraudulent misrepresentation claims that do arise with respect to advertising and promotions most notably claims based on allegedly false statements of material fact made in advertisements) are not pre-empted by section 5(b). Such claims are not predicated on a duty 'based on smoking and health' but rather on a more general obligation - the duty not to deceive." <u>Id.</u> at 528-529.
Fraudulent concealment	Duty "not to make false statements... or to conceal facts"	NO	"intentional fraud and misrepresentation both by false representation of a material fact [and by] conceal[ment of] a material fact. The predicate of this claim is a state law duty not to make false statements of material fact or to conceal such facts. . . . Petitioner's claims that respondents concealed material facts are therefore not preempted insofar as those claims rely on a state law duty to disclose such facts through channels of communication other than advertising and promotion." <u>Id.</u> at 528
Conspiracy	Duty "not to commit fraud"	NO	"The predicate duty underlying this claim is a duty not to conspire to commit fraud... we conclude that the 1969 Act does not pre-empt petitioner's conspiracy claim." <u>Id.</u> at 530.

1	Strict Liability	State law duty to avoid selling defective product	NO	"That the pre-emptive scope of section 5(b) cannot be limited to positive enactments does not mean that section pre-empts all common law claims. For example, as respondents concede, section 5(b) does not generally pre-empt 'state-law obligations to avoid marketing cigarettes with manufacturing defects or to use a demonstrably safer alternative design for cigarettes.'" <i>Id.</i> at 523.
2	3	4	5	6
7	failure to test or do adequate research	State law duty to test	NO	"The Act does not, however, pre-empt petitioner's claims that rely solely on respondents' testing or research practices or other actions unrelated to advertising or promotion." <i>Id.</i> at 524-525.
8	9	10	11	12
13	Failure to utilize non-advertising, non-promotional means to warn	General duty to warn and duty voluntarily undertaken	NO	"The act does not, however, pre-empt petitioner's claims that rely solely on respondents' testing or research practices or other actions unrelated to advertising or promotion..." <i>Id.</i> at 524-525. "[A] common law remedy for a contractual commitment voluntarily undertaken should not be regarded as "a requirement . . . imposed under State law" within the meaning of § 5(b)." <i>Id.</i> at 526.
14	15	16	17	18

17 **Preemption is not a doctrine which eliminates single allegations set forth in a**
18 **plaintiff's cause of action. Either the preemption is valid, in which case the claim is**
19 **gone, or if the preemption argument is not valid, the language within the claim is not**
20 **subject to a motion to strike.** Philip Morris has not attempted here to strike out a single
21 claim. Nowhere in Defendant's moving papers does Philip Morris suggest any grounds for
22 striking these allegations beyond their simplistic and meaningless statement that the
23 allegations challenge "... directly and indirectly the adequacy of the federally mandated
24 warnings on cigarette packages". This "challenge" is pure fiction and is not a proper basis
25 for either preemption nor a motion to strike.

26 The motion here is nothing more than a frivolous attempt to conduct a "line item veto"
27 **over some of the most damning allegations of tortious conduct plaintiff made against**
28 **it in her complaint.** None of Plaintiff's claims are based on allegations that Philip

1 Morris' post-1969 warning labels should have included additional, or more clearly stated,
2 warnings, and more importantly, none of the allegations under attack by this motion allege that
3 Philip Morris failed to warn of the health risks of smoking after 1969 through advertising and
4 promotion. Defendant's Motion to Strike portions of Plaintiff's complaint under the doctrine
5 of preemption is improper and unsupported by fact or law. The Motion should be denied.

6 Dated: May ____, 2000

THE LAW OFFICES OF MICHAEL J. PUIZE

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9 By: _____
MICHAEL J. PUIZE
10 Attorney for Plaintiff

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

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

20
21

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

22
23
24

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 MOTION TO STRIKE PORTIONS OF PLAINTIFF'S COMPLAINT** on the interested parties in this action by placing:

25
26

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

27

See Attached Service List

28

(X) By Envelope - by placing () the original (X) a true copy thereof enclosed in sealed

1 envelopes addressed as above and delivering such envelopes:

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

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

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

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

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

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

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

21 _____
22 Ellen Girma

23 **SERVICE LIST**

24 Boeken v. Philip Morris, Inc., et al.
25 Case No. BC 226593

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