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

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11 RICHARD BOEKEN,) Case No. BC 226593
12 Plaintiff,)
13 vs.) **PLAINTIFF'S OBJECTION TO**
14 PHILIP MORRIS, INC., et al.,) **DEFENDANT PHILIP MORRIS, INC'S**
15 Defendants.) **REQUEST FOR JUDICIAL NOTICE**
16 _____) Date: June 7, 2000
Time: 8:30 a.m.
Dept: 55
Complaint Filed: May 16, 2000
17 Judge: Honorable Cesar C. Sarmiento

18 FILED CONCURRENTLY HEREWITH:
19 APPENDIX OF NON-CALIFORNIA
20 AUTHORITIES; REQUEST FOR
21 JUDICIAL NOTICE; [PROPOSED]
22 ORDER; AND PROOF OF SERVICE

21 **I. PHILIP MORRIS, INC'S CITATION TO AND RELIANCE ON UNPUBLISHED**
22 **COURT OPINIONS IS A VIOLATION OF RULE 977 OF THE CALIFORNIA**
23 **RULES OF COURT AND ALL REFERENCES THERETO CONTAINED IN ITS**
DEMURRER SHOULD BE STRICKEN

24 Plaintiff Richard Boeken hereby objects to following exhibits referenced in
25 Defendant Philip Morris Incorporated's Request for Judicial Notice, and cited to and relied
26 upon by Philip Morris in its Demurrer to Plaintiff's complaint, on the grounds that citation to
27 and reliance on said exhibits is prohibited by California Rules of Court, Rule 977:

- 28 1. Exhibit C, Order in Van Fossen v. American Tobacco Co., No. CIV S-98-1694 GEB DAD (E.D. Cal. Jan. 22, 1999);

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2. Exhibit D, Order Sustaining Demurrer and Briefing Thereon in Pavolini v. Raybestos-Manhattan, Inc., S.F. Sup. No. 992223 (July 7, 1998);
3. Exhibit F, Order denying in part and granting in part defendants' motion for judgment on the pleadings in Guzman v. Philip Morris Inc., No. C-99-071797 MMC (N.D. Cal. July 9, 1999);
4. Exhibit G, Order granting defendants' motion to dismiss in Myers v. Philip Morris Inc., No. CIV-F-99-5449-REC-LJO (E.D. Cal. May 25, 1999);
5. Exhibit H, Order granting defendants' motion for summary judgment in Baker v. Philip Morris Inc. No. 98-1684-IEG (LSP) (S.D. Cal. Jan. 28, 1999.);
6. Exhibit I, Order in Jernigan v. Brown & Williamson Tobacco Corp., No. CIV-S 94-1325 GEB JFM (E.D. Cal. Jan. 3, 1996);
7. Exhibit J, Order on Demurrer in County of Los Angeles v. R.J. Reynolds Tobacco Co., S.D. Sup. No. 707651 (Dec. 23, 1997);
8. Exhibit L, Order Sustaining Demurrer in Bright v. Philip Morris, Inc., L.A. Sup. No. BC206968 (June 15, 1999);
9. Exhibit M, Ruling on defendant's demurrer in In Re Tobacco II, S.D. Sup. No. JCCP 4042 (Mar. 26, 1999);
10. Exhibit N, Order sustaining defendants' demurrer to plaintiffs' amended complaint in Fibreboard Corp. v. R.J. Reynolds Tobacco Co., Alameda Sup. No. 791919-8 (Jan. 13, 1999);
11. Exhibit O, Order sustaining defendants' demurrer to eight causes of action and overruling defendants' demurrer to on cause of action in Souders v. Philip Morris, Inc., Los Angeles Cty. Super. Ct. No. PC 024515 (Mar. 2, 2000);
12. Exhibit P, Order Sustaining Demurrer and Briefing Thereon in Brigham v. Raybestos-Manhattan, Inc., S.F. Sup. No. 992230 (July 7, 2000);
13. Exhibit Q, Ruling in Stern v. Brown & Williamson Tobacco Corp., Monterey Sup. No. M 37696 (Aug. 7, 1998);
14. Exhibit R, Order in Seibels Bruce Group v. R.J. Reynolds Tobacco Co., No. C990593 (N.D. CA Sep. 21, 1999);
15. Exhibit S, Order and opinion in Colfield v. American Tobacco, No. CIV-98-1695 DFL DAD (E.D. Cal. May 7, 1999);
16. Exhibit T, Order in Shipunoff v. American Tobacco Co., No. CIV S98-1696 GEB PAN (E.D. Cal. May 4, 1999);
17. Exhibit U, Order in Perseley v. Brown & Williamson Tobacco Corp., No. CV 97-2696 JMI (C.D. Cal. Feb. 11, 1998);

Citation to and **reliance** on unpublished opinions is a violation of Rule 977 of the California Rules of Court. Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.

1 et.al. (1996) 45 Cal. App.4th 1, n.10:

2 “(a) **An opinion that is not ordered published shall not be cited or**
3 **relied upon by a court or a party in any other action or proceeding**
4 except as provided in subdivision (b).

4 “(b) Such an opinion may be cited or relied on:

5 “(1) when the opinion is relevant under the doctrines of law of the case, res
6 *judicata*, or collateral estoppel; or

7 “(2) when the opinion is relevant to a criminal or disciplinary action or proceeding
8 because it states reasons for a decision affecting the same defendant or
9 respondent in another such action or proceeding.” Cal. Rules of Court, Rule
10 977(a), (b).

9 Judicial notice may not be used to circumvent the prohibition against citing
10 unpublished opinions. Mangini v. R.J. Reynolds Tobacco Co. (1994) 7 Cal.4th 1057,
11 1064.

12 Philip Morris failed to provide this Court with the Legislative History surrounding the
13 1998 amendment to Civil Code Section 1714.45, **citing and relying** instead on a series
14 of **unpublished trial court** orders (most from Federal Courts purporting to interpret
15 California law). Not only are these cases of **no precedential value**, but such citation to
16 and reliance on is a violation of Rule 977 of the California Rules of Court. Therefore,
17 **Plaintiff requests that all references to said unpublished orders contained in Philip**
18 **Morris’ Demurrer to Plaintiff’s Complaint be stricken on the same grounds as set**
19 **forth above.**

20 **II. ONLY ONE OF THE UNPUBLISHED ORDERED CITED AND RELIED UPON**
21 **BY PHILIP MORRIS, INC. SUPPORT ITS POSITION**

22 Although Philip Morris has attached 17 Orders that purportedly support its position,
23 only **one**, Myers v. Philip Morris, Inc. No. CIV-F-99-5449-REC-LJO (E.D. Cal. May 25,
24 1999) actually adopts its position.¹ Of the others: **three involve cases filed between**
25 **1988 and 1998**, the period of time when the tobacco companies enjoyed their fraudulently

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28 ¹Bright v. Philip Morris, Inc., L.A. Sup. No. BC206968 (June 15, 1999) appears at first glance to also
adopt Defendant’s position. **However, that case was filed in pro per and no opposition papers were
filed by the plaintiff, nor did she appear at the hearing on Defendant’s motion.**

1 obtained immunity²; **four** involve cases where the plaintiff was **diagnosed with a**
2 **smoking-related disease between 1988 and 1998**, but filed their case after 1998. The
3 court in those cases ruled that **because the plaintiff's cause of action accrued as of**
4 **the date of diagnosis** the former version of Civil Code Section 1714.45 applied and,
5 thus, barred their claims;³ **four** hold that **the date the cause of action accrues**
6 **determines which version of 1714.45 applies**;⁴ **two** have so little detail that is
7 impossible to determine the rationale for their holding or even exactly what the holding
8 was;⁵ **one** denied the tobacco defendants motion for judgment on the pleadings to the

10 ²Jernigan v. Brown & Williamson Tobacco Corp., CIV-S 94-1325 GEB JFM was filed in **1996**; County of
11 Los Angeles v. R.J. Reynolds Tobacco Company, Sup. Ct. Cnty. San Diego No. 707651 was filed in 1997;
12 Persley v. Brown & Williamson Tobacco Corp. (E.D. Cal.) CV 97-2696 JMI (Rcx) was first filed in **1997**.

13 ³Baker v. Philip Morris Incorporate (S.D. Cal.) No. 98-1684-IEG (LSP) ("In late June of July of **1997**
14 plaintiff ... first discovered his personal injury." However, the Court held "**...[A]mended Section 1714.45**
15 **indicates that it is meant to apply to suits filed either before or after January 1, 1998....**" p.7); The
16 Seibels Bruce Group, Inc. v. R.J. Reynolds Tobacco Co. (N.D. Cal.) No. C-99-0593 ("... [P]lantiff's claims for
17 equitable indemnity, **which accrued before January 1, 1998**, would be barred by section 1714.45... [T]he
18 court is not willing to determine at this time whether plaintiff's claims accrued after January 1, 1998." pp. 15-
19 16); Colfield v. American Tobacco Company (E.D. Cal.) CIV-S-98-1695 DFL DAD ("There is no dispute that
20 all of plaintiffs' claims arose between **1987 and 1997**, during the period of defendants' immunity from suit."
21 p. 3); Shipunoff v. The American Tobacco Co. (E.D. Cal.) CIV S-98-1696 ("Because it cannot be determined
22 ... whether Plaintiffs can amend their complaint to state an actionable products liability claim for **injuries or**
23 **damages occurring after the effective date of amended section 1714.45**, Plaintiffs' product liability
24 claims are dismissed without prejudice." p. 4).

25 ⁴Van Fossen v. The American Tobacco Company (E.D. Cal.) CIV S-98-1694 GEB DAD ("[Plaintiff]
26 asserted ... that he should be granted leave to amend his complaint to state a claim for **injuries that**
27 **became manifest approximately when he had surgery in 1998**. . . . [A]t this time, it cannot be
28 determined whether [plaintiff] can amend his complaint to state an actionable products liability claim for
these injuries. Therefore, [plaintiff's] products liability claims are dismissed without prejudice." P. 4);
Pavolini v. Raybestos-Manhattan, Inc. S.F. Sup. Ct. No. 992223 and Brigham v. Raybestos-Manhattan, Inc.
S.F. Sup. Ct. No. 992230. (Philip Morris failed to inform the Court that in both cases, Judge Garcia
sustained initial demurrers but allowed amendments "**to plead injury prior to the January 1, 1988**
enactment and post the January 1, 1998 amendment." See, the Court's Orders thereon attached to
Plaintiff's Request for Judicial Notice filed concurrently herewith.) Fibreboard Corp. & Owens Corning v. R.J.
Reynolds Tobacco Co. et. al. Alameda Sup. Ct. No. 791919-8 ("The Court does **not** rule that the amended
version of Civil Code Section 1714.45 bars . . . claims with respect to . . . personal injury actions . . . that
accrued after January 1, 1998." p. 1).

⁵Stern v. Brown & Williamson Tobacco Corp. Monterey S. Ct. No. M 37696 (The Court merely stated
"For the reasons advanced by Defendant the court agrees" that it is "immune from liability under Civil Code
§1714.45." p. 1. There is no indication in the Order, however, what those reasons were.); Souders v. Philip
Morris L.A. Sup. Ct. No. PCO24515 (Merely states "Demurrer is sustained with **leave to amend** as to the
First, Second, Third, Fourth, Fifth, Eighth, Ninth and Tenth Causes of Action and **overruled** as to the Sixth
Cause of Action as stated in the moving papers as well as the official notes of the Court Reporter." p. 1)

1 extent that plaintiff's negligence, strict liability, false representation, deceit/fraudulent
2 concealment and civil conspiracy claims "are based on defendants' conduct occurring
3 during the periods before January 1, 1988 and after January 1, 1998;⁶ and **one** expressly
4 overruled the tobacco companies' demurrers based on Section 1714.45.⁷

5 Surprisingly, Philip Morris attached a copy of the Order Denying Defendant's
6 Renewed Motion to Dismiss and Granting Defendant's Request for Judicial Notice in Erler
7 v. Philip Morris Incorporated (S.D. Cal.) No. 98CV138. This decision expressly supports
8 Plaintiff's position and held that "[T]his court finds that the Legislature made a **clear**
9 **statement of intent that Amended §1714.45 apply retroactively.**" See, Ex. V to
10 Defendant's Notice of Lodging p. 7. The Court further held: "Given the retroactivity
11 provision contained in Amended §1714.45, and the significant public interest served by
12 the statute, this court finds that **retroactive application of the statute does not**
13 **contravene the due process clause.**" Id. at p. 14.

14 Other Courts have ruled similarly. Plaintiff has not cited to any of these unpublished
15 rulings in its opposition to Philip Morris' Demurrer and has not relied thereon. Plaintiff
16 provides the Court with following unpublished trial court orders only to counteract the
17 impression left by Philip Morris that the vast majority of courts have ruled as Philip Morris
18 urges this Court to do. This is simply not true as set forth herein.

19 In Henley v. Philip Morris, et. al., S.F.S.C. No. 995172, Opinion and Order on
20 Defendant's Motion for New Trial and For Judgment Notwithstanding the Verdict, RJN Ex
21 4, the Court ruled:

22 "Whereas the exemption was in effect between 1988 and the end of 1997,
23 plaintiff smoked, and became addicted to, Philip Morris' cigarettes in the
24 decades before the exemption went into effect and was first diagnosed after
25 the exemption was lifted. ...[P]resent... Section 1714.45(f) evidences the
clear legislative intent to hold tobacco manufacturers accountable in

26 ⁶Guzman v. Philip Morris (N.D. Cal.) No. C-99-071797 MMC.

27 ⁷In Re Tobacco Cases 11, S.D. Sup. Ct. No. JCCP 4042. ("Demurrer to the . . . cause of action for fraud
28 & deceit, . . . violation of B & P Code §16700 et seq. and . . . cause of action for unjust enrichment on the
ground that they are barred by the immunity afforded by CC §1714.45 prior to its January 1, 1998
amendment is **overruled.**" P. 3 of 13.)

1 **situations such as that presented...." Id., Plaintiffs' RJN Ex. 4 at 16.⁸**
2 The Court in Whiteley v. Raybestos-Manhattan, Inc., et al., S.F.S.C. No. 303184,
3 Order Re: Tobacco Defendants' Summary Judgment Motion, RJN Ex. 6 **denied** Philip
4 Morris' Motion for Summary Judgment on the basis of Section 1714.45, because Ms.
5 Whiteley was diagnosed **after** the effective date of the 1998 Amendment.⁹ In both Henley
6 and Whiteley, the plaintiffs were allowed to base their claims against the tobacco
7 companies on their **past** misconduct.

8 **III. CONCLUSION**

9 For the foregoing reasons, Plaintiff objects to the unpublished trial court opinion
10 listed as exhibits by Defendant Philip Morris Incorporated in its Request for Judicial
11 Notice, and cited to and relied upon by Philip Morris in its Demurrer to Plaintiff's complaint
12 and Plaintiff hereby requests that all references thereto be stricken from the Memorandum
13 of Points and Authorities in Support of Philip Morris' Demurrer to Plaintiff's Complaint.

14 Dated: May 26, 2000 THE LAW OFFICES OF MICHAEL J. PUIZE
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16 By: _____
17 Michael J. Puize
18 Attorney for Plaintiff

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

20 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**
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22 ⁸Judge Munter's post-trial rulings in Henley are particularly persuasive here. He had an advantage, in
23 his ruling, unavailable to all other California courts (federal or state) considering the issues discussed here.
24 He presided over an extensive trial with all of the evidence that was presented in that case. Judge Munter
25 determined that **Section 1714.45 did not immunize pre-1988 conduct and the none of Plaintiff's**
26 **causes of action were barred by Section 1714.45 because her lung cancer was diagnosed in 1998,**
27 **after the effective date of the 1998 Amendment.** The trial resulted in a jury verdict on **nine** causes of
28 action against Philip Morris in the amount of \$1.5 million in compensatory damages and \$50 million (later
reduced by the Court to \$25 million) in punitive damages.

⁹Whiteley just went to trial against Philip Morris, Inc. and R.J. Reynolds Tobacco Company and resulted in a
jury verdict awarding the Plaintiffs \$1.72 million in compensatory damages and \$10 million in punitive damages
against each Defendants.

1 I am employed in the County of Los Angeles, State of California. I am over the age of
2 18 and not a party to the within action; my business address is 11755 Wilshire Boulevard,
Suite 1170, Los Angeles, California 90025.

3 On May 30, 2000, I served the foregoing document described as **PLAINTIFF'S**
4 **OBJECTION TO DEFENDANT PHILIP MORRIS INC'S REQUEST FOR JUDICIAL**
NOTICE on the interested parties in this action by placing:

5 _____ the original to the propounding party and a true copy to all other parties; or

6 XX a true copy thereof enclosed in a sealed envelope addressed as follows:

7 **See Attached Service List**

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

10 (X) By Mail: As follows: I am "readily familiar" with this firm's practice of collection and
11 processing correspondence for mailing. Under that practice, it would be deposited with United
12 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.

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

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

16 () By Facsimile Transmission: On _____, I caused the above-named document to be
17 transmitted by facsimile transmission telephonically to the offices of the addressee(s) at the
18 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.

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

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

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

23 _____
24 Ellen Girma

25 **SERVICE LIST**

26 Boeken v. Philip Morris, Inc., et al.

27 Case No. BC 226593

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