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**CORPORATE DISCLOSURE STATEMENT OF
DEFENDANT-RESPONDENT PHILIP MORRIS, USA, INC.**

Philip Morris USA is a wholly owned subsidiary of Altria Group, Inc. (“Altria”). The following entities are also wholly owned, directly or indirectly, by Altria:

201 Turk Street Limited Partnership
500 Grant Street Associates, Limited Partnership
Altria Client Services Inc.
Altria Corporate Services International, Inc.
Altria Enterprises LLC
Altria Finance (Cayman Islands) Ltd.
Appalachian Basin Partners, L.P.
Arlington R.A. LLC
Attleboro R.A. LLC
Bluegrass Leasing
Carolina Properties of Greenville, Inc.
Coadunate, LP
Colonial Heights Packaging Inc.
Cormorant Energy Investment Corp.
Dart Resorts Inc.
DM Associates Limited Partnership
Fall River R.A. LLC
First Midland Limited Partnership
General Foods Credit Corporation
General Foods Credit Investors No. 1 Corporation
General Foods Credit Investors No. 2 Corporation
General Foods Credit Investors No. 3 Corporation
Golden Ring Limited Partnership
Grant Holdings, Inc.
Grant Transit Co.
HNB Investment Corp.
Hugo Generation, LLC
HUDC TC Limited Partnership
John Middleton Co.
Lexington R.A. LLC
Le Rhône Investment Corp.

LIC Investors France
Management Financial Services LLC
Management Subsidiary Holdings Inc.
Michigan Investment Corp.
Milwaukee West Development Limited Partnership
MX Production, L.P.
National Temple Limited Partnership
Oak Terrace Limited Partnership
One Channel Corp.
Peabody R.A. LLC
Philip Morris Capital (Bermuda) Limited
Philip Morris Capital Corporation
Philip Morris Duty Free Inc.
Philip Morris USA Inc.
PMBT Leasing Ventures
PMCC Calpine NEIM LLC
PMCC Calpine New England Investment LLC
PMCC Investors No. 1 Corporation
PMCC Investors No. 2 Corporation
PMCC Investors No. 3 Corporation
PMCC Investors No. 4 Corporation
PMCC Leasing Corporation
PMCC Pasadena Investment L.P.
PT Production L.P.
R.A. Anandale LLC
R.A. Black Mountain LLC
R.A. Carlisle LLC
R.A. Chantilly LLC
R.A. Chatanooga Polymer Drive LLC
R.A. Chatanooga Shallowford Road LLC
R.A. Cherry Hill LLC
R.A. Clemson LLC
R.A. Cromwell LLC
R.A. Dillon LLC
R.A. Glenside Heights LLC
R.A. Greenville Brookfield Road LLC
R.A. Greenville Industrial Blvd. LLC
R.A. Harrisburg Pike LLC
R.A. Mullins LLC
R.A. Pottsville LLC

R.A. Providence LLC
R.A. Rochester LLC
R.A. Rossville LLC
R.A. Seymour LLC
R.A. Smithfield LLC
R.A. Willimantic LLC
R.A.N. Smithfield LLC
Raynham R.A. LLC
RIC Investors No. 1 Corporation
RIC Investors No. 2 Corporation
RIC Investors France
SB Leasing Inc.
SIC Investors France
Simsbury Associates Limited Partnership
Simsbury Leasing Joint Venture
Simsbury Properties Inc.
So. Yarmouth R.A. LLC
SunAmerica Affordable Housing Partners III
SunAmerica Affordable Housing Partners IV
SunAmerica Affordable Housing Partners VI
SunAmerica Affordable Housing Partners XXIV
Technology Enterprise Computing Works, LLC
Trademarks LLC
Trimarin Leasing Investors, L.L.C.-I
Trimarin Leasing Investors, L.L.C. II
Trimarin Leasing, L.P.
Watertown R.A. LLC
Wolverine Investment Corp.
Worcester TC LLC

Altria also owns a 28.5% economic and voting interest in SABMiller plc.

CORPORATE DISCLOSURE STATEMENT OF DEFENDANT-RESPONDENT BROWN & WILLIAMSON HOLDINGS, INC.

Defendant-Respondent Brown & Williamson Holdings, Inc., formerly known as Brown & Williamson Tobacco Corporation, hereby advises the Court that effective August 2, 2004, Brown & Williamson Tobacco Corporation changed its name to Brown & Williamson Holdings, Inc. (“Brown & Williamson”). Brown & Williamson is sued herein as successor by merger to The American Tobacco Company. The American Tobacco Company was a Delaware corporation that was merged into Brown & Williamson Tobacco Corporation on February 28, 1995. The American Tobacco Company no longer exists as a separate corporate entity, and has no corporate parents, subsidiaries, or affiliates.

Brown & Williamson is a Delaware corporation that is wholly owned by BATUS Tobacco Services, Inc., which is a non-public holding company. Brown & Williamson's ultimate parent corporation is British American Tobacco, p.l.c., a publicly held United Kingdom corporation.

Brown & Williamson further states that R.J. Reynolds Tobacco Company (“Reynolds Tobacco”) is the successor in interest to Brown & Williamson Tobacco Corporation’s U.S. tobacco business. Reynolds Tobacco is an indirect, wholly-owned subsidiary of Reynolds American, Inc., which is a publicly traded company. In addition to its ownership of non-U.S. tobacco business and other specified assets

and liabilities, Brown & Williamson owns approximately 42% of Reynolds American Inc.

Brown & Williamson hereby advises the Court that the following is a listing of its parent companies, subsidiaries and affiliates:

A/T B.A.T. – Prilucky Tobacco Co.
B.A.T Capital Corporation
B.A.T. China Ltd.
B.A.T Industries p.l.c.
B.A.T. International Finance p.l.c.
B.A.T. La Reunion SAS
B.A.T Vietnam Ltd.
B.A.T (Cyprus) Ltd.
B.A.T (U.K. and Export) Ltd.
BATMark Ltd.
BAT Pésci Dohánygyár Kft.
BAT Pacific Corporation
BAT Pacific, Inc.
BATUS Japan, Inc.
British American Tobacco Australia Ltd.
British American Tobacco Bangladesh Co. Ltd.
British American Tobacco Belgium S.A.
British American Tobacco Cameroun S.A.
British American Tobacco Central America S.A.
British American Tobacco Congo SARL
British American Tobacco Egypt LLC
British American Tobacco España, S.A.
British American Tobacco France SAS
British American Tobacco Ghana Ltd.
British American Tobacco Hellas S.A.
British American Tobacco Holdings South Africa (Pty) Ltd.
British American Tobacco Holdings (The Netherlands) B.V.
British American Tobacco Kenya Ltd.
British American Tobacco Korea Ltd.
British American Tobacco Korea Manufacturing Ltd.
British American Tobacco International Ltd.
British American Tobacco International (Holdings) B.V.

British American Tobacco Italia S.p.A.
British American Tobacco Japan K.K. (Ltd.)
British American Tobacco Mexico, S.A. de C.V.
British American Tobacco Nordic Oy
British American Tobacco p.l.c.
British American Tobacco Sigara ve Tütüncülük Sanayi ve Ticaret A.S.
British American Tobacco Switzerland S.A.
British American Tobacco The Netherlands B.V.
British American Tobacco Uganda Ltd.
British American Tobacco UK Ltd.
British American Tobacco (1998) Ltd.
British American Tobacco (Brands) Inc.
British American Tobacco (Brands) Ltd.
British American Tobacco (Cambodia) Ltd.
British American Tobacco (Czech Republic), s.r.o.
British American Tobacco (Industrie) GmbH
British American Tobacco (Investments) Ltd.
British American Tobacco (Malawi) Ltd.
British American Tobacco (Malaysia) Berhad
British American Tobacco (New Zealand) Ltd.
British American Tobacco (Nigeria) Ltd.
British American Tobacco (PNG) Ltd.
British American Tobacco (Zambia) plc
British American Tobacco-Vinataba (JV) Ltd.
British-American Tobacco Co. (Hong Kong) Ltd.
British-American Tobacco Marketing (Singapore) Pte Ltd.
British-American Tobacco Polska S.A.
British-American Tobacco (Germany) GmbH
British-American Tobacco (Holdings) Ltd.
British-American Tobacco (Mauritius) p.l.c.
British-American Tobacco (Romania) Trading SRL
British-American Tobacco (Singapore) Pte Ltd.
C.A. Cigarrera Bigott Sucs.
CARISMA Marketing Services Ltd.
Carreras Group Ltd.
Ceylon Tobacco Co. Ltd.
CJSC British American Tobacco – SPb
Compania Chilena de Tabacos S.A.
Demerara Tobacco Co. Ltd.

Duvanska Industrija 'Vranje' A.D.
Imperial Tobacco Canada Ltd.
Nobleza-Piccardo S.A.I.C.y F.
OJSC British American Tobacco – STF
OJSC British American Tobacco – Yava
P.J. Carroll & Company Ltd.
Pakistan Tobacco Co. Ltd.
PT BAT Indonesia Tbk
Sociedade Agricola de Tabacos Lda.
Souza Cruz S.A.
Tabacalera Hondureña S.A.
Tabacalera Instmeña S.A.
Tabacalera Nacional S.A.A.
Tabacofina-Vander Elst N.V.
The West Indian Tobacco Company Ltd.
Tobacco Insurance Co. Ltd.
UZBAT A.O.
Weston Investment Co. Ltd.

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PRELIMINARY STATEMENT

This case went to the jury on a single theory of liability: that all cigarettes containing more than trace amounts of tar and nicotine – the vast majority of cigarettes on the market – are “defectively designed.” In a carefully reasoned opinion, the Appellate Division vacated the judgment and dismissed the complaint. Contrary to the characterization in appellants’ brief, the Appellate Division broke no new ground and imposed no “unprecedented proof requirement[s]” on negligence plaintiffs. Rather, the Appellate Division applied settled New York common law to appellants’ novel claim and found that claim to be fundamentally deficient.

To establish a claim for negligent design, plaintiffs in New York (and virtually every other jurisdiction) are required to show that the challenged product is dangerous *and* that the manufacturer could have produced instead a safer alternative design that would have retained the essential “function” and “utility” of the original. As the Appellate Division recognized, the appellants failed to do that. Instead, they were permitted to put their claim to a jury without *any* proof that their proposed alternative to regular cigarettes – “ultra-light” cigarettes with only trace amounts of nicotine and tar – served the same function as the defendants’ product or had any utility to consumers at all. This was because the trial court believed that a negligent-design plaintiff may prevail simply upon a showing that a safer “version” of the defendant’s product exists – even if that version is so different from

the original product that no consumer would consider it an acceptable substitute. Under the trial court's (and the plaintiffs') theory of New York law, whether a supposed alternative is "sellable or not is not part of the case." A-4301.¹ The Appellate Division correctly held this was dismissible error.

Where, as here, a product's function is to satisfy a subjective desire for pleasure and sensation, the "utility" of a proposed alternative product must be measured by whether consumers would consider it a reasonable substitute for the original. This holding is not "radical," nor does it "alter[] established New York product liability law." Br. 7. To the contrary, this principle has been an accepted part of modern product liability law for decades. It is *appellants'* proposed revision of New York law that is radical: if adopted by this Court, appellants' approach would empower the jury in a single civil case to impose sweeping changes in social policy that are clearly the prerogative of the legislature. The consequences would reach far beyond cigarettes to any "discretionary" product – motorcycles, convertibles, alcohol, hang-gliders, roller coasters, processed foods – that cannot be made safer without substantially impairing its appeal to consumers. This Court should decline appellants' invitation to transform New York law in such a way.

¹ A-__ refers to the Joint Appendix presented to the Appellate Division. R-__ refers to the single-volume supplemental Record on Appeal submitted to this Court. "Br. __" refers to Appellants' Brief.

There are other reasons the dismissal should be affirmed: appellants failed to prove proximate causation, and appellants' proposed rule, if adopted by this Court, would be preempted by federal law. And even if the dismissal were not affirmed, defendants would be entitled to a new trial because the trial court committed multiple evidentiary and instructional errors. Moreover, as the entire Appellate Division panel recognized, the punitive award is barred by federal and state law.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Can a plaintiff recover for negligent product design without presenting proof of a safer alternative design that would be acceptable to consumers and thus have function and utility similar to that of the defendant's product?

(Appellate Division's answer: No)

Should the Court decide to go beyond Question 1 (which we submit is unnecessary), the following questions will be presented:

2. Can a plaintiff in a negligent design case establish proximate causation without proving that the alleged negligence was a substantial contributing factor in her injury?

(The Appellate Division analyzed this question and suggested that the answer would be no, but did not rule on this basis. The trial court and the Appellate Division dissenters answered in the affirmative.)

3. Was it error to instruct the jury to consider only the product's risks and not its utility, or to exclude evidence that consumers consistently refuse to purchase the allegedly safer alternative despite knowledge of the original product's risks?

(The Appellate Division did not answer this question. The trial court and the Appellate Division dissenters answered in the negative.)

4. Is a rule of tort liability barring the sale of nearly all cigarettes in New York State preempted by federal law?

(The Appellate Division did not answer this question. The trial court and the Appellate Division dissenters answered in the negative.)

5. With regard to punitive damages, did the trial court err by (a) failing to dismiss the claim where defendant had no notice that the conduct at issue was punishable; (b) failing to require clear and convincing evidence of facts supporting punitive liability; (c) admitting evidence and argument concerning defendant's substantial net worth; or (d) upholding an award ten times the already substantial compensatory damages?

(The Appellate Division did not answer these questions. The dissenting justices answered question "5a" in the affirmative; the trial court answered that and the remaining questions in the negative.)

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Norma Rose was a regular smoker from the early 1950s until she quit in 1993. A-2546, 2615-16, 2630. In 1995, Mrs. Rose was diagnosed with lung cancer and a related neurological condition. A-2554-56, 2578, 2581. She was successfully treated for the cancer, but still suffers from the neurological condition. A-1791. She filed this lawsuit with her husband, Leonard Rose, against the six leading cigarette manufacturers, their current and former corporate parents, and two tobacco-industry research organizations.

Many of the initial claims, and several of the defendants, were dismissed or withdrawn early on. Ultimately, the trial proceeded against Philip Morris USA ("Philip Morris"), R.J. Reynolds Tobacco Company ("Reynolds"), and Brown &

Williamson Tobacco Corporation (“B&W”)² on a single theory of liability: negligence in the design of cigarettes.

A. Plaintiffs’ Theory of the Case

At trial, plaintiffs initially took the position that defendants were negligent because they “could have designed a safer cigarette” by “[taking] the nicotine out” or by making cigarettes with extremely low tar yields. A-1081, 1096-97. Plaintiffs’ expert witnesses testified that nicotine is addictive and a stimulant. A-1394-96. They explained that, for nicotine to produce these effects, it must be present in an “effective dose range” (A-1561), which they testified was somewhere between 0.3 and 0.5 milligrams per cigarette. A-1745. A “safer cigarette,” these experts opined, would be one that had no stimulating effects: “if it’s below the effective range, it doesn’t have that particular effect.” A-1740.

Defendants responded to plaintiffs’ claims by showing that, during the period when Mrs. Rose was smoking, Philip Morris and American Tobacco each manufactured and sold “ultra-light” cigarettes at the precise nicotine yield ranges that plaintiffs’ experts argued were “safer.” A-1745-48, 2042-44. For example, Philip Morris has marketed, and continues to market, cigarette brands (such as Merit Ultima) yielding as little as 0.1 milligrams of nicotine per cigarette, as well

² B&W was sued in its capacity as the successor in interest to The American Tobacco Company, which manufactured Pall Malls before being acquired by B&W.

as equivalently small yields of tar. A-2829-44. See also A-3061-62, 4147, 4221-22, 4378-79. Similarly, by 1971, the tar and nicotine yield of Carltons, made by B&W's predecessor, had been lowered to 1 milligram of tar and 0.1 milligrams of nicotine. A-7264.

Faced with this evidence, plaintiffs changed course. Instead of adhering to their argument that cigarette manufacturers could have made a safer cigarette but did not, plaintiffs told the jury in their closing argument that defendants were negligent because they provided consumers with a choice among cigarette brands with different tar and nicotine yields:

For the tobacco companies to put high tar cigarettes on the market, and then to put low tar cigarettes on the market, that I say is wrong.

A-5112. According to plaintiffs, defendants had a duty to sell *only* cigarettes with the lowest possible tar and nicotine yields: “[S]ell the safest one you can make.”

A-5185. Defendants were negligent because they sold ultra-light cigarettes and regular cigarettes “side by side.” A-5228.

Plaintiffs conceded that they offered no evidence that ultra-light cigarettes would have been accepted by consumers as a substitute for regular cigarettes: “we don’t have [that] evidence because that’s not part of the case.” A-4116. Indeed, the undisputed evidence was to the contrary – it showed that the vast majority of

smokers reject ultra-light cigarettes because such cigarettes do not provide the taste and sensory experience that they seek. See, *e.g.*, A-4028, 4091.

B. The Trial Court's Evidentiary Rulings

To counter this moving-target theory of liability, each defendant sought to show that it had acted reasonably throughout the period Mrs. Rose smoked. Defendants acknowledged that they had the capacity to produce (and indeed did produce) low-yield and ultra-low-yield products. But the trial court excluded or struck all evidence showing that nearly all smokers (including Mrs. Rose) prefer to purchase regular cigarettes and will not purchase ultra-low-yield alternatives. Even though the trial court initially permitted some of this evidence to be introduced, it ultimately changed its mind and instructed the jury to disregard it: “[W]hat consumers preferred or did not prefer,” the court instructed, was not “part of the issues in this case.” A-4198. “[Y]ou will no longer consider it.” *Id.* This ruling came after plaintiffs acknowledged to the court that they had no evidence that consumers *would* purchase ultra-light cigarettes or that ultra-lights have the same utility to consumers that regular cigarettes do: “[I]t’s a whole different trial to determine what is acceptable to a consumer. That’s a different case tha[n] we have been trying before your Honor.” R-16-17.

The trial court's ruling made it virtually impossible for defendants to show that it was reasonable to continue selling regular cigarettes alongside the ultra-light varieties.

1. The Role of Tar in Cigarette Flavor

The trial court excluded or struck all evidence that consumers choose their cigarettes based on "taste," that "tar" is the primary determinant of cigarette taste, and that smokers overwhelmingly prefer regular-strength cigarettes to those without appreciable levels of tar.

This evidence showed that low tar delivery necessarily means a less intense flavor. By its very design, defense witnesses testified, a low-tar cigarette has less intense taste than a regular cigarette: "It's the design of the product to give them less flavor, less tar diluted with air. *** It's the tar that creates the flavor." A-4029-30, 3024. Thus, when design features lower tar yields dramatically, those same features adversely affect cigarettes' taste, draw, and sensory effects. "That's always been a problem in introducing these products ***." A-3992. Consumers described smoking low-tar cigarettes as akin to "sucking on a straw." A-4031. Because of these characteristics, "very low-tar products have a very low acceptability in the marketplace." A-4028; see also A-4091.

Mrs. Rose herself acknowledged the differences between regular cigarettes and the light and ultra-light varieties. She testified that she smoked in part because

it was relaxing and it relieved stress and tension. A-2460-64, 2621-22, 4885-87. She also liked the taste of cigarettes. A-2619. And she disliked low-tar cigarettes. One of the brands she tried – Merit – was a low-tar and low-nicotine cigarette (not an ultra-light, which would have had an even less intense taste), but Mrs. Rose “didn’t like the taste” of Merits, so she did not smoke that brand for long. A-2553, 2618. Mrs. Rose briefly tried Vantage, another low-tar cigarette, but disliked that brand, too. A-2618. She instead decided to smoke Benson & Hedges, because she “liked the taste of them.” A-2556, 2619.

As a result of the court’s erroneous ruling regarding the relevance of consumer preferences, all of this evidence was stricken, and the jury was instructed that it was irrelevant.

2. The Effects Of Nicotine

The trial court also struck all evidence concerning consumer preferences for cigarettes containing nicotine. As appellants discuss in their brief (at 15-16), all of the evidence at trial showed that the sensory and pharmacological effects of nicotine, when it is present in sufficient amounts, play an essential role in smoking. One of appellants’ experts, for example, testified that nicotine consumption results in a “kick,” creates a sense of “euphoria or pleasure,” and has a “calming [e]ffect.” A-1408-09. “It jazzes us up when we’re down but calms us down when we’re jazzed up.” A-1410. See also A-2448 (testimony of plaintiffs’ expert psychophar-

macologist to the same effect). Another of plaintiffs' witnesses asserted that "nicotine is the product that sells cigarettes," and that the market performance of cigarettes with very low levels of nicotine was "dismal"; the reason ultra-light cigarettes are preferable, he testified, is that they are so unsatisfactory that smokers will not smoke them (or will smoke dramatically fewer of them). A-1466, 2042. See also A-1396, 1711. Defendants' witnesses agreed (see, *e.g.*, A-3918-24), but their testimony regarding consumer preferences was stricken. Because of the court's ruling that consumer preferences are irrelevant to a negligent design claim, defendants were prohibited from suggesting to the jury that consumer preferences for nicotine could be taken into account when assessing whether defendants' conduct was reasonable.

C. The Verdict

After seven weeks of trial, the jury returned a verdict for plaintiffs and assessed compensatory damages in the amount of \$3,420,000, allocated equally between Philip Morris and B&W. The jury found no liability against Reynolds, which manufactured the Camel cigarettes that Mrs. Rose had last smoked in the early 1950s. The trial then moved into a bifurcated punitive damages phase: punitive liability in Phase II and punitive amount in Phase III. The jury found that Philip Morris, but not B&W, was liable for punitive damages. A-5865-66. After hearing evidence in Phase III of Philip Morris's financial structure and resources,

including its supposed net worth of \$31.5 billion, the jury awarded the Roses \$17.1 million in punitive damages against Philip Morris. A-6019-20.

The court denied defendants' post-trial motions seeking judgment, a new trial, or, in the alternative, a substantial reduction in the punitive damages.

D. The Appeal

Philip Morris and B&W argued on appeal, *inter alia*, that they were entitled to judgment because plaintiffs had failed to make out a *prima facie* case when they elected not to present any evidence that their proposed alternative was acceptable to consumers and thus retained the function and utility of the original. In the alternative, defendants asked for a new trial based on various evidentiary and instructional errors and argued that the punitive award should be set aside or substantially reduced.

The Appellate Division majority agreed with the defendants' argument that plaintiffs had failed to make out a *prima facie* case of negligence. It therefore vacated the judgment and dismissed the complaint. Two dissenting justices would have upheld the compensatory award, but agreed with the defendants that punitive liability was improper.

The Appellate Division majority analyzed the case under traditional principles of New York product liability law. "Under New York law," the court explained, "a manufacturer cannot be held liable for failing to adopt an alternative

product design that has not been shown to retain the ‘inherent usefulness’ [of the original].” R-14. Because the plaintiffs had chosen not to present any evidence that consumers would consider ultra-light cigarettes an acceptable alternative to regular cigarettes, the court concluded that “the record contains no basis for a finding that light cigarettes have the same utility for the vast majority of smokers as do regular cigarettes.” R-13.

At the heart of the court’s ruling was a recognition that cigarettes – like many other discretionary products – serve a purely “subjective” function: they provide pleasurable sensations to their users. Thus, the only way to measure their “utility,” as compared with the utility of a purportedly safer alternative, is to examine whether consumers would consider the alternative a viable substitute. The court explained:

In the case of cigarettes, in which the product’s “usefulness” (such as it is) is the production, not of any objectively observable results, but of certain subjective sensations and feelings in the user (the taste of tar and the psychological effect of nicotine), the product’s functionality can only be demonstrated by its acceptability to consumers. *Absent any evidence that cigarettes with the low levels of tar and nicotine advocated by plaintiffs would be acceptable in the market for the cigarettes Norma Rose smoked, it cannot be said that plaintiffs have carried their burden of proving that it was “feasible to design [the offending product] in a safer manner.”*

R-14 (emphasis added).

The court also noted that plaintiffs had failed to identify any evidence from which the jury could legitimately have concluded that the defendants' supposed negligence proximately caused Mrs. Rose's injuries. According to the court, plaintiffs' own evidence indicated "that light cigarettes are inherently unsafe products" and that "that they may create even greater risk of harm by inducing smokers to 'compensate' for the reduced delivery of tar and nicotine by increasing the number of cigarettes smoked, the frequency of puffing, or the depth and duration of inhalation." R-27. The court also noted that plaintiffs identified no expert evidence "excluding the possibility that a previously nicotine-addicted person may, due to such 'compensation,' maintain the addiction by smoking [ultra-light] cigarettes." *Id.* Because plaintiffs adduced no expert testimony establishing that Mrs. Rose's injuries would not have occurred had she switched to ultra-light cigarettes, the court suggested that the plaintiffs had not proven proximate causation.

This appeal followed.

ARGUMENT

I. THE APPELLATE DIVISION CORRECTLY DISMISSED APPELLANTS' NEGLIGENT DESIGN CLAIM BECAUSE THERE WAS NO EVIDENCE OF A SAFER DESIGN THAT WOULD HAVE UTILITY SIMILAR TO THAT OF REGULAR CIGARETTES.

The Appellate Division held that appellants' claim failed as a matter of law because they did not introduce evidence sufficient to allow the jury to find that there was a safer alternative design for defendants' cigarettes that preserved the

function and utility of the original design. Contrary to appellants' assertions, the Appellate Division did not make new law when it required them to show that their proposed alternative would be acceptable to consumers. Instead, the court applied well established rules that are firmly grounded not only in New York product liability law, but also in common sense and compelling public policy considerations.

A. Appellants Failed To Prove That Defendants' Cigarettes Are Defectively Designed.

It is well established that New York law requires negligence plaintiffs in product liability suits to prove not only that the defendants' product is dangerous, but also that there is a safer, *feasible* way to design that product. And this Court has consistently defined "feasibility" to mean that the alternative product must retain the "function" and "utility" of the original. By failing to show that consumers would consider ultra-light cigarettes to have similar function or utility to regular cigarettes, plaintiffs failed to prove their case.

1. To Prove A Design Defect Claim Under New York Law, A Plaintiff Must Proffer A Feasible, Safer Alternative Design.

This Court has promulgated a risk-utility test to determine whether a product is defectively designed. *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102, 107-109 (1983). In order to prove such a claim, a plaintiff must show that the product

is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use; that is[,] *one whose utility does not outweigh the*

danger inherent in its introduction into the stream of commerce.

Id. at 107 (quoting *Robinson v. Reed-Prentice Div. of Package Machinery Co.*, 49 N.Y.2d 471, 479 (1980)) (emphasis added). Jurors in design-defect cases (regardless of whether the plaintiff’s claim sounds in negligence or strict liability) are instructed to balance a product’s risk against its utility in order to determine whether it is “not reasonably safe” for its intended use. *Id.* at 108; *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 258 (1995) (strict liability concept of defective design is “functionally synonymous” with negligence concept of unreasonable design; risk-utility test is applicable in both causes of action). As this Court explained in *Denny*, the risk-utility balancing test is

rooted in a recognition that there are both risks and benefits associated with many products and that there are instances in which *a product’s inherent dangers cannot be eliminated without simultaneously compromising or completely nullifying its benefits.*

87 N.Y.2d at 257 (emphasis added).

Thus, the central feature of any design defect claim is a comparison of the product that caused the injuries with a feasible and safer alternative design proffered by the plaintiff. In this respect, New York law is consistent with that of nearly every other State. See RESTATEMENT (THIRD) OF TORTS § 2(b) cmt d (sum-

marizing approaches of states requiring proof of a safer, feasible alternative design).³ As summarized in the Restatement (Third), a product

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

Id. at § 2(b) (emphases added).

2. An Alternative Design Is “Feasible” Only If It Retains The Functionality Of The Original.

To establish a *prima facie* claim of design defect, a plaintiff must submit proof not only that a safer alternative design was technically feasible, but also that the alternative would “*remain[] functional.*” *Denny*, 87 N.Y.2d at 257 (emphasis added); see also, *e.g.*, *Scarangella v. Thomas Built Buses, Inc.*, 93 N.Y.2d 655, 659 (1999); *Felix v. Akzo Nobel Coatings, Inc.*, 262 A.D.2d 447, 448 (2d Dep’t 1999); *Perez v. Radar Realty*, 34 A.D.3d 305 (1st Dep’t 2006).⁴ And any consideration of

³ Plaintiffs identify two jurisdictions – New Jersey and Louisiana – in which courts have applied a risk-utility test without requiring any proof of a safer alternative design. See Br. at 74 (citing *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239 (N.J. 1990), and *Gilboy v. Am. Tobacco Co.*, 582 So. 2d 1263 (La. 1991)). In both jurisdictions, the legislature subsequently displaced those holdings by statute. See LA. REV. STAT. ANN. § 9:2800.56(a); N.J. STAT. ANN. § 2A:58C-3.b(3) (West 1990).

⁴ New York is squarely in the mainstream in requiring proof of functionality. See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2, cmt. f (factors arguing against reasonableness of an alternative design include “evidence that the proposed alter-

functionality must take into account the fact that safety is not the only consideration in product choice. Consumers value and desire many characteristics of products in addition to their safety and may legitimately choose to use a product that is dangerous in order to obtain those benefits. Indeed, certain products “must by their very nature be dangerous in order to be functional.” *Robinson v. Reed-Prentice Div. of Package Machinery Co.*, 49 N.Y.2d 471, 479 (1980). A supposed “alternative” to such a product that *eliminates* the product’s desirable features in the name of safety cannot, as the Appellate Division recognized, be considered a “feasible” alternative for purposes of negligence liability.

As the Appellate Division recognized, this is where the appellants’ claim faltered. There was no dispute that cigarettes are dangerous or that it is possible to produce a cigarette with only trace amounts of tar and nicotine. But without proof

native design would reduce the efficiency *and utility* of the product”) (emphasis added); John W. Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 17 (1965) (listing as the second factor to consider when determining whether a product is reasonably safe, “the availability of other and safer products *to meet the same need*”) (emphasis added); 78 A.L.R. 4th 154, § 4 (collecting cases requiring consideration of functionality as a part of feasibility determination); see also, e.g., *Bolduc v. Colt’s Mfg. Co.*, 968 F. Supp. 16, 18 (D. Mass. 1997) (alternative design would have “substantially interfered with the gun’s functionality”); *Palmer v. Avco Distributing Corp.*, 82 Ill.2d 211, 220 (Ill. 1980) (plaintiff demonstrated that alternative was safer “without hindering its function or increasing its price”); *DeWitt v. Eveready Battery Co.*, 550 S.E.2d 511, 518 (N.C. App. 2001) (plaintiff must prove that manufacturer “failed to adopt a safer, practical, feasible, and otherwise reasonable alternative design *** that would have prevented or substantially reduced the risk of harm without substantially harming the usefulness, practicality, or desirability of the product.”).

that this alternative would retain the utility of regular cigarettes or perform the function that causes consumers to purchase cigarettes in the first place, appellants could not make out a *prima facie* case.

3. This Court Has Recognized The Importance Of Consumer Preferences In Gauging The Functionality Of An Alternative Design.

In *Scarangella*, the Court stated that when evaluating a design-defect claim, courts may “take[] into account” whether “liability for failure to adopt [an] alternative design” would affect “the range of *consumer choice* among products.” 93 N.Y.2d at 659 (emphasis added) (quoting RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2, cmt. f). The Court cited with approval illustration 9 of the Restatement (Third). *Id.* at 663. That illustration describes a hypothetical case in which the defendant’s cars are claimed to be too small, and the proposed safer, feasible alternative design is a larger vehicle. Imposing liability under that theory, the Restatement notes, would result in the removal of small cars from the market and deprive consumers of the option to purchase them. The illustration explains that a small car is not defective, *even though it is more dangerous than a larger one*:

*Eliminating smaller automobiles from the market would unduly restrict the range of consumer choice among automobile designs ***.* Given that the risks and benefits associated with relative automobile size are generally known, decisions regarding which sizes to purchase and use should be left to purchasers and users in the market.

RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2, cmt. f, Illustration 9 (emphasis added).

Consistent with this analysis, courts in New York and across the country have taken consumer preferences into account when evaluating (and often rejecting) proffered alternative designs. Indeed, this Court lists “the utility of the product to the public as a whole and to the individual user” as the very first of seven factors to be considered when determining whether a product is “unreasonably dangerous” under New York’s risk-utility test. *Voss*, 59 N.Y.2d at 109. Applying this test, the Appellate Divisions regularly look to evidence of consumer acceptability when evaluating the feasibility of proffered alternatives. See, e.g., *Felix*, 262 A.D.2d at 448 (rejecting water-based lacquer sealer as feasible alternative design because quick-drying oil-based lacquer sealers “comprise approximately 95% of the lacquer sealer market”); *Pigliavento v. Tyler Equip. Corp.*, 248 A.D.2d 840, 841-42 (3d Dep’t 1998) (no design defect where “approximately 85%” of consumers had “declined” to purchase the plaintiffs’ proposed safer design).⁵

Focusing on consumer acceptability to determine whether a proposed alternative is functionally equivalent to a challenged product makes good sense. Con-

⁵ Courts outside New York regularly reach similar results. See, e.g., *Nissan Motor Co. v. Nave*, 740 A.2d 102, 125-28 (Md. App. 1999); *Owens v. Allis-Chalmers Corp.*, 326 N.W.2d 372, 379 (Mich. 1982); *Bagley v. Mazda Motor Corp.*, 864 So. 2d 301, 312 (Ala. 2003); *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 384 (Tex. 1995).

sumers' willingness to buy the alternative product is the best indicator of whether that product has the characteristics that are valued and desired by the marketplace. If a substantial majority of consumers refuse to buy an alternatively designed product, that is compelling evidence that the alternative is missing some important quality and, as a result, lacks the functionality of the original.

For these reasons, a federal court applying New York law recently rejected a design defect claim against cigarette manufacturers that was virtually identical to the one presented here. *Clinton v. Brown & Williamson Holdings, Inc.*, 498 F. Supp. 2d 639, 646 (S.D.N.Y. 2007) (Briant, J.). The plaintiff in *Clinton*, like appellants here, proposed an alternative design consisting of “reduced-carcinogen” or “non-addictive” cigarettes. *Id.* at 645. The court found that the safer cigarettes proposed by plaintiff were “indisputably rejected by consumers” and therefore “plainly not feasible alternative designs in any meaningful sense.” *Id.* at 648. As the court summarized, “[t]his is exactly the type of claim that *Voss*'s alternative feasible design requirement was meant to disallow.” *Id.*

B. A Discretionary Product Is Functional Only If It Is Acceptable To Consumers.

The focus on consumer acceptability is especially appropriate in the context of products (such as cigarettes, alcohol, processed foods, motorcycles, and convertible cars) that consumers use solely for the subjective pleasures that they provide. For example, one of the principal reasons most consumers drink beer is to

experience the sensations caused by alcohol. No one could seriously contend, therefore, that non-alcoholic beer is a feasible alternative to regular beer. The alcohol in beer is what makes it potentially dangerous and addictive, but it is also what makes it desirable. Remove the alcohol, and the product is fundamentally changed. That is true even though non-alcoholic beer is similar to regular beer in many ways: both have similar flavors, both are sold in similar bottles, both are consumed in the same manner, both quench thirst, and both can be served in similar social and commercial settings.

The authors of the Restatement (Second) recognized this principle explicitly – particularly with respect to products that derive their functionality in large part from the same components that make them dangerous:

Many products cannot possibly be made entirely safe for all consumption ***. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics ***. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful ***. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks ***.

RESTATEMENT (SECOND) OF TORTS § 402A, cmt i.

As the Appellate Division explained, and as the evidence showed, the purpose of cigarettes, like alcohol or highly processed foods, is to create “certain subjective sensations and feelings in the user.” R-14. Cigarettes provide flavor, psy-

chological pleasure, and physiological effects, like decreased blood pressure and improved relaxation, concentration, and memory. A-3918-24. And, as discussed above (*supra* at 9), appellants' own experts testified that nicotine provides a "kick" and a sense of "euphoria or pleasure." One cannot simply ignore these aspects of the smoking experience when evaluating the utility and functionality of a proposed alternative to regular cigarettes. That would be like ignoring the role of alcohol when deciding whether grape juice is the functional equivalent of wine. But that is just what the trial court did in this case, and what the appellants urge this court to do: to conclude that a cigarette's function is nothing more than "to be lit, burned and inhaled." A-109.

As noted above (*supra* at 7), appellants did not even attempt at trial to prove that consumers would accept their proposed alternative as having similar utility to regular cigarettes. See R-16-17 ("[I]t's a whole different trial to determine what is acceptable to a consumers. That's a different case tha[n] we have been trying before your Honor."). They nevertheless suggest on appeal that if they were required to do so, they did, with testimony that ultra-light cigarettes would satisfy the "ritual going into smoking" and would still provide "some stimulating action" for smokers. Br. 34-35. As the Appellate Division recognized, however, the issue is not whether low-nicotine cigarettes would serve a ritualistic function of some sort or would produce some stimulatory effect, "but whether that effect would be of suffi-

cient magnitude to satisfy the smoking public.” R-21, n.2. Appellants produced no such evidence at trial.

Appellants criticize the Appellate Division’s focus on the “subjective nature of the benefits of smoking,” R-17, and argue that the court should have instead limited its inquiry to “‘objective’ utility.” Br. at 42. What is the “objective utility” of a bungee cord or a hang glider – products that are dangerous yet surely not automatically negligent to sell? Appellants do not cite even a single case holding that it is improper to consider the subjective utility of a product in evaluating a proposed safer alternative design. Nor do they explain *how* one would measure the “objective” utility of a product whose sole function is to give subjective pleasure.

Instead, appellants point to several design defect cases that they claim lack any discussion of consumer acceptability or any distinction between “objective” and “subjective” utility. Br. 42-44 (citing *Felix*, 262 A.D.2d 447; *Perez*, 34 A.3d 305; *Rypkema v. Time Mfg. Co.*, 263 F.Supp. 2d 687 (S.D.N.Y. 2003); and *Micallef v. Miehle Co.*, 39 N.Y.2d 376 (1976)). But none of those cases involved a product like cigarettes, whose purpose is to provide subjective sensations. *Felix* and *Perez* both concerned deck sealers, *Rypkema* was about an aerial lift bucket, and *Micallef* involved a printing press. And even in *those* cases, the courts acknowledged that consumer acceptance of the alternative design was a key factor in determining feasibility. See, e.g., *Felix*, 262 A.D.2d at 448 (concluding that pro-

posed alternative design was “functional[ly] differen[t]” from original, in part because the original garnered 95% of the relevant market).

Appellants’ proposed distinction between objective and subjective utility is utterly unworkable for products like cigarettes, processed foods, or alcohol – or many other products ranging from convertibles to hang-gliders. With respect to such products, alternative designs that do not provide the experience consumers seek, and therefore are not desirable, do not, by definition, provide similar “utility” or “functionality” to the original products. They therefore cannot be considered “feasible” alternatives for purposes of design defect claims.

C. New York’s Jurisprudence And The Appellate Division’s Decision Are Based On Sound Public Policy Considerations.

The Appellate Division’s decision – requiring proof of a feasible safer alternative design that would be acceptable to consumers – is also supported by considerations of public policy.

This Court has repeatedly recognized that manufacturers should not function as insurers against risk: “no manufacturer may be automatically held liable for all accidents caused or occasioned by the use of its product.” *Robinson v. Reed-Prentice Division of Package Machinery Co.*, 49 N.Y.2d 471, 479 (1980). Other courts applying New York law agree.⁶ Stripping consideration of consumer ac-

⁶ See, e.g., *Smith v. 2328 University Avenue Corp.*, 52 A.D.3d 216, 217 (1st Dep’t 2008) (rejecting design defect claim that lead pigment was unreasonably dangerous

ceptability from the feasible safer alternative test would run contrary to these principles by holding manufacturers of inherently dangerous products liable to pay for all harm caused by their products and would effectively render manufacturers of inherently dangerous products insurers against even unavoidable risks. Certain products cannot be made appreciably safer in a manner that consumers would accept. See *Robinson*, 49 N.Y.2d at 479. But under appellants' proposal, manufacturers of inherently dangerous products could be held liable so long as the plaintiff could point to an alternative design that would have prevented the injuries, regardless of whether consumers would have used that design. Alcohol manufacturers would be liable because liquor causes intoxication and alcoholism. Manufacturers of fatty processed foods would be liable because such foods cause obesity and hypertension. Automobile manufacturers would be negligent for selling sports cars or convertibles, because they are far less safe than large sedans. The fact that many buyers do not want to drink only non-alcoholic beer, eat only low-fat foods,

simply because it was "hazardous to children" and stating "New York does not impose a duty upon a manufacturer to refrain from the lawful distribution of a non-defective product.") (quoting *Forni v. Ferguson*, 232 A.D.2d 176, 177 (1st Dep't 1996)); *McCarthy v. Olin Corp.*, 119 F.3d 148, 155 (2d Cir. 1997) (allegation that hollow point bullets were unreasonably dangerous because their "sole utility is to kill and maim" did not state a claim for design defect under New York law); *Portnoy v. Capobianco*, 77 Misc. 2d 817, 821 (Sup. Ct. Nassau Cty. 1974) ("[W]e are not yet at a point, even in strict products liability cases, where the manufacturer of a product is an unqualified insurer of his product regardless of any showing of a defect.").

or drive only large cars would be completely irrelevant. The resulting liability would be limitless. See Page Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 34 (1973-1974) (“[L]iability should not be extended to makers for harm resulting from unavoidable injurious effects of highly desirable products, such as good penicillin, good cigarettes, or good whiskey.”); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 828 (1973) (recognizing that such insurer-type liability is inappropriate).

Moreover, appellants’ proposed rule would effectively result in judicially imposed bans on certain categories of products. And it is unlikely that such prohibitions would actually address the underlying safety concerns – especially in a world in which black markets in illegal but desirable products flourish.⁷ That is one reason many courts and commentators have observed that courts should not be

⁷ The public health community has recognized this concept in connection with cigarettes:

a virtually harmless cigarette smoked by one percent of the population will have a lesser impact on the reduction of tobacco-related diseases than a somewhat more harmful cigarette smoked by 80 percent of the total smoking population. Research on the less harmful cigarette should therefore be directed toward developing a cigarette containing the lowest possible amount of harmful elements for all tobacco-related diseases, *but one that has sufficient acceptability for the largest segment of smokers.*

A-3143 (emphasis added) (statement of Dr. Ernst Wynder). (The exhibit containing this statement was admitted at trial and then stricken, based on the trial court’s ruling that consumer preferences were irrelevant.)

called upon to make policy judgments that are properly within the purview of the legislature. The Appellate Division expressed the belief that

whether to make as sharp a break with past practice as the one plaintiffs advocate, and to accept the undoubtedly vast social and economic consequences of such a change of course, is a political decision resting with the legislative branch of government or with regulators acting pursuant to a legislative grant of authority.

R26. See also *Clinton*, 498 F. Supp. 2d at 648 (“the vast majority of courts have been markedly unreceptive to the call that they displace markets, legislatures, and governmental agencies by decreeing whole categories of products to be ‘out-laws.’”) (quoting David G. Owen, *Inherent Product Hazards*, 93 KY. L.J. 377, 377 (2004-2005)); RESTATEMENT (THIRD) OF TORTS: PROD. LIAB., § 2, cmt. d (“[C]ourts generally have concluded that legislatures and administrative agencies can, more appropriately than courts, consider the desirability of commercial distribution of some categories of widely used and consumed, but nevertheless dangerous products.”); *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 301-02 (1983) (recognizing that public policy is the underlying determinative consideration with respect to tort liability in general and that such issues “are best and more appropriately explored and resolved by the legislative branch of our government”).⁸

⁸ See also *Jones v. Amazing Prods., Inc.*, 231 F. Supp. 2d 1228 (N.D. Ga. 2002) (“[T]raditionally, legislatures and regulatory bodies, not juries, make policy deci-

Appellants’ only response to this point is that the rule they propose does not constitute a *statutory* or *regulatory* ban on regular cigarettes: they assert that manufacturers could continue to sell regular cigarettes and simply pay tort damages “as a cost of doing business.” Br. at 66. But the United States Supreme Court has explicitly rejected that argument – in a smoking and health product liability case. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). Like appellants here, the plaintiff in *Cipollone* argued that state-law tort claims were not “requirements or prohibitions” preempted by federal law because manufacturers could continue to sell cigarettes and absorb resulting damage awards as a cost of doing business. *Id.* at 521. The Court rejected that argument as “at odds *** with the general understanding of common-law damages actions.” “[State] regulation,” the Court held, “can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation *** is designed to be a potent method of governing conduct and controlling policy.” *Id.* (citation omitted). See also, e.g., *Riegel v. Medtronic, Inc.*, 128 S.Ct. 999, 1007-08 (2008); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 882 (2000); *Clinton*, 498 F. Supp.

sions concerning whether a given product is too inherently dangerous to be marketed in any form.”); *Parish v. Jumpking, Inc.*, 719 N.W.2d 540, 545 (Iowa 2006) (“[C]ourts generally have concluded that legislatures and administrative agencies can, more appropriately than courts, consider the desirability of commercial distribution of some categories of widely used and consumed, but nevertheless dangerous, products.”).

2d at 648 (“A state law requirement that allows only cigarettes with no tar or no nicotine to be sold is a virtual ban on cigarettes, just as a requirement that allows only ‘alcohol-free’ liquor to be sold would be a ban on whiskey.”).⁹

D. Appellants’ Efforts To Avoid Or Eliminate The Consumer Acceptability Requirement Should Be Rejected.

None of appellants’ arguments in support of their proposed new standard for design defect cases withstands scrutiny. And their request that the Court eliminate the safer alternative design requirement entirely for dangerous products like cigarettes, Br. 76-78, is equally insupportable.

⁹ This case is quite different from the two noted by appellants (at Br. 67-68) in which tobacco defendants have been held liable or settled negligence claims and still continued to sell cigarettes. The suit by New York’s attorney general was *settled* by the parties under an agreement that specifically contemplates future sales. And in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), the judgment did not rest on any finding that it was negligent to sell any but ultra-light cigarettes. The *Engle* trial took an entire year and involved claims of fraud, breach of warranty, and a number of traditional negligence theories, including claims that manufacturers adulterated cigarettes with chemicals. No such evidence was before this jury.

In any event, the only precedent cited by appellants to support their argument, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), is plainly inapplicable. The *Goodyear* Court was addressing the effect of an “incidental” state regulation that was not sufficient to violate Congress’ preclusion of direct regulation on federal nuclear power facilities – not the imposition of common-law tort liability that would essentially outlaw a legal product that has been tolerated and taxed by Congress and New York State for years.

1. The Appellate Division Did Not Shift The Focus Of A Design Claim Away From The Manufacturer's Conduct Or Adopt An Industry-Practice Standard.

Appellants argue that the Appellate Division's decision should be reversed because "the inquiry in a negligent design claim focuses not on the consumer, but rather on the design decisions made by the manufacturer." Br. at 45. We do not dispute that a manufacturer's conduct is central to an evaluation of its alleged negligence. However, to determine whether a manufacturer was negligent in failing to adopt a particular alternative design, a court must consider whether consumers would have accepted that design. See, e.g., *Clinton*, 498 F. Supp. 2d at 648. To hold otherwise would subject a vast array of manufacturers (distillers, brewers, motorcycle manufacturers, and countless others) to negligence claims for refusing to adopt product designs that few consumers would have used. Such a rule would make no economic or legal sense.

Nor is appellants' approach supported by the Restatement (Third) of Torts. The comment cited by appellants (at 45-46) states merely that in determining whether to impose liability, the finder of fact should not consider the effect on corporate *profitability* of adopting an alternative design. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. §2, cmt f. By its plain terms, this means only that where an alternative safer design exists that would meet the consumers' needs, the manufacturer cannot avoid liability simply by arguing that producing the alternative would

reduce corporate profits. Defendants make no such argument here. Ultra-light cigarettes are not functionally equivalent to regular cigarettes – not because manufacturers make less money selling them, but because *consumers* do not *treat* them as substitutes for each other. Whether customers choose to use a product (which would demonstrate functional equivalence) is a very different question from how much money a manufacturer earns from selling that product.

Appellants are also wrong that requiring proof of an alternative design acceptable to consumers would allow defendants to invoke “industry practice” as a shield against asserted liability. Br. 57-59. A plaintiff’s ability to prove functionality depends on the qualities that consumers look for in a product, not industry practice. The Appellate Division’s order does not limit a plaintiff’s ability to introduce expert testimony, customer surveys, and other evidence to establish that a proposed alternative would meet consumer demands. This “industry practice” argument is a straw man.

2. *Scarangella* Does Not Relieve Appellants Of Their Burden To Prove A Feasible Alternative Design That Is Acceptable To Consumers.

Appellants argue that reversal is required because the three factors identified in *Scarangella* are not satisfied. Br. at 46-51. But, as the Appellate Division correctly held (R-21-22), *Scarangella* does not control here. Moreover, contrary to appellants’ contentions, the *Scarangella* Court acknowledged the importance of

consumer acceptability to an evaluation of a proposed alternative design, and thus the opinion is entirely consistent with the decision below. See *supra* at 18-20.

In *Scarangella*, the defendant bus manufacturer offered, as an optional feature, an alarm that sounded when the driver put the bus in reverse. The bus at issue did not have the alarm; the purchaser had declined that option because of concerns about noise. 93 N.Y.2d at 658. The plaintiff contended that the bus was negligently designed because the alarm should have been standard on all buses. This Court identified three factors to consider in determining whether the bus was defective without the alarm: (1) the buyer's knowledge regarding the product; (2) whether there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and (3) whether the buyer is in a position to balance the benefits and risks of the optional device. *Id.* at 661.

The *Scarangella* factors thus address a question not implicated here: whether a “product without an *optional* safety feature is defectively designed because the equipment was *not standard*.” 93 N.Y.2d at 661 (emphasis added). In such cases, the focus is on whether the buyer could make a rational decision whether or not to purchase the optional safety feature: the factors are intended to determine whether “the buyer, not the manufacturer, is in the superior position to make the risk-utility assessment” based on “the *buyer's* use of the product.” *Id.* (emphasis in original). As the Appellate Division correctly recognized, R-22, the

factors are not intended to address the question presented here – whether an alternative design is the functional equivalent of the original design in light of consumer preferences. That issue was not presented in *Scarangella*. There, both types of buses did what buses are supposed to do – transport people – and the optional safety feature had no bearing on that function. In contrast, plaintiffs in this case presented an alternative design that lacked the function and utility of the original.

Although *Scarangella* is thus inapplicable here, appellants attempt to use its first and third elements as an excuse to introduce irrelevant factual findings made by the district court in *United States v. Philip Morris, USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006). Br. 51-53. But the opinion in *Philip Morris* actually supports the Appellate Division’s decision here. Although the district court in that case found against defendants on some issues unrelated to product defect (the question whether any of defendants’ alleged misconduct actually caused injury to any consumer was not before that court), it specifically *rejected* the allegation that defendants “chose not to utilize or market feasible designs or product features that could produce less hazardous cigarettes.” 449 F. Supp. 2d at 384, 429. The court determined, for instance, that:

Philip Morris *** in particular *** spent many years, enormous amounts of money, and the creative energies of their top scientists to investigate different approaches to production of cigarettes which would present fewer health risks to the public.

Id. at 429. The court found that the defendants’ design efforts failed, in part, because the alternatively designed products “*could not gain consumer acceptability because they were too dissimilar from traditional cigarettes.*” *Id.* (emphasis added). These findings further demonstrate that consumer acceptability is a vital part of the feasible alternative design analysis and that appellants cannot satisfy that element of their claim.

In any event, appellants’ summary assertion that the findings from *Philip Morris* may be given preclusive effect, Br. 53 n.16, is mistaken. It is well established that collateral estoppel is inappropriate and violates due process if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 & n.14 (1979). Here, the *Philip Morris* judgment is inconsistent with numerous verdicts in favor of these defendants. For example, defendants have prevailed on RICO claims in several other lawsuits based on the same allegations, including *Blue Cross and Blue Shield of New Jersey Inc. v. Philip Morris, Inc.*, No. 98 CV 3287 (E.D.N.Y.). Judge Weinstein recognized these inconsistent verdicts in refusing, on fairness grounds (among other reasons), to give preclusive effect to the findings. See *Schwab v. Philip Morris U.S.A., Inc. et al.*, 449 F. Supp. 2d 992, 1077-78 (E.D.N.Y. 2006), rev’d on other grounds, *McLaughlin v. Ameri-*

can Tobacco Co., 522 F.3d 215 (2d Cir. 2008). No court has applied collateral estoppel based on the *Philip Morris* findings.¹⁰

3. Requiring Proof Of An Alternative Design Acceptable To Consumers Does Not Immunize Cigarette Manufacturers From Liability.

Appellants further complain that the consideration of consumer acceptability in determining the functionality of a proposed safer alternative design will be “unworkable” and impose “almost insurmountable barriers” to recovery at trial. Br. at 60. Those fears are wholly unjustified.

First of all, appellants fail to explain why it would be difficult for courts and juries to determine whether a proposed alternative design would be acceptable to consumers. According to appellants, juries regularly assess whether a particular design would be technically feasible to produce; why should it be any more difficult for jurors to decide whether an alternative design would be acceptable to consumers?¹¹

¹⁰ We note, moreover, that defendants have challenged the *Philip Morris* judgment in its entirety and that the appeal is currently pending. *United States v. Philip Morris USA*, Nos. 07-5103, 06-5267 (D.C. Cir.).

¹¹ Appellants similarly complain that the Appellate Division’s rule would require the creation of a prototype, but do not explain why the creation of a prototype would be necessary to address consumer acceptability but not technical feasibility. Depending on the circumstances of the particular case, a variety of different expert and lay evidence may be appropriate to establish consumer acceptability. Of course, in this case, a prototype was unnecessary because defendants marketed the

Appellants also are plainly wrong in their assertion that the Appellate Division's decision would "immuniz[e] the industry from unsafe design claims and abdicat[e] the traditional adjudicatory role of the courts." Br. at 71. Plaintiffs in smoking-and-health cases remain free to offer alternative designs that would be safer and acceptable to consumers – or to bring other kinds of claims, if they have the evidence to support them. It is appellants who are seeking to abandon normal legal principles in product design cases in favor of what amounts to a virtual prohibition of cigarette sales.

4. The Court Should Not Create An Exception For “Highly Dangerous” Products.

As an alternative argument, appellants go dramatically further and ask this Court to eliminate the alternative design requirement altogether in cases involving “highly dangerous” products, which they say includes cigarettes. Br. at 76-78. They base their request on two arguments: (1) because nicotine is addictive, it is “impossible, as a matter of logic” to propose a safer alternative that satisfies consumer demands, and (2) a comment in the Restatement (Third) of Torts suggests that it is unnecessary to prove an alternative design for highly dangerous products. Neither argument has merit.

very product claimed by plaintiffs to be safer – and smokers (including Mrs. Rose) overwhelmingly rejected it.

a. Addiction

Appellants suggest that because nicotine is addictive, it does not matter that smokers prefer regular cigarettes to ultra-light versions. According to appellants, it is not “logical” to consider consumer preferences when determining whether an addictive product is unreasonably dangerous. Br. 12, 76. But as the Appellate Division noted, “[t]he premise of this argument is that it is appropriate for a court *** to retroactively outlaw the satisfaction of the demand for a given product notwithstanding that the satisfaction of that demand has long been consciously tolerated – and taxed and regulated – by the political branches of government.” R-24. The Appellate Division is correct: the addictive nature of nicotine has been widely known to the public and the government for years. To accept appellants’ argument – and carve out an exception to New York product liability law based on a judicial fiat that consumer preferences for nicotine should be disregarded, unlike consumer preferences for all other products (such as coffee and alcohol) – would be to make a policy determination that not only is fundamentally legislative in nature, but is contrary to the choices the political branches of government have in fact made.

Appellants are wrong, moreover, to suggest that they demonstrated at trial that the “utility” of regular cigarettes is nothing more than “their ability to sustain addiction.” Br. 75. As we have discussed, the evidence was undisputed that smokers enjoy the pleasurable sensations imparted by nicotine – the “kick,” the

“euphoria or pleasure,” the ability to “jazz[] us up when we’re down but calm[] us down when we’re jazzed up.” A-1408-10 (discussed *supra* at 9, 22). These sensations are not unlike those of other products and they are regarded by consumers who use these products as having real utility. That is why many smokers remain, for years or even decades, loyal to a particular brand of cigarettes: they prefer the flavor and the sensations associated with that brand, and they are reluctant to change to a different brand, even if it is less expensive and even though it would, in appellants’ words, “sustain addiction.” See, *e.g.*, A-3911 (“[C]onsumers of cigarettes are notoriously taste sensitive. If you change the product, even in a very small way, it’s amazing how quickly they notice.”).

Moreover, any notion that the utility of regular cigarettes is nothing more than the ability to sustain addiction is belied by the undisputed evidence that addicted smokers can quit smoking, like Mrs. Rose did, and have done so by the millions. A-1573-80; A2469-70.¹²

¹² Mrs. Rose is an excellent example. After smoking for 40 years, she quit in 1993 when her husband had a heart attack and bypass surgery. In her own words, “after that I stopped smoking because I was more worried about Lenny with his heart than anything else because I didn't want him to get sick on me.” A-2577. At the time she quit, Mrs. Rose was still years away from being diagnosed with any smoking-related illness. Appellants claim Mrs. Rose made “15 quit attempts,” but they do not acknowledge their expert’s admission on cross examination that at most, Mrs. Rose made one or two “serious” attempts before finally deciding to quit. A-2487-89. Addiction did not deprive Mrs. Rose and smokers like her of their free will to stop smoking, and it does not warrant a departure from established product liability law.

b. The Restatement (Third)

Appellants also point to RESTATEMENT (THIRD) OF TORTS § 2, cmt e, which sets forth a hypothetical involving a toy gun that shoots hard pellets. In the hypothetical, a toy gun that shoots soft pellets is not viewed as a feasible alternative design, because the realism created by the hard pellets constitutes a feature valued by consumers. The comment speculates that:

[if] a court were to adopt this characterization of the product, and deem the capacity to cause injury as an egregiously unacceptable quality in a toy for use by children, it could conclude that liability should attach without proof of a reasonable alternative design.

RESTATEMENT (THIRD) OF TORTS § 2, cmt e. (emphases added). According to appellants, this language “recommends that liability can be imposed [for highly dangerous products] without requiring the plaintiff to comply with the logically impossible tasks of demonstrating a safer alternative design.” Br. at 77. Appellants’ reliance on this comment is inconsistent with both New York law and the language and clear intent of the Restatement.

First, this Court has never indicated that there should be any exception to the safer alternative design requirement. See *supra* at 15-16. Eliminating the requirement for inherently dangerous products would introduce confusion and ambiguity into a sensible and workable rule and would give rise to precisely the type of insurer-like limitless liability scheme that this Court has rejected. See *supra* at 24-

26. Indeed, the reporters for the Restatement (Third) make clear that the approach described in comment e is *contrary* not only to the law of New York, but also to the overwhelming majority of other jurisdictions across the country. See Reporters Note cmt e. The Reporters explain that “[o]nly one American jurisdiction [Oregon] currently recognizes [the position discussed in comment e] other than by way of dictum.” In particular, the theory underlying comment e has been almost universally rejected in cigarette cases, where courts have declined to find that cigarettes are unreasonably dangerous products.¹³

¹³ See, e.g., *Semowich v. R.J. Reynolds Tobacco Co.*, No. 86-CV-118, 1988 WL 123930, at * 3-4 (N.D.N.Y. Nov. 15, 1988) (New York law); *Toole v. Brown & Williamson Tobacco Corp.*, 980 F. Supp. 419, 425 (N.D. Ala. 1997) (Alabama law); *Filkin v. Brown & Williamson Tobacco Corp.*, No. 99 C 238, 1999 WL 617841, at *1 (N.D. Ill. Aug. 11, 1999) (Illinois law); *Estate of White ex rel. White v. R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 431 (D. Md. 2000) (Maryland law); *Kotler v. Am. Tobacco Co.*, 926 F.2d 1217, 1225 (1st Cir. 1990) (Massachusetts law); *Hardin v. Brown & Williamson Tobacco Co.*, No. G87-503CA1, 1988 WL 288976, at *3 (W.D. Mich. Dec. 27, 1988) (Michigan law); *Herndon v. Brown & Williamson Tobacco Corp.*, No. 1:92:CV:166, 1993 WL 475530 (W.D. Mich. Apr. 19, 1993) (Michigan law); *Gianitsis v. Am. Brands, Inc.*, 685 F. Supp. 853, 859 (D.N.H. 1988) (New Hampshire law); *Buckingham v. R.J. Reynolds Tobacco Co.*, 713 A.2d 381, 385-86 (N.H. 1998) (New Hampshire law); *Paugh v. R.J. Reynolds Tobacco Co.*, 834 F. Supp. 228, 230-31 (N.D. Ohio 1993) (Ohio law); *Hite v. R.J. Reynolds Tobacco Co.*, 578 A.2d 417, 420 (Pa. Super. Ct. 1990) (Pennsylvania law); *Gunsalus v. Celotex Corp.*, 674 F. Supp. 1149, 1158-59 (E.D. Pa. 1987) (Pennsylvania law); *Miller v. Brown & Williamson Tobacco Corp.*, 679 F. Supp. 485, 488-89 (E.D. Pa.) (Pennsylvania law), *aff'd mem.*, 856 F.2d 184 (3d Cir. 1988); *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 236 (6th Cir. 1988) (Tennessee law); *Sanchez v. Liggett & Myers, Inc.*, 187 F.3d 486, 489-91 (5th Cir. 1999) (Texas law).

Second, it is clear that the drafters of the Restatement believed that the possible approach set forth in comment e, if it were ever adopted by a significant number of jurisdictions, would have very limited application and would *not* be applied to widely used consumer products such as cigarettes. Indeed, during a 1994 meeting discussing a proposal to adopt comment e, Reporter Aaron Twerski explained that the comment did not apply to “common and widely distributed products such as alcoholic beverages, *tobacco*, small firearms, and above ground swimming pools,” which “may be found defective only upon proof of the requisite conditions in §2(a), (b), or (c).” 71st Annual Meeting, The American Law Inst., Proceedings 1994, at 115 (1994) (emphasis added). Appellants offer no good reason for the radical change in New York law that they propose.

* * *

In sum, when it dismissed appellants’ complaint for failure to present any evidence of a feasible alternative design acceptable to consumers, the Appellate Division applied well established product liability law that is firmly grounded in both New York precedent and sound considerations of public policy. Appellants acknowledge that they did not even attempt to introduce evidence that would satisfy the traditional New York standard. Accordingly, this Court should uphold the Appellate Division’s order dismissing appellants’ design defect claim as a matter of law.

II. APPELLANTS' FAILURE TO PROVE PROXIMATE CAUSE PROVIDES AN INDEPENDENT BASIS FOR AFFIRMANCE.

Appellants' case suffered from an additional, equally fundamental defect: as the Appellate Division recognized, they failed to introduce evidence from which a reasonable jury could have concluded that Mrs. Rose would have avoided her injury if she had smoked ultra-light cigarettes instead of regular ones. Appellants offered no proof that the difference in tar and nicotine yields between the cigarettes that Mrs. Rose smoked and ultra-light brands was a substantial contributing cause of her cancer. This failure of proof is an independent ground for dismissal.

Appellants' theory was that Mrs. Rose's cancer was caused by smoking regular cigarettes and that their proposed alternative would have been "safer." But her own witnesses admitted that even ultra-light cigarettes are unsafe, and even if Mrs. Rose had switched to ultra-lights, she might still have developed cancer. As the Appellate Division explained, appellants "do not identify any expert evidence in the record providing a reasoned basis for concluding that *** the net effect of smoking light cigarettes is, on average, to reduce the smoker's ingestion of tar and nicotine and thereby to reduce the risk of cancer." R-27. And such testimony is required in cases like this one, involving complex scientific and medical issues not within the common knowledge and experience of jurors. *Kulak v. Nationwide Mut. Ins. Co.*, 40 N.Y.2d 140, 147 (1976); *Mieselman v. Crown Heights Hospital*, 285 N.Y. 389, 396 (1941).

Appellants argue that they satisfied their causal burden with evidence that smoking cigarettes caused Mrs. Rose's lung cancer. Br. 81. But the question is not whether *smoking* caused her injury; it is whether the alleged *defective design* of regular cigarettes did. See *Voss*, 59 N.Y.2d at 107. Evidence that smoking caused the injury does not constitute evidence that the injury would have been avoided if Mrs. Rose had smoked a different cigarette. To hold otherwise would effectively eliminate the safer alternative design requirement articulated by this Court in *Voss* and render all cigarettes defective merely because of their inherent dangers.

Appellants argue further that Mrs. Rose was addicted to nicotine, and that cigarettes containing more than 0.4 mg of nicotine “sustain[ed her] addiction” and “compelled her to continue smoking.” Br. at 81-83 (quoting R-60). In other words, they appear to contend that they proved proximate causation because had Mrs. Rose switched to ultra-light cigarettes, she would have ceased smoking entirely. This makes no sense. The premise of a design claim is that a plaintiff *would have used* a safer alternative design if offered and that the alternative would have prevented the injury. The plaintiff cannot satisfy that requirement by showing that the defendant could have sold an alternative so unattractive that the plaintiff would have ceased using the product altogether.

Courts around the country have granted judgment to tobacco defendants on records virtually identical to the one here. See, e.g., *Whiteley v. Philip Morris*,

Inc., 11 Cal. Rptr. 3d 807, 862-63 (Cal. Ct. App. 2004) (“Plaintiff’s expert witnesses did not attempt to quantify the likelihood that the asserted design defects of cigarettes, as distinguished from smoking cigarettes in general, contributed to Whiteley’s developing lung cancer.”); *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487, 1493-96 (D.N.J. 1988) (under New Jersey law, evidence that switching to low-tar cigarettes would have reduced the plaintiff’s risk of lung cancer by 8% to 17% was insufficient to establish proximate cause on a design defect theory).

III. PREJUDICIAL INSTRUCTIONAL AND EVIDENTIARY ERRORS WOULD REQUIRE A RETRIAL IF THIS COURT WERE TO REVERSE THE DISMISSAL.

Because the Appellate Division found appellants’ failure to present evidence of a feasible alternative design dispositive, that court did not have occasion to address any of the highly prejudicial evidentiary and instructional errors committed by the trial court. In the event that this Court finds it necessary to reach these issues, it should hold that the trial court’s errors individually and cumulatively require retrial.¹⁴

¹⁴ The instructional and evidentiary issues raised here were raised in the trial court (A-11713-11736, 11742-11749) and the Appellate Division (Def. Br. 30-42); they can therefore be considered by this Court.

A. Errors Relating To The Risk-Utility Test

The trial court did not simply allow appellants to submit their claim to the jury without evidence that their proffered alternative design would be acceptable to consumers. It also went a step further and held that evidence of consumer acceptability, even if offered defensively, was *irrelevant*. In totally excising the subject from the case, the trial court committed both evidentiary and instructional error.

The trial court's jury instructions and exclusionary rulings grossly distorted the jury's application of the risk-utility test. See *Denny*, 87 N.Y.2d at 257-58. As discussed above, this Court has indicated that juries generally should consider seven factors, balancing those relating to the product's utility (factors one and two) against the factors relating to the product's risks (factors three through six):

- (1) the product's utility to the public as a whole;
- (2) the product's utility to the individual user;
- (3) the likelihood that the product will cause injury;
- (4) the availability of a safer design;
- (5) the possibility of designing and manufacturing the product so that it is safer but remains functional and reasonably priced;
- (6) the degree of awareness of the product's potential danger that can reasonably be attributed to the injured user; and
- (7) the manufacturer's ability to spread the cost of any safety-related design changes.

Id. at 257; see also *Voss*, 59 N.Y.2d at 109 (listing seven similar factors).

Because the trial court concluded that these factors are “flexible,” however, it refused to instruct the jury on the utility factors. A-96. Instead, the court instructed the jury *only* on the risk factors. A-5266, A-5277-78, A-11416-17. That ruling was both erroneous and highly prejudicial. While this Court has stated that the jury need not be instructed on factors that are not “relevant” in a particular case, *Scarangella*, 93 N.Y.2d at 659, the “utility” side of the risk-utility balancing test was clearly relevant to the jury’s task here. See *id.* at 659 (noting that a “defectively designed product *** ‘is one whose *utility* does not outweigh the danger inherent in its introduction into the stream of commerce.’”) (emphasis added) (quoting *Voss*, 59 N.Y.2d at 107). The trial court’s failure to instruct on the utility factors resulted in a one-sided instruction that eviscerated the policy behind the risk-utility test and effectively directed a plaintiffs’ verdict. This prejudicial error alone requires a new trial. See *J.R. Loftus, Inc. v. White*, 85 N.Y.2d 874, 876 (1995).

The trial court further compromised the jury’s application of the risk-utility test by excluding all evidence relating to whether consumers would accept plaintiffs’ proposed alternative design, including testimony explaining *why* consumers overwhelmingly prefer regular cigarettes to ultra-light products. Although the court initially stated that the jury should consider whether an ultra-light cigarette “[g]ives pleasure, relaxation, *** taste[, and] *** a whole bunch of things,” A-

4167, A-4173, the court later backtracked and instructed the jury *not* to consider such evidence:

This is very important, so get out your notebooks*** .

[T]here are no issues in this case as to people purchasing cigarettes on the basis of taste, that is consumers liking cigarettes or not, thinking one [is] better than others. That's not part of the issues in this case. They are out.

So any testimony that's been given up to now *** as to what consumers preferred or did not prefer, is out of the case and you will no longer consider it.

A-4198; see also A-4257, 4278-82, 4289 (reiterating that consumer preferences were not to be considered). In addition to striking testimony that had already been presented, the trial court also barred testimony from defendants' marketing expert, Jeanne Bonhomme, who would have explained that ultra-low-yield and denicotinized cigarettes do not appeal to consumer preferences. A-4640-48. All of this evidence would have borne directly upon the jury's consideration of "the possibility of designing *** the product so that it is safer but remains functional and reasonably priced," and should have been admitted. *Denny*, 87 N.Y.2d at 257. In sum, defendants should have been permitted, at a minimum, to rebut appellants' claim by showing that the proposed alternative was not acceptable to consumers and therefore lacked the same function and utility as regular cigarettes.

B. Errors Relating To Public Awareness Of The Risks Of Smoking

The trial court also committed reversible error by (1) excluding evidence that the public has been aware of the dangers of smoking since at least the 1960s and (2) refusing to instruct the jury on this issue. A-94-97, A-5269-78, A-5299, A-11415-18. These errors stemmed from the court's holding that "[w]hile public awareness *** is relevant in a case premised on strict liability, it has no relevance in a case premised on negligent design." A-96. According to the trial court, in a strict liability case "the central issue" is "the condition of the product," whereas in a negligent design case the focus is on the conduct of the manufacturer. A-97.

The trial court was mistaken. Although negligence cases do require examination of a manufacturer's conduct, they do not dispense with the requirement that the plaintiff show the design to be unreasonable. See *Denny*, 87 N.Y.2d at 258 (defective design is "functionally synonymous" in context of strict liability and negligence). As this Court has consistently held, a product is defective for purposes of both strict liability and negligence if it is "*in a condition not reasonably contemplated by the ultimate consumer* and *** unreasonably dangerous for its intended use." *Scarangella*, 93 N.Y.2d at 659 (emphasis added); *Robinson*, 49 N.Y.2d at 479 (same). Thus, one of the risk-utility factors relevant to both negligence and strict liability claims is "the degree of *awareness* of the potential danger of the product which reasonably can be attributed to the plaintiff." *Denny*, 87

N.Y.2d at 257 (addressing negligence and strict liability) (emphasis added). The trial court erred by excluding, on relevance grounds, evidence that plainly bore on an important risk-utility factor. Indeed, the trial court’s ruling turns New York law on its head, making it easier for a plaintiff to prove a negligence claim than a strict liability claim.

IV. APPELLANTS’ NEGLIGENCE CLAIM, AS IT WAS SENT TO THE JURY, IS PREEMPTED BY FEDERAL LAW.

The Appellate Division recognized the verdict in this case for what it was: an attempt by the plaintiffs and the trial court, “through the imposition of tort liability, to retroactively outlaw” the sale of regular cigarettes in this State, despite the fact that such sales have “long been consciously tolerated – and taxed and regulated – by the political branches of government.” R-24. As demonstrated above (*supra* at 28-29), imposing tort liability for the mere act of selling regular cigarettes would effectively constitute a ban imposed by the State of New York on a product that the federal government has for decades explicitly recognized as lawful. Even if this Court thought that theory had some merit as a matter of New York law, such a theory would be in direct conflict with decades of clearly established federal policy and would therefore be preempted. See, *e.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (state law is preempted if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (same).

A. Congress Has Foreclosed A Ban On Regular Cigarettes.

In *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the Supreme Court recognized that a cigarette ban would contradict the express will of Congress. The federal government, the Court recognized, “has foreclosed the removal of tobacco products from the market,” *id.* at 137, choosing instead to allow the continued sale of these products, subject to extensive federal regulation of labeling and advertising.

Congress first convened hearings on “the tobacco problem” following the release of the 1964 Surgeon General’s Report. The result of those hearings was the Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. 89-92, § 2, 79 Stat. 282, codified at 15 U.S.C. §§ 1331, *et seq.* (“Labeling Act”), which regulates cigarette sales by imposing strict requirements for labeling and advertising. The choice to regulate sales and advertising, rather than to ban cigarettes, was purposeful. Congress’s stated objective was to balance the goals of (1) ensuring that “the public may be adequately informed that cigarette smoking may be hazardous to health,” and (2) protecting “commerce and the national economy *** to the maximum extent.” *Id.*, § 2, 79 Stat. 282 (codified at 15 U.S.C. § 1331).

Over the following decades, Congress repeatedly confirmed this policy choice by blocking attempts to ban regular cigarettes. In 1974, for example, a federal district court ordered the Consumer Product Safety Commission (“CPSC”) to

regulate cigarettes containing more than 21 milligrams of tar, pursuant to the agency's authority under the Hazardous Substances Act ("HSA"). See *American Public Health Assoc. v. Consumer Prod. Safety Comm.*, CCH Consumer Prod. Safety Guide 75,081 (D.D.C. 1975), vacated as moot, No. 75-1863 (D.C. Cir. 1976). In response to this potential ban on regular cigarettes, Congress promptly amended the HSA to divest the CPSC of authority to regulate "tobacco and tobacco products." Consumer Product Safety Commission Improvements Act of 1976, Pub. L. 94-284, § 3(c), 90 Stat. 503 (codified at 15 U.S.C. § 1261(f)(2)). A statement in the Senate Report accompanying this legislation underscored the law's purpose: to

unmistakably reaffirm the clear mandate of the Congress that the basic regulation of tobacco and tobacco products is governed by the legislation dealing with the subject, *** and that *any further regulation in this sensitive and complex area must be reserved for specific Congressional action.*

S. Rep. No. 94-251 at 43 (1978), as reprinted in 1976 U.S.C.C.A.N. 993, 1012 (additional views of Sens. Hartke, Hollings, Ford, Stevens, and Beall) (emphasis added). Congress has also historically rejected proposals to allow the FDA to regulate tar and nicotine levels in cigarettes, and it has placed strict limitations on the power of the FTC to impose labeling or advertising requirements on cigarette manufacturers without first seeking express Congressional authorization. *FDA*, 529 U.S. at 150.

The Supreme Court recognized the significance of this history in its *FDA* decision. The Court noted that Congress “has directly addressed the problem of tobacco and health through legislation” on multiple occasions since 1965 and has never banned the sale of cigarettes or other tobacco products, even though the “adverse health consequences of tobacco use were well known as were nicotine’s pharmacological effects.” *FDA*, 529 U.S. at 137-38. The import of this series of consistent policy decisions is clear:

Congress’s decisions to regulate labeling and advertising and to adopt the express policy of protecting ‘commerce and the national economy *** to the maximum extent’ reveal its intent that tobacco products remain on the market. *Indeed, the collective premise of these statutes is that cigarettes and smokeless tobacco will continue to be sold in the United States.* A ban of tobacco products by the FDA would therefore plainly contradict congressional policy.

Id. at 139 (emphasis added).

Relying on this regulatory history and the Supreme Court’s decision in *FDA*, courts around the country have recognized that claims like the one at issue here are preempted by federal law. For example, in *Conley v. R.J. Reynolds Tobacco Co.*, 286 F. Supp. 2d 1097, 1107-08 (N.D. Cal. 2002), the court held that a claim for design defect was preempted to the extent it was based upon dangers that “are so inherent in tobacco products that it would not be scientifically or commercially feasible to remove the defect. Holding defendants liable in such circumstances would

effectively constitute a ban on the manufacture of tobacco products, a result that would undeniably conflict with Congressional policy.” Similarly, in *Johnson v. Brown & Williamson Tobacco Corp.*, 345 F. Supp. 2d 16 (D. Mass. 2004), the plaintiff claimed – as plaintiffs did here – that cigarettes are defective because they have been “designed and manipulated *** to deliver doses of nicotine sufficient to create and sustain consumer addiction.” *Id.* at 20. The court dismissed the plaintiff’s defective design claims on the ground that allowing liability “based upon the dangers of smoking” would “impermissibly override the congressional decision to allow [the] continued sale [of regular cigarettes].” *Id.* at 21. The court noted that “[f]ar from being a defect, the presence of a prescribed level of nicotine is exactly what consumers seek.” *Id.* at 21. See also, *e.g.*, *Insolia v. Philip Morris Inc.*, 128 F. Supp. 2d 1220-25 (W.D. Wisc. 2000) (imposing liability on tobacco manufacturers “merely for continuing to manufacture and sell a product they knew was dangerous” would effectively ban cigarettes and would “interfere with Congress’ policy in favor of keeping cigarettes on the market”); *Gault v. Brown & Williamson*, No. 1:02-CV-1849, slip op. 20 (N.D. Ga. Mar. 31, 2005) (“It would be in conflict with Congress’s decision to keep tobacco products on the market for this court to now hold Brown & Williamson liable for designing a product that contains and delivers tobacco and nicotine to the body”); *Prado Alvarez v. R.J. Reynolds Tobacco Co.*, 313 F. Supp. 2d 61, 73 (D.P.R. 2004) (“To the extent that Plaintiffs as-

sert that Defendant was negligent because it made and sold cigarettes that were dangerous and addictive, such claims are foreclosed by the doctrine of conflict preemption.”).¹⁵

Appellants attempt to distinguish *FDA* and its progeny by noting that the decision “only addressed the impact on the tobacco industry of a direct, regulatory, presumed *total* ban on cigarettes.” Br. 97. This case does not involve such a ban, appellants assert, because even if the judgment were upheld, defendants would still be free to sell ultra-light cigarettes (which defendants “can, by design, engineer”) without fear of penalty. But Congress has specifically considered banning regular cigarettes and has decided not to do so. The State of New York, we respectfully submit, cannot override that national policy choice.

¹⁵ Appellants contend, however, that “a number of courts” have rejected preemption arguments in negligence cases against cigarette manufacturers. Br. 98-99. But the cases they cite – *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183 (11th Cir. 2004); *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76 (Mo. Ct. App. 2006); and *Philip Morris USA, Inc. v. Arnitz*, 933 So. 2d 693 (Fla. Ct. App. 2006) – involved traditional negligence claims in which the plaintiffs argued that the defendants had *failed* to make a “safer cigarette.” None of those cases involved a claim that selling regular cigarettes – even when the so-called “safer alternative” had been manufactured and sold alongside it – was *per se* negligent. Such claims, based on nothing more than the inherent dangerousness of cigarettes, are almost uniformly held to be preempted by federal law. To the extent the Missouri Court of Appeals in *Thompson* rejected the preemption argument we raise here, we respectfully submit it was mistaken.

Relying on *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988), appellants argue that Congress’s repeated refusals to ban tobacco products and its consistent efforts to block regulation of tar and nicotine are “of no relevance to support a finding of a Congressional purpose” to preclude a ban on regular cigarette sales. Br. 89. But *Isla Petroleum* simply held it improper to infer an intent to preempt state regulation in the absence of some congressional action – either a statute setting forth express preemption or a “federal regulatory program with which the state regulation might conflict.” 485 U.S. at 500. Here, there is precisely such a program: Congress has enacted significant legislation regulating tobacco and has set up a comprehensive federal regulatory scheme to further its goals. In any event, the Supreme Court has explicitly recognized that where Congress has a “prolonged and acute awareness of [an] important *** issue,” its “failure to act” on proposed legislation is a strong indicator of its intent not to act. *Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983).¹⁶

¹⁶ It is for this reason that appellants’ reliance on *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) and *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994) is no more persuasive than the citation to *Isla Petroleum*. *Solid Waste* and *Bank of Denver* both held that it is “dangerous” to adopt a particular interpretation of a statute based on evidence that Congress had once rejected a bill that would have been inconsistent with that interpretation. Absent “overwhelming evidence of acquiescence” to the proposed interpretation, like the evidence in *Bob Jones*, the Court in those decisions expressed an understandable hesitation to “replace the plain text and original understanding of a statute with an amended agency interpre-

B. *Cipollone* Does Not Salvage Appellants' Claim.

Finally, appellants argue that *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) “is controlling and precludes any finding of implied goal conflict preemption here.” Br. 91. Appellants claim, incorrectly, that *Cipollone* rejected an argument regarding the preemptive effect of the Cigarette Labeling Act on state claims for negligent design.

Appellants’ reliance on *Cipollone* is misplaced for two reasons: First, our argument to this Court does not rely solely on the Labeling Act, but on a range of actions and decisions that reflect federal policy. Congress’s statement of purpose in the Labeling Act is one important indicator of its intent, but it is hardly the only one. See *supra* at 50-52. For forty years, Congress has repeatedly taken up the question whether to ban regular cigarettes, and it has repeatedly and consistently refused to do so. Congress’s intent is clear, and not because of any one sentence in the Labeling Act: regular cigarettes remain legal products.

Second, appellants are wrong to suggest that we are urging this Court to find that all state tort liability for the negligent design of cigarettes is preempted. To the contrary, preemption is limited to those causes of action, like the claim here,

tation.” *Solid Waste*, 531 U.S. at 169 n.5. Here, the evidence of Congressional intent is just as “overwhelming” as it was in *Bob Jones*.

that rest on the inherent properties of cigarettes – in short, to those causes of action predicated on an alleged duty to refrain entirely from selling ordinary cigarettes.¹⁷

Cipollone held that the Labeling Act’s preemption of “state warning requirements” did not imply that Congress intended to block all common-law damages actions based on fraud and misrepresentation. See 505 U.S. at 512 & n.6 (claims before the Court were failure to warn, express warranty, fraudulent misrepresentation, and conspiracy to defraud; questions regarding “design defect” claims were “not presented” to the Supreme Court). Accordingly, the Court did not address the question at issue here: whether a state theory of tort liability that would effectively ban cigarettes would be preempted by the well established Congressional policy of allowing cigarettes to be marketed in the United States.

Appellants have not pointed to any case in which a court has upheld a verdict based on the theory of liability at issue here – that cigarettes are defective because they deliver more than trace amounts of nicotine. To the contrary, as noted above, many courts have recognized that a defective design claim is preempted in exactly the circumstances presented by this case. Claims like this one are pre-

¹⁷ The statement plaintiffs quote from the respondents’ brief in *Cipollone* (Br. 92-93) is irrelevant and misleading. The brief addressed the preemptive force of the Labeling Act’s comprehensive regulation of *warnings and advertisements* and concluded that such regulation, standing alone, did not bar a state tort suit claiming cigarettes could be made safer – and retain the same utility – through the addition of an ingredient that would have facilitated combustion. That has nothing to do with the question in this case.

empted because they would erect an impermissible obstacle to Congress's purposes.¹⁸

V. THE PUNITIVE AWARD CANNOT STAND.¹⁹

The Appellate Division justices were unanimous in concluding that the unprecedented punitive award was improper and should be dismissed. The justices who dissented from the vacatur of the compensatory award went so far as to write separately and explain that the imposition of punitive damages – even if the award of compensatory damages were upheld – would violate both New York law and federal due process. Moreover, even assuming punitive liability could be imposed in this case – which it cannot – a new trial would be required because evidentiary and instructional errors permeated the punitive phases of the trial. The jury's award was also grossly excessive; in the absence of a new trial, both New York law and due process would mandate a substantial reduction.

¹⁸ We note that Philip Morris is advancing both express and implied preemption arguments (in a different context) in *Good v. Altria Group, Inc.*, No. 07-562 (U.S. 2008), currently pending before the U.S. Supreme Court.

¹⁹ Appellant Brown & Williamson Tobacco Holdings, Inc. was not found liable for punitive damages and therefore does not join in this section of the brief.

A. Philip Morris Is Entitled To Dismissal Of The Punitive Damages Award.

1. Philip Morris's Conduct Was Neither Willful Nor Wanton.

This Court has explained that punitive damages cannot be imposed for mere negligence.

[Punitive damages] may only be awarded for exceptional misconduct which transgresses mere negligence, as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness *** or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights ***.

Sharapata v. Islip, 56 N.Y.2d 332, 335 (1982) (internal quotation marks omitted); see also *McDougald v. Garber*, 73 N.Y.2d 246, 254 (1989). It is therefore unsurprising that *no* New York court has *ever* imposed punitive damages in a negligent design case; indeed, trial courts routinely dismiss punitive damages claims before trial in such cases.²⁰ And where such claims have been allowed to go to the jury, the resulting award has invariably been vacated as a matter of law.²¹

²⁰ See, e.g., *Lugo v. LJM Toys, Ltd.*, 146 A.D.2d 168, 171 (1st Dep't 1989); *Dubecky v. S2 Yachts, Inc.*, 234 A.D.2d 501, 502-03 (2d Dep't 1996); *Krohn v. Agway Petroleum Corp.*, 168 A.D.2d 858, 860 (3d Dep't 1990); *Croton Falls Fire Dist. v. Pierce Mfg. Co.*, 130 A.D.2d 456, 456 (2d Dep't 1987); *West v. Goodyear Tire & Rubber Co.*, 973 F. Supp. 385, 389 (S.D.N.Y. 1997).

²¹ See, e.g., *Camillo v. Geer*, 185 A.D.2d 192, 194 (1st Dep't 1992); *Hafner v. Guerlain, Inc.*, 34 A.D.2d 162, 163 (1st Dep't 1970).

Appellants claim that “New York courts have long recognized that punitive damages *may be awarded* in product liability cases involving negligence.” Br. 108 (emphasis added). Neither of the two cases appellants cite for this proposition actually supports their argument. *Home Insurance Co. v. American Home Products Corp.*, 75 N.Y.2d 196 (1990), held only that “punitive damages could be recovered in New York *in a failure to warn case*”; the Court expressly added that “we *do not* suggest that punitive damages are necessarily appropriate in all types of products liability litigation.” 75 N.Y.2d at 204 (emphasis added). And in *Lugo v. LJM Toys Ltd.*, 146 A.D.2d 168 (1st Dep’t 1989), the First Department *struck* the plaintiffs’ punitive damages request because their negligence claims could not satisfy New York’s standard for punitive liability. The court neither stated nor even implied that punitive damages are generally available in negligence cases.

In any event, even if punitive liability could be imposed in a negligent design case under some circumstances, it could not be imposed here: plaintiffs did not meet their burden of proving willful or wanton misconduct. Appellants rely on three categories of evidence to support their claim that the conduct at issue here was willful and wanton: (1) evidence that Philip Morris knew cigarettes were inherently dangerous (Br. 102); (2) evidence that Philip Morris knew nicotine was addictive (Br. 103); and (3) evidence that Philip Morris purposefully marketed cigarettes with more than minimal nicotine levels despite knowing (1) and (2) (Br.

104-107). But appellants simply ignore the fact that all of this conduct was *legal* – that it was expressly authorized by New York and federal law despite public and legislative awareness of the risks and the addictive properties of cigarettes – and therefore could not have constituted a wanton or willful disregard for the legal rights of others.

In addition, Philip Morris has worked consistently to reduce smokers’ overall tar and nicotine intake. A-5736. This effort has resulted in a significant overall reduction in the sales-weighted-average nicotine yields in cigarettes. A-5661. Philip Morris has also spent more than \$300 million developing a completely denicotinized cigarette; it built specialized commercial plants dedicated entirely to that project. A-5754. The project ultimately failed, however, because nobody would buy the product. A-5752-54.²² In this context, continuing to sell regular cigarettes cannot be deemed “malicious” or “wanton.”

²² Appellants’ citation to the *Philip Morris* case for the proposition that Philip Morris concealed evidence of health risks (Br. 107) is entirely inappropriate. In addition to the collateral estoppel concerns discussed above (*supra* at 34-35), the district court’s findings in *Philip Morris* have no relevance at all to punitive damages in this case. Unlike *Philip Morris*, this is not a fraud case; indeed, appellants voluntarily withdrew their fraud claims before trial. Appellants made no allegations of fraud or concealment, the jury was not required to find fraud or concealment, and Mrs. Rose was not required to prove reliance on any fraud or concealment. Punitive damages may not be imposed on a defendant for acts other than those alleged to have harmed the plaintiff. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-23 (2003) (“A defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed

2. Philip Morris Had No Notice That Its Conduct Could Give Rise To Punishment.

Appellants' claim for punitive damages is barred in any event by due process because Philip Morris did not have notice that the act of selling cigarettes could subject it to punishment. As the dissenting justices noted, "an award of punitive damages cannot be based upon conduct – such as that at issue here – that the defendant could reasonably have believed to be lawful. Philip Morris did not have 'fair notice' that the conduct at issue in this case might result in severe punishment. Indeed, the verdict in this case is novel." R-66-67. See also *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice *** of the conduct that will subject him to punishment.")

Appellants argue that "there is nothing at all novel *** in finding a manufacturer liable for continuing to sell a product with an unreasonably unsafe design when a safer feasible alternative design was available in the market." Br. 109. That argument misses the point. The issue is whether such general principles of tort law gave Philip Morris sufficient notice that it could be punished for *the conduct at issue in this case* – that is, producing a range of cigarette products. Courts

the plaintiff, not for being an unsavory individual or business."); New York PJI 2:278 (Punitive Damages) (a defendant is liable for punitive damages only if the jury finds "that *the act of the Defendant that caused the injury complained of* was wanton and reckless ***.").

around the country have long recognized that imposition of punitive damages is inappropriate where a plaintiff's claim is novel, even where, as here, that claim purports to be based on generally applicable principles of tort law.²³

B. Philip Morris Would Be Entitled In Any Event To A New Trial On Punitive Damages.

Even if this Court somehow were to conclude that punitive damages are available in this case, the punitive phase of the trial was so permeated by evidentiary and instructional errors that a new trial would be necessary.

1. The Facts Supporting An Award Of Punitive Damages Must Be Established By Clear And Convincing Evidence.

At trial Philip Morris requested a jury instruction that the facts supporting a finding of punitive damages must be established by clear and convincing evidence. A-11471. The court instead instructed that only “a fair preponderance of the credible evidence” was required. A-5850, 6014. If this Court finds it necessary to

²³ See, e.g., *BMW*, 517 U.S. at 585 (a company is “entitle[d] to fair notice of the demands that the several States impose on the conduct of its business”); *Mackintosh v. California Fed. Sav. & Loan Ass’n*, 935 P.2d 1154, 1163 (Nev. 1997) (“[P]unitive damages should not be awarded in the case which initially adopts [a] new cause of action.”); *Harrison v. Allstate Ins. Co.*, 662 So. 2d 1092, 1095 (Miss. 1995) (refusing to award punitive damages on novel cause of action); *Murphy v. Dep’t of Labor Servs.*, 630 P.2d 186, 193 (Kan. 1981) (“[I]nasmuch as this is the first recognition of such a cause by a Kansas court of appellate jurisdiction, we believe the allowance of punitive damages in this case would be extremely unjust.”); *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 360 (Ill. 1979) (recognizing the “penal nature” of punitive damages and concluding that “punitive damages should not be awarded where, as here, the cause of action forming the basis for their award is a novel one”).

reach this question, it should take this opportunity to confirm that the clear-and-convincing standard of proof applies to punitive damages claims in New York.

In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the United States Supreme Court warned that “[g]reat care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof.” *Id.* at 428. Most states, motivated by such concerns, require that any facts supporting a punitive award must be established by clear and convincing evidence (or, in the case of one state, proof beyond a reasonable doubt). Twenty four states have adopted the standard by statute,²⁴ seven additional states and the District of Columbia have done so by judicial deci-

²⁴ See ALA. CODE § 6-11-20; ALASKA STAT. § 09.17.020(b); CAL. CIV. CODE § 3294(a); COLO. REV. STAT. § 13-25-127(2) (beyond a reasonable doubt standard); FLA. STAT. ANN. § 768.725 (specified causes of action); GA. CODE ANN. § 51-12-5.1; IDAHO CODE § 6-1604(1); IND. CODE ANN. § 34-51-3-2; IOWA CODE ANN. § 668A.1; KAN. STAT. ANN. § 60-3701(c); KY. REV. STAT. ANN. § 411.184(2); MINN. STAT. ANN. § 549.20.1(a); MISS. CODE ANN. § 11-1-65(1)(a); MONT. CODE ANN. § 27-1-221(5); NEV. REV. STAT. § 42.005(1); N.J. STAT. ANN. § 2A:15-5.12(a); N.C. GEN. STAT. § 1D-15(b); N.D. CENT. CODE § 32-03.2-11(1); OHIO REV. CODE ANN. §§ 2315.21(C)(3), 2307.80(A); OKLA. STAT. ANN. tit. 23, § 9.1(C); OR. REV. STAT. § 31.730(1); S.C. CODE ANN. § 15-33-135; TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a); UTAH CODE ANN. § 78B-8-201(1)(a).

sion.²⁵ In contrast, we are aware of only two states that have chosen a preponderance standard.²⁶

The First and Second Departments have unequivocally adopted the clear-and-convincing standard. See, e.g., *Camillo v. Geer*, 185 A.D.2d 192, 194 (1st Dep't 1992); *Orange and Rockland Util., Inc. v. Muggs Pub, Inc.*, 292 A.D.2d 580, 581 (2d Dep't 2002). See also *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 850 (2d Cir. 1967). The Fourth Department reached the opposite conclusion, however, holding in 1993 that punitive liability need be proven only by a preponderance of the evidence. See *In re Seventh Judicial Dist. Asbestos Litig.*, 190 A.D.2d 1068, 1069 (4th Dep't 1993) (noting conflict with *Camillo*). The Third Department has not addressed the question since the 1950s, when it too evidently endorsed the preponderance standard. See *Frechette v. Special Magazines, Inc.*, 285 A.D. 174, 176 (3rd Dept. 1954).

²⁵ See *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675, 681 (Ariz. 1986) (*in banc*); *Masaki v. Gen. Motors Corp.*, 780 P.2d 566, 575 (Haw. 1989); *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985); *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 657 (Md. 1992); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 111 (Mo. 1996) (*en banc*); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 458 (Wisc. 1980); *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 932 (D.C. 1995).

²⁶ See *Jessen v. Nat'l Excess Ins. Co.*, 776 P.2d 1244, 1248 (N.M. 1989); *Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1098 n.14 (Pa. 1985), overruled on other grounds, *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800 (Pa. 1993).

The confusion on this subject largely stems from an apparent conflict in this Court's precedents. In 1874, this Court first addressed the standard-of-proof issue in punitive damages cases, in *Cleghorn v. New York Central & Hudson River R.R. Co.*, 56 N.Y. 44 (1874), holding that “[s]omething more than ordinary negligence is requisite; it must be reckless and of a criminal nature, and clearly established.” 56 N.Y. at 48. The issue was not raised again until 1920, when, without analysis and without citing *Cleghorn*, the Court noted that in order to recover punitive damages in a defamation case, the plaintiff was “bound to satisfy the jury by a fair preponderance of evidence” that defendant bore him ill will. *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 66-67 (1920).

Corrigan is wrong, we respectfully submit, because it appears to be in direct conflict with *Cleghorn*. And, as noted above, it is inconsistent with the rule in a substantial majority of States. Nevertheless, *Corrigan* is this Court's most recent word on the standard-of-proof issue, and it has been cited by those modern courts (including the trial court in this case) that choose to apply the preponderance standard in punitive damages cases. Assuming that this Court finds it necessary to reach our new-trial arguments, it should take this opportunity to endorse *Cleghorn* over *Corrigan* and confirm that the First and Second Departments are correct – that New York's law on this point is in line with that of most of the rest of the country.

2. The Trial Court Erroneously Excluded Defense Evidence Concerning The Commercial Acceptability Of Plaintiffs' Proposed Alternative Design.

The trial court erroneously excluded from Phase II relevant defense evidence regarding the acceptability of plaintiffs' proposed alternative design to consumers. In addition to arguing that such evidence was relevant in Phase I (see *supra* at 46-47), defense counsel argued that the evidence should (at a minimum) be admissible in Phase II to show that it had been reasonable, and certainly not wanton, for Philip Morris to respond to public health concerns by attempting to produce a lower-yield product that was commercially acceptable, while continuing to market cigarettes with a range of tar and nicotine yields. The trial court initially agreed, A-5407-09, and defense counsel told the jury during Phase II opening statements that the evidence would show that consumers wanted a range of products and would not purchase ultra-light cigarettes. A-5438-48. The court ultimately excluded that evidence. A-5761-62, 5773, 5750-51. In so doing, it committed reversible error.

This evidence was plainly admissible to rebut plaintiffs' assertion that Philip Morris should be punished for continuing to sell regular cigarettes. At the very least, it was relevant as mitigating evidence. Under New York law, a defendant facing a claim for punitive damages is entitled to introduce evidence bearing on the

motive underlying its conduct, as well as any mitigating circumstances. *Nickerson v. Winkle*, 161 A.D.2d 1123, 1124 (4th Dep't 1990).²⁷

3. The Admission Of Evidence Regarding Philip Morris's Financial Condition Necessitates A New Trial.

The trial court denied defendants' motion *in limine* to preclude evidence of defendants' financial condition. A-122. Thus, in Phase II, plaintiffs relied heavily on reports analyzing Philip Morris's recent sales data and national market share. A-5542-49. During his closing statements in Phase II plaintiffs' counsel asserted that "people spend 12 billion dollars to promote [cigarettes] and sell [them]" and that "[t]his is big business. This is selling billions and billions of cigarettes." A-5830. At a minimum, New York law absolutely prohibits the consideration of such evidence during the punitive *liability* phase. See *Rupert v. Sellers*, 48 A.D.2d 265, 272 (4th Dep't 1975).

Plaintiffs' arguments during Phase III were even more specifically likely to inflame the jury's passions. Counsel emphasized that "Philip Morris USA has a stand-alone or net worth of \$31.5 billion,"²⁸ and conjectured about Philip Morris's

²⁷ See also, *e.g.*, *Guariglia v. Price Chopper Operating Co.*, 13 A.D.3d 1028, 1030 (3d Dep't 2004); *Gatz v. Otis Ford, Inc.*, 274 A.D.2d 449, 450 (2d Dep't 2000); *Levine v. Abergel*, 127 A.D.2d 822, 824-25 (2d Dep't 1987).

²⁸ That figure was not correct: appellants' expert calculated the company's net worth as being \$22.5 billion, and its "stand-alone value" as being \$31.5 billion. Both figures were based on market capitalization, which is not a valid measure of a company's ability to pay a punitive damages award. See, *e.g.*, *Bullock v. Philip*

yearly, weekly, and daily income. A-6006-09. Counsel summarized, over defendant's objection, "[n]ow we're talking about a million seven or 3 million or even \$5 million [in punitive damages]. And they're grossing in one week \$351 million corporate. Philip Morris won't even hear about it. And if anything, it will be a little bug on their shoulder they'll flick off with their finger. *** They'll think it's a joke." A-6007. The obvious purpose of this argument was to encourage the jury to increase the size of the award it might otherwise impose, simply on the basis of Philip Morris's wealth.

As the comments to the Pattern Jury Instructions state, "[t]he numerous New York State cases preceding recent holdings of the United States Supreme Court on the issue of punitive damages must now be read in light of these Supreme Court holdings." PJI 2:278 (comment). Recent Supreme Court decisions demonstrate that using wealth as an aggravating factor in determining punitive amount – as plaintiffs' counsel encouraged the jury to do here – violates the Constitution. See *BMW*, 517 U.S. at 585 (holding that "[t]he fact that BMW is a large corporation rather than an impecunious individual" does not change the punitive inquiry); *State Farm*, 538 U.S. at 426-27 (holding that lower court's reliance on State Farm's

Morris USA, Inc., 42 Cal. Rptr. 3d 140, 166 (Cal. App. 2006) (recognizing that market capitalization does not represent "the company's net worth or ability to pay"); *Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge) L.L.C.*, 171 S.W.3d 905, 914 (Tex. App. 2005). The trial court, however, overruled defendants' objections to the expert's methodology. A-461.

“enormous wealth” constituted “a departure from well established constraints on punitive damages,” and declaring that “[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award”).²⁹

At the very least, the jury should have been cautioned not to allow its decision to be affected by the fact that Philip Morris is a large company. See, e.g., *State Farm*, 538 U.S. at 417. Defendants’ proposed jury instructions to this effect were rejected. A-11495. The trial court’s inexplicable refusal to take even this small precautionary step against the pervasive prejudice inherent in evidence of Philip Morris’s wealth would require a new trial on punitive damages even if punitive liability were permissible in the abstract.

C. The \$17.1 Million Punitive Damages Award Is Excessive.

This Court need not reach the issue of the punitive award’s excessiveness, because of all the flaws in the trial court’s judgment that are discussed above. If the Court does, however, find that it is necessary to address this issue, it should hold that the \$17.1 million award – which was 10 times the compensatory damages

²⁹ See also *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153, 167 (Ky. 2004) (excluding evidence of defendant’s wealth following *State Farm* in part because of potential for bias against big business); *Zazu Designs v. L’Oreal, S.A.*, 979 F.2d 499, 509 (7th Cir. 1992) (“Corporate size is a reason to magnify damages only when the wrongs of larger firms are less likely to be punished; yet judges rarely have any reason to suppose this ***.”); *La Plante v. Am. Honda Motor Co.*, 27 F.3d 731, 740 (1st Cir. 1994); *Ake v. Gen. Motors Corp.*, 942 F. Supp. 869, 876 (W.D.N.Y. 1996).

awarded against Philip Morris – is grossly and unconstitutionally excessive. Both as a matter of federal constitutional law and New York common law, the punitive award must be reduced to no more than the amount of compensatory damages awarded against Philip Morris.

1. General Common Law Principles Mandate A Significant Reduction In The Award.

In *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2008 U.S. LEXIS 5263 (2008), the United States Supreme Court considered the propriety of a large punitive damages award under federal maritime law. The Court reviewed the damages award, much as this Court reviews similar awards, “in the position of a common law court of last review, faced with a perceived defect in a common law remedy.” *Id.* at *64-65. It held that in most cases the maximum permissible punitive award is no greater than the compensatory damages assessed by the jury.

The Court explained that studies show that the median ratio of punitive to compensatory damages is less than 1:1, but that the size of punitive awards for similar conduct varies widely. This, the Court observed, demonstrates that “[t]he real problem *** is the stark unpredictability of punitive awards.” *Id.* at *50. The Court explained that the “spread between high and low individual awards” is unacceptable and held that “a 1:1 ratio *** is a fair upper limit” for punitive awards reviewed under federal common law. *Id.* at *76.

Although *Exxon* is not binding on this Court, the concerns that motivated the Supreme Court to impose a 1:1 limit on punitive awards should inform this Court's thinking about the punitive award in this case. The award here was ten times the amount of the compensatory damages awarded against Philip Morris. Similar cases in this state, alleging nearly identical tortious conduct, have resulted in far lower awards – or in many cases, no punitive liability at all. It is that type of unpredictable variation – punishment subject to the whims of individual juries – that led the Supreme Court to impose a 1:1 limit in *Exxon*. This Court should do the same, as a matter of New York common law.

2. Federal Constitutional Law Mandates The Same Result.

In any event, federal constitutional law *also* requires reduction of the award to no more than the \$1.7 million compensatory award. As the Supreme Court explained in *State Farm* and reiterated in *Exxon*, where a compensatory award is “substantial” – which the \$1.7 million award in this case indisputably is – punitive award can rarely exceed that amount without violating due process.

The Supreme Court has instructed lower courts to consider three “guideposts” for determining whether a punitive award is unconstitutionally excessive: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive to compensatory damages; and (3) the civil penalties applicable to comparable conduct. *BMW*, 517 U.S. at 574-76. In reviewing an award for excessiveness, this

Court must conduct a *de novo* review of the trial court’s application of these three guideposts. See *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001). In so doing, the court views the evidence evenhandedly, rather than taking the facts in the light most favorable to the verdict. *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 70 (Cal. 2005) (appellate court must “review the award *de novo*, making an independent assessment” of the record; where the jury has not made an “express finding,” court may not “infer one from the size of the award,” which “would be inconsistent with *de novo* review, for the award’s size would thereby indirectly justify itself”).

a. Philip Morris’s Conduct Was Not Highly Reprehensible.

The \$17.1 million punitive award in this case is “grossly out of proportion to the severity of the offense” – the sale of a legal, highly regulated product. *BMW*, 517 U.S. at 576 (internal quotation marks omitted). It was uncontested that Philip Morris has spent considerable resources developing and marketing low-yield cigarettes, including the ultra-light cigarettes that plaintiffs identify as a safer alternative design. See *supra* at 5-6, 61. Philip Morris’s only claimed wrongdoing, as embodied in this anomalous verdict, was in offering consumers a choice. The evidence at trial also firmly established that the custom and practice in the industry is to manufacture and sell a range of products. A-3055-56, 3995, 4465. As a matter of law, common sense, and public policy, it cannot be considered legally “repre-

hensible” for Philip Morris to have conducted its business in conformity with industry-wide standards, especially where Congress and the public health community have refrained from banning that practice.

b. The Ratio Guidepost Confirms The Award’s Excessiveness.

The 10:1 ratio of punitive to compensatory damages demonstrates the award’s excessiveness.³⁰ In *State Farm*, the Supreme Court stated that “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” 538 U.S. at 425. That is because compensatory damages have a deterrent effect in their own right: the Court admonished that “punitive damages should only be awarded if the defendant’s culpability, *after having paid compensatory damages*, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.” 538 U.S. at 419 (emphasis added).³¹ Five

³⁰ As the trial court recognized (A-67), the appropriate denominator in the ratio analysis is the amount of compensatory damages attributed by the jury to Philip Morris’ misconduct – \$1.7 million. See, e.g., *Romo v. Ford Motor Company*, 6 Cal. Rptr. 3d 793, 812 n.14 (Cal. Ct. App. 2003); *Waddill v. Anchor Hocking, Inc.*, 190 Or. App. 172, 183 n.6 (2003).

³¹ See also, e.g., *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (“Deterrence *** operates through the mechanism of damages that are compensatory.”); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (“The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.”); *United States v. Bailey*, 288 F. Supp. 2d 1261, 1281 (M.D. Fla. 2003) (compensatory damages exceeded

years later, in *Exxon*, the Court observed that due to the large size of the compensatory award in that case, “the constitutional outer limit may well be 1:1.” 2008 U.S. LEXIS 5263, at *79 n.28.

For these reasons, a 1:1 ratio is the constitutional maximum in this case.³² The compensatory award that the Supreme Court deemed “substantial” in *State Farm* was \$1 million. 538 U.S. at 426. The Eighth Circuit concluded that a 1:1 ratio was the constitutional maximum in *Boerner v. Brown & Williamson Tobacco Co.*, a smoking-and-health case in which – unlike in this case – the plaintiff’s warning claim involved allegations that the defendant “actively misled” consumers. The jury had awarded compensatory damages of \$4.025 million and punitive damages of \$15 million. Although it viewed the defendant’s conduct as highly reprehensible, the court held that a maximum “ratio of approximately 1:1 would comport with the requirements of due process.” 394 F.3d 594, 603 (8th Cir. 2005).³³ In this case, where plaintiffs’ claim is entirely novel, where no prior stat-

the gain to the defendant, making “the imposition of further sanctions to achieve punishment or deterrence” unnecessary), aff’d, 419 F.3d 1208 (11th Cir. 2005).

³² The same result is required as a matter of New York law, which holds that an award must be reduced where it “show[s] by its very exorbitancy that it was actuated by passion.” *Nardelli v. Stamberg*, 406 N.Y.S.2d 443, 445 (1978).

³³ See also, e.g., *Bach v. First Union Nat’l Bank*, 486 F.3d 150, 154, 157 (6th Cir. 2007) (describing a 6.6:1 punitive-to-compensatory damages ratio “alarming” and capping punitive damages at a 1:1 ratio); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (reducing punitive award from \$6 million to

ute, regulation, or decision had ever questioned the lawfulness or reasonableness of the conduct at issue, and where the compensatory damages against Philip Morris totaled \$1.7 million, a ratio of 1 to 1 is the constitutional maximum both under the federal Constitution and under New York law.

c. The Third Guidepost Confirms The Award's Excessiveness.

No state or federal authority would impose any penalty for the conduct at issue here – the sale of a lawful product, the dangers of which have been evaluated by the appropriate authorities, which found no basis for removal of the product from the market. The absence of any penal provisions covering the conduct is itself another indication that any substantial punitive award is excessive.³⁴

\$600,000; \$600,000 compensatory award was “a lot of money” and “substantial” enough to merit 1:1 ratio); *TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 413, 450-51 (S.D.N.Y. 2003) (punitive damages of \$108 million remitted to approximately \$30 million, for a ratio of 1:1), rev'd on other grounds, 412 F.3d 82 (2d Cir. 2005); *Czarnik v. Illumina, Inc.*, 2004 WL 2757571, at *11 (Cal. App. Dec. 3, 2004) (unpublished) (“1:1 ratio of punitive to compensatory damages [was] the maximum award that is sustainable against a due process challenge” where compensatory damages were \$2,196,935); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651, 670-72 (S.D. 2003) (compensatory award of \$25,000 was “substantial,” and an award “at or near the amount of compensatory damages” was appropriate); *Ceimo v. General Am. Life Ins. Co.*, 2003 U.S. Dist. LEXIS 26699, *5-6 (D. Ariz. Sept. 16, 2003) (reducing \$79 million punitive award to \$7 million; because “the compensatory damages are substantial *** the Constitution constrains us to reduce the punitive damages award *** to an amount roughly equal to the compensatory damages.”), aff'd, 137 Fed. Appx. 968 (9th Cir. 2005).

³⁴ See, e.g., *FDIC v. Hamilton*, 122 F.3d 854, 862 (10th Cir. 1997); *Groom v. Safeway, Inc.*, 973 F. Supp. 987, 995 (W.D. Wash. 1997).

CONCLUSION

The Appellate Division order dismissing this entire case should be affirmed.

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