To Be Argued By:
ANDREW H. SCHAPIRO

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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

NORMA ROSE and LEONARD ROSE,

Plaintiffs-Respondents,

—against—

BROWN & WILLIAMSON TOBACCO CORPORATION, as successor in interest to AMERICAN TOBACCO, PHILIP MORRIS, USA, INC.,

Defendants-Appellants,

—and—

R.J. REYNOLDS TOBACCO COMPANY,

Defendant.

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PRELIMINARY STATEMENT

The jury in this case awarded almost $20 million in compensatory and punitive damages merely because defendants marketed and sold cigarettes that contain more than negligible amounts of nicotine. This verdict represents an effective ban on nearly all cigarettes currently sold in New York – a ban that directly conflicts with Congress's stated intent that cigarettes remain on the market. The decision below also sets a new rule of tort liability in New York, under which manufacturers may be held negligent – and punished – for failing to replace products consumers want with versions that few consumers would buy.

The adoption of such a regime would fly in the face of precedent and policy. Plaintiffs' brief provides no support for the judgment. It leaves our opening arguments unanswered, and instead asserts irrelevant or uncontested propositions. If the sale of anything but 'ultra-light' cigarettes is to be outlawed, it is not the province of the judiciary to take that radical step.

ARGUMENT

I. DEFENDANTS ARE ENTITLED TO DISMISSAL.

A. Plaintiffs Have Not Met Their Burden Of Proving A Feasible Alternative Design.

We argued that defendants are entitled to judgment because plaintiffs failed to prove – indeed, to produce any evidence – that their proposed "alternative" to regular cigarettes (*i.e.*, ultra-light cigarettes with less than .4 mg of nicotine) would

have the same utility to consumers as regular cigarettes do. Plaintiffs offer no, and have no, meaningful response to this fundamental defect in their case.

1. In Order To Be "Feasible," An Alternative Design Must Be Acceptable To Consumers.

As we showed (DB 21-26),[1] New York law, like the law of most states, requires a plaintiff in a negligent design suit to show not only that the defendant's product is dangerous but also that there is an alternative design for the same product that is both safer *and* feasible. It must be shown that the proposed alternative would perform the same "function" and have the same "utility" to consumers as the original product – *i.e.*, that most consumers who use the product would actually *purchase* the proposed alternative if given the choice.

Plaintiffs barely contest this legal rule and its applicability here: they do not dispute that they were required to offer evidence that consumers would accept their proposed alternative as a viable replacement for the original. Nor have they attempted to distinguish most of the cases cited in our opening brief (at DB 23-26) holding that the absence of such evidence is dispositive.[2] Their sole challenge to

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[1] "DB" refers to the defendants' opening brief; "PB" refers to the plaintiffs' brief. As in the opening brief, "A" refers to the Joint Appendix.

[2] For example, we cited *Pigliavento v. Tyler Equipment Corp*., 248 A.D.2d 840, 841-42 (3d Dep't 1998), which affirmed summary judgment in favor of a design-defect defendant, noting that "approximately 85%" of consumers had "declined" to purchase the plaintiffs' proposed safer design when it was offered as an alternative. We also cited *Felix v. Akzo Nobel Coatings, Inc*., 262 A.D.2d 447,

the existence – or, more accurately, the wisdom – of New York's "commercial viability" requirement is a footnote (PB 27 n.5) in which they argue that there is no "principled method for applying" a rule requiring proof of commercial acceptability. The question of what proportion of consumers would have to find the alternative acceptable is not before the Court, however, because plaintiffs admit that they offered *no* proof that *any* proportion of consumers would view ultra-lights as having utility comparable to that of regular cigarettes. In any event, New York case law does provide guidance on this point: The Third Department granted summary judgment in *Pigliavento v. Tyler Equipment Corp.*, 248 A.D.2d 840, 841-42 (3d Dep't 1998) (cited at DB 23, 26, and discussed at n.2, *supra*), in part upon a finding that "approximately 85%" of consumers "had declined" to purchase the proposed alternative. The court reached the same result in *Jackson v. Bomag*

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448 (2d Dep't 1999), and *Perez v. Radar Realty*, 7 Misc. 3d 1015A (Sup. Ct. Bronx Cty. 2005), both cases in which summary judgment was granted to a negligent-design defendant on the ground that the plaintiffs' proposed alternative designs changed the "function" of the original products. Plaintiffs ignore both *Pigliavento* and *Perez.* Their only mention of *Felix* is in a footnote – one that observes merely that the proposed alternative in *Felix* was an "entirely different product" from the allegedly defective one. What was true in *Felix*, however, is also true here. The proposed alternative in *Felix* – a water-based wood sealer that was offered as an alternative to an oil-based product – was a "different product" because it lacked an ingredient "critical to the product's performance." *Felix*, 262 A.D.2d at 448-49. Cigarettes with only trace amounts of nicotine are directly analogous.

GmbH, 225 A.D.2d 879 (3d Dep't 1996) (cited at DB 39), where "statistics revealed that [the safer alternative] was rarely purchased." *Id.* at 881.

Plaintiffs *admitted* at trial that they had produced no evidence to show that their proposed alternative had sufficient utility to make it acceptable to consumers. DB 11; A-4116. They do not retreat from this position on appeal, except for a passing reference to the undisputed fact that defendants have all marketed ultra-light cigarettes, "sold *as such*," from time to time. PB 16-17 (emphasis in original). But that is no answer. The record demonstrated that the market for ultra-lights is minuscule. In order to make out a prima facie case, plaintiffs must show that the alternative actually *is* a viable substitute – that, when given the choice, consumers who use the original would actually choose the alternative, because the alternative has function and utility comparable to the original. Plaintiffs have not done so here.

As for plaintiffs' assertion (PB 18) that their burden was somehow met because two defense witnesses suggested that some people enjoy cigarettes for the "ritual of lighting up," that testimony did not even suggest that most consumers would switch to ultra-light cigarettes if other choices were eliminated. The testimony plaintiffs cite (from Dr. Cassadonte and Dr. Blackie) was very clear: many people smoke because they like the sensations imparted by nicotine. Some people *also* enjoy *other* aspects of smoking, but that does not come close to

demonstrating that consumers find regular cigarettes have the same "function" as cigarettes with only trace amounts of nicotine. A-3919 (nicotine is not the "only" reason people smoke). Indeed, the evidence was all to the contrary. See DB 31-33.

2. Plaintiffs' Arguments About "Profitability" And "Industry Custom And Practice" Are Irrelevant.

Because they cannot dispute (a) that New York requires proof of consumer acceptability and (b) that they failed to produce such proof, plaintiffs instead seek to reframe the case as involving an argument we never made: that manufacturers of dangerous products are insulated from liability if it would be less "profitable" to sell a safer alternative. The issue here, of course, is not whether manufacturing a safer product would be more expensive – or less profitable – on a unit-by-unit basis. Rather, the issue is whether, regardless of cost or profit, the finished product would retain the same "utility" for the consumer. New York does not require manufacturers to cease production of a potentially dangerous product unless the proposed alternative retains enough of the "functionality" of the original to be considered feasibly equivalent. And when it comes to a product like cigarettes, the "utility" of which is entirely subjective, the way to measure utility is to determine whether consumers will buy the alternative.

Plaintiffs also assert that a negligence regime in which only "market-acceptable" designs would qualify as feasible alternatives to allegedly unsafe

products "would effectively elevate an industry-wide unsafe design into a liability defense." PB 27. Plaintiffs' confusion about the relevance of industry-wide conduct in this case stems from a colloquy during the trial, when defendants offered to produce a witness who would testify that when given a choice between regular cigarettes and the de-nicotinized products plaintiffs offered as an alternative, almost no consumers chose to purchase the "alternative" design. When asked by the trial court whether any of the defendants ever attempted to market *only* de-nicotinized cigarettes, counsel answered that none had ever tried, because had they done so, they would have lost nearly all their customers to competitors who were selling the products that consumers wanted. A-4647.

Plaintiffs misconceive the purpose for offering this evidence. A showing that consumers overwhelmingly choose regular cigarettes over the types of "ultra-light" products the plaintiffs endorse would demonstrate that ultra-light cigarettes do not have utility comparable to that of regular cigarettes (a subject on which *plaintiffs* had the burden of proof). Plaintiffs' lengthy recitation of authority for the proposition that compliance with industry standards will not, by itself, insulate a defendant from tort liability is both non-controversial and beside the point. See PB 29-31.[3] The fact that so few consumers choose to purchase ultra-lights (even

[3] It is worth noting, however, that plaintiffs go too far when they imply that industry custom is entirely irrelevant to the jury's negligence calculus. Adherence to industry custom is not conclusive proof of non-negligence, but under settled

when ultra-lights are available and aggressively marketed) shows that plaintiffs failed to prove that their alternative design was an acceptable substitute for regular cigarettes to the ordinary smoker.

This highlights a related point raised in our opening brief (DB 25-26): plaintiffs contended at trial, and the court found, that one of the public-safety benefits of replacing regular cigarettes with ultra-lights would be that many smokers would quit smoking altogether rather than purchase ultra-low-yield products. But the comparative safety of a product so unattractive that no one will ever use it does not establish negligent design under New York law. Plaintiffs have offered no response to this argument.

3. This Argument Is Preserved For Appeal.

Finally, plaintiffs contend (PB 19-20) that defendants failed to preserve this argument because defense counsel "conceded" in the trial court that the "functionality" issue was a jury question and did not object when that issue was submitted to the jury. That is a specious claim and a mischaracterization of the record.

New York law, it is relevant to the jury's risk/utility analysis. See, *e.g.*, *Sawyer v. Dreis & Krump Mfg. Co.*, 67 N.Y.2d 328, 337 (1986); *Alvarez v. First Nat'l Supermarkets, Inc.*, 11 A.D.3d 572 (2d Dep't 2004). Defendants requested an instruction to this effect (A-11431-32), which the trial court improperly refused.

Counsel promptly objected to the trial court's decision to submit the case to the jury without requiring evidence of commercial acceptability. A-4198-99. Defendants argued *in the alternative* that *if* the court sent the case to the jury at all, the court was at least required to submit the issue of feasibility to the jury as a factual question. To that end, defendants proffered evidence regarding the unacceptability of ultra-light cigarettes to smokers (A-4640-48); objected to the exclusion of that evidence (A-4775); submitted a proposed jury instruction properly framing the issue for the jury (A-11415-16); and objected to the instructions as given (A-4923).

It is black-letter law that proposing a fallback position does not waive a previously-asserted argument. David D. Siegel, NEW YORK PRACTICE, § 214 (3d ed. 1999) ("Inconsistency is expressly permitted, either among claims or among defenses."). In any event, at the close of the plaintiffs' evidence, defendants moved for a directed verdict, and the trial court ruled that all arguments would be deferred until post-trial motions. A-2760. In those motions, this issue was extensively briefed (A-11696-709, 11713-23), and the trial court expressly ruled upon it (A-59-60; 107-109). The issue is fully preserved for this Court's review.

B. Plaintiffs Failed To Prove Causation.

Dismissal is required for a second, independent reason as well. Plaintiffs produced no evidence that the "extra" nicotine in the regular cigarettes they claim

should have been removed from the market constituted a "substantial factor" in causing Mrs. Rose's cancer.[4] See DB 27-30. Plaintiffs' response rests on *Liriano v. Hobart Corp.*, 170 F.3d 264 (2d Cir. 1999), in which the Second Circuit held that a New York plaintiff meets his prima facie causation burden by showing that "the kind of negligence that the jury attributed to the defendant tends to cause exactly the kind of injury that the plaintiff suffered." *Id.* at 271. Plaintiffs claim they met this burden: "[A]ddictive levels of nicotine in defendants' cigarettes 'significantly increased the chances' of Norma Rose contracting the 'injury' of lung cancer *** ." PB 38.

That response is wholly inadequate. Plaintiffs provided *no* competent evidence that would have allowed the jury to conclude that smoking regular cigarettes, *rather than ultra-light products*, "significantly increased the chances" that Mrs. Rose would be injured. See DB 27-28. In other words, plaintiffs did not show – indeed, they did not even try to show – that, if Mrs. Rose had used the proffered alternative design, she would not have been injured. Plaintiffs' own witness stated that low-yield cigarettes are unsafe; Dr. Wigand, on whose testimony plaintiffs now rely, even suggested during trial that "light cigarettes"

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[4] Plaintiffs have apparently abandoned the claim they advanced below: that high tar levels in the defendants' cigarettes constitute an actionable defect. On appeal, plaintiffs assert that the "single theory of liability" was that it was negligent to design and market "cigarettes containing addictive levels of nicotine." PB 1.

"created *more* risk" for smokers. A-2023 (emphasis added). Whether and to what extent low-yield cigarettes are more or less "dangerous" than regular cigarettes is a contested matter of scientific inquiry. The jury was not permitted simply to assume, without guidance from expert witnesses, that smoking regular as opposed to low-yield cigarettes "increased" Mrs. Rose's chances of injury. See *Mieselman v. Crown Heights Hosp., Inc.*, 285 N.Y. 389, 396 (1941). And as we showed in our opening brief (DB 28), there was absolutely no expert testimony on this subject.

Thus, plaintiffs have not met the *Liriano* standard for establishing proximate cause. Instead, they rely on precisely the same evidence that courts across the country have determined to be insufficient to establish causation. Plaintiffs do not even attempt to distinguish *Whiteley v. Philip Morris Inc.*, 11 Cal. Rptr. 3d 807 (Cal. Ct. App. 2004), which addressed causation evidence identical to that submitted in this case (see DB 29) and found it inadequate to meet the plaintiff's burden under California law – which, like New York, requires the plaintiff to establish that the defendant's negligence was a "substantial factor" in causing the injury. *Id.* at 858. And plaintiffs' treatment of *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487 (D.N.J. 1988), is unavailing. In *Cipollone*, the plaintiffs provided much *more* specific evidence than plaintiffs presented here of the increased cancer risk that purportedly stemmed from smoking regular cigarettes, but the court found that it was *still* insufficient to demonstrate causation. Plaintiffs

contend that this is irrelevant because the case was decided under New Jersey law, but New Jersey (like New York and California) applies the "substantial factor" test. *Id*. at 1494 n.6 (citing *Hake v. Manchester Twp.*, 486 A.2d 836, 841 (N.J. 1985)).

II. DEFENDANTS ARE AT A MINIMUM ENTITLED TO A NEW TRIAL.

Even if plaintiffs' multiple failures of proof did not entitle defendants to dismissal, a new trial would be required for each of at least four independent reasons. First, the trial court erroneously excluded or struck all evidence of consumer preferences. Second, it refused to instruct the jury to balance the risks of regular cigarettes against their utility, instead telling the jury to consider only the risks in deciding whether defendants had been negligent. Third, the court excluded all evidence of consumer expectations and refused to instruct the jury to consider smokers' knowledge of the risks. And finally, the court erroneously barred defendants' assumption of risk defenses as a matter of law.

A. It Was Error To Strike Evidence Of Consumer Preferences.

The trial court's erroneous belief that consumer "utility" is irrelevant in a negligent-design case extended to its evidentiary rulings: it struck or excluded all of defendants' evidence relating to consumer preferences for regular cigarettes. DB 15-17, 31-33. Plaintiffs dismiss the challenge to this action as "nothing more than a rehash" of the argument we raised in support of dismissal. PB 41. But the

trial court made two independent errors in its treatment of the consumer-preference evidence. First, it failed to require plaintiffs to meet their affirmative burden of demonstrating the feasibility of their design by showing that their proposed alternative was commercially acceptable. See pp. 2-5, *supra*. And second, the court erroneously excluded evidence *offered by defendants* that consumers refuse to purchase the alternative product. This second error is wholly separate from the first. At the very least, the defendant has a right to introduce evidence that it was not negligent in selling its product. See, *e.g.*, *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102, 108 (1983). The court's exclusion of that evidence deprived defendants of the opportunity to explain why their choice not to sell exclusively a product that no one wanted was reasonable. Plaintiffs offer no meaningful response.

B. It Was Error Not To Instruct The Jury To Balance Risk Against Utility.

The trial court's erroneous view that consumer utility is irrelevant fundamentally prejudiced the jury charge as well. New York law requires the jury in a negligent design case to balance the risks associated with the defendant's product against its benefits in order to assess whether the product is unreasonably dangerous. The trial court told the jury in this case that it was to decide negligence by evaluating *only the risks* of regular cigarettes. It charged the five "risk" factors, but refused to charge the two "utility" factors. A-5266, 11416-17. In other words,

the court focused the jurors on the five factors that favored liability, without telling them about the two that cut in favor of defendants. This was tantamount to a directed verdict. Plaintiffs' two arguments in support of the court's unbalanced charge are meritless.

First, plaintiffs argue that a trial court is not required to list the *Voss* factors "verbatim" to the jury; it has only to instruct the jury about factors that are "pertinent *** in the individual case." PB 43 (citing *Voss*, 59 N.Y.2d at 109). But whether the court must charge every factor in every case is beside the point. The utility factors were required in *this* case, because they *were* relevant. The question for the jury was whether smokers derive any pleasure from smoking regular cigarettes that they do not get from ultra-light products, and if so, whether those benefits sufficiently outweigh the potential harms.

Plaintiffs claim that utility was irrelevant because "defendants put in no evidence of the social utility of their cigarettes and, of course, there is none." PB 43. But defendants *tried* to introduce evidence of the utility of regular cigarettes. That evidence was erroneously excluded by the court (DB 31-34; pp. 11-12, *supra*; A-4198, 4281-82, 4257, 4278-80, 4989), and the jurors were expressly instructed to disregard it. Indeed, the court expressly told the jury *not* to consider whether smokers preferred cigarettes with nicotine to those without nicotine. A-4198 (telling jurors to disregard any testimony regarding consumers' decision to

purchase "cigarettes on the basis of taste, that is consumers liking cigarettes or not, thinking one are [sic] better than others"). In a case involving a claim for negligent design – where the jury needed to decide the critical question whether it was reasonable for defendants to market cigarettes with nicotine – that instruction was highly prejudicial; the jury was *affirmatively prevented* from considering the utility of the critical design feature.[5]

Plaintiffs next contend that the utility factors "would have weighed heavily against defendants in the jury's deliberations." PB 44. Yet the undisputed fact that many people choose to smoke in the face of Congressional warnings and with full knowledge of the risks, including addiction, demonstrates that regular cigarettes have utility to smokers. Mrs. Rose herself testified that smoking relaxed her and relieved her tension. A-2620-21. Indeed, even the trial court conceded that the testimony later excluded as irrelevant demonstrated that "what cigarettes do is they give people pleasure, relaxation, all these things." A-4168. Plaintiffs cannot possibly assert that if cigarettes were completely risk-free, no one would choose to buy them. This fact alone demonstrates that they have *some* utility that must be

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[5] Plaintiffs are also wrong when they assert (at PB 45 n.8) that the trial court allowed "substantial evidence" of utility to be admitted and to remain in the case. Plaintiffs cite the testimony of Drs. Blackie and Cassadonte describing the effects of nicotine on taste and the sensation of smoking, and explaining that these effects were among the "reasons people smoke." A-3919. This is *exactly* the testimony that jurors were *explicitly instructed to disregard*.

considered in the risk/benefit balance. In the end, when plaintiffs claim that cigarettes have no "utility," they are really saying that the risks outweigh the utility. That is not plaintiffs' call to make. It was the *jury's* job to weigh the utility of cigarettes against the risks.

New York law has been clear on this point for decades: No matter how the trial court words its charge, it must instruct jurors to weigh risk against utility.[6] Flouting this mandate, the trial court in this case chose to recite – verbatim, in fact – the five *Voss* factors that deal with risk, and to omit any instruction whatsoever that would even hint that the jury is supposed to weigh those factors against the challenged products' utility. This was error.

Second, plaintiffs argue that it was unnecessary to instruct the jury to balance risk against utility because the court somehow implied that jurors should do so by telling them that the plaintiffs' proposed alternative had to have the "functionality" of the original. PB 45-46. But a properly instructed jury is told to conduct two separate inquiries: (i) whether the risks of the original product outweigh that product's utility; and (ii) whether there is a feasible and less

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[6] See, *e.g.*, *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 239 (1998) ("The existence of a design defect involves a risk/utility analysis that requires an assessment of whether 'if the design defect were known at the time of the manufacture, a reasonable person would conclude that *the utility of the product did not outweigh the risk* inherent in marketing a product designed in that manner.'" (emphasis added)); *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 257 (1995).

dangerous alternative design. See DB 20-21 (citing cases). The fact that the court (properly) told the jury to consider functionality when conducting the second inquiry cannot save the court's blatantly lopsided charge on the first.

C. It Was Error To Exclude Evidence Of Consumer Expectations And To Refuse To Charge The Jury To Consider Such Evidence.

For a third and separate reason, defendants are entitled to a new trial: despite the clear New York rule that the jury in a negligent design case must consider whether the product "'is in a condition *not reasonably contemplated by the ultimate consumer* and is unreasonably dangerous for its intended use,'" *Scarangella v. Thomas Built Buses, Inc.*, 93 N.Y.2d 655, 659 (1999) (emphasis added) (quoting *Voss*, 59 N.Y.2d at 107), the trial court excluded all evidence concerning both the public's knowledge of the risks of smoking and Mrs. Rose's personal knowledge of those risks. It then compounded this error by refusing to instruct the jury that consumer expectations were even relevant to plaintiffs' claims. See DB 35-40.

1. Defendants' Consumer-Awareness Evidence Was Relevant and Admissible.

On the evidentiary issue, plaintiffs contend only that "the Court could rationally conclude" that the prejudicial effect of this evidence outweighed its probative value. PB 50-51. But the court did not exclude evidence of consumer awareness on the ground that it was more prejudicial than probative; it excluded it

on *relevance* grounds. See DB 36-38. Had the court believed, as plaintiffs now assert it did, that the evidence *was* relevant but that it was more prejudicial than probative, the court should have put the result of such a balancing on the record to afford the parties an opportunity to dispute its conclusion. See 1 John H. Wigmore, EVIDENCE § 10a, at 685 n.19 (Tillers rev. 1983). The court never did so.

In any case, the evidence was clearly more probative than prejudicial. Plaintiffs' claim is that defendants were negligent because nicotine should have been removed from all cigarettes, rather than simply being removed from some. But as the Court of Appeals held in *Scarangella*, a manufacturer is not negligent for selling a product that lacks an available safety feature if the defendant can show (i) that the buyer was "thoroughly knowledgeable regarding the product"; (ii) that there are "normal circumstances of use in which the product is not unreasonably dangerous"; and (iii) that the buyer is in a position "to balance the benefits and the risks of not having the safety device." *Scarangella*, 93 N.Y.2d at 661 (see also DB 39 and cases cited). Even if the plaintiffs established a prima facie case of negligence, the defendants were still entitled to argue to the jury that these factors were satisfied, and the jury was entitled to decide these issues of fact upon a full record.

Plaintiffs argue (PB 23-25) that the defendants could not possibly have satisfied these elements, but any "impossibility" stemmed solely from the court's

erroneous evidentiary rulings. As to Mrs. Rose's understanding of the risks of regular cigarettes and her ability to balance them against the benefits (the first and third elements): the trial court refused to allow defendants to introduce any evidence on these points; indeed, it refused to accept the defendants' offer of proof at all.[7] And with regard to whether there exist "normal circumstances of use in which [regular] cigarettes are not unreasonably dangerous" (PB 25), the lesson of *Scarangella* – as well as the long line of New York cases holding that is that not negligent simply to sell dangerous products – is that *consumer choice* is a critical component of the *reasonableness* of a product's risks. Defendants sought to proffer sufficient evidence from which the jury could have concluded that given consumers' antipathy toward ultra-light cigarettes, the extra risks associated with smoking regular cigarettes were reasonable. At a minimum, defendants proffered enough evidence to get to the jury.

2. The Jury Instructions Were Defective.

The court's refusal to instruct the jury regarding consumers' awareness of the risks of smoking ran directly counter to New York law. DB 35-40. Plaintiffs present two arguments in support of the court's charge. First, they contend that

[7] A-3952-53 ("Defendant is making an offer of proof *** on the consumer's knowledge. The Court has made a legal determination that under negligent design [such evidence is irrelevant]. Having ruled that, I will not take an offer of proof of any documents.").

such a charge is unimportant, because "consumer awareness of danger is merely a factor to be considered in the risk-utility balancing process." PB 48 (citing *Miele v. Am. Tobacco Co*., 2 A.D.3d 799 (2d Dep't 2003)). That very concession dooms their argument: because consumer awareness *is* a factor, the jury must be instructed about it. A relevant factor is not rendered irrelevant simply because it is one of several things to be considered. Beyond that, plaintiffs are wrong about the importance of consumer-awareness evidence. As discussed above, a defectively designed product is by definition one that "is in a condition not reasonably contemplated by the ultimate consumer." *Voss*, 59 N.Y.2d at 107. The very case on which plaintiffs rely, *Miele*, specifically recognizes the centrality of such evidence, holding that consumer awareness "'may substantially influence or even be ultimately determinative on risk-utility balancing.'" 2 A.D.3d at 804.

Second, plaintiffs argue that the court *did* in fact charge the jury to consider consumer awareness: it instructed the jurors to consider what *defendants* "could reasonably expect that the consumer would know about the dangers of cigarette smoking." PB 49-50. That, however, is not enough. As we have explained (DB 36-37), the manufacturer's conduct is not the sole focus of the jury's inquiry in a negligent design case. Regardless of what the manufacturer believed about consumers' knowledge, the jury is required to consider what the public *actually* believed about the dangers of smoking, as well as what the plaintiff herself knew

or should have known. See *Voss*, 59 N.Y.2d at 109 ("the degree of awareness of the potential danger of the product which reasonably can be attributed to the plaintiff" is a factor for the jury to consider). If consumers are aware of a product's risk and choose to buy it anyway, that circumstance demonstrates that the product – as it is sold – has "utility" that might outweigh the risks. The trial court's ruling precluded this critical argument.

D. The Jury Should Have Been Permitted To Consider Assumption Of The Risk.

1. Plaintiffs Ask The Court To Dismiss Express Assumption Of The Risk By Improperly Deciding Issues Of Fact.

Plaintiffs defend the trial court's legal decision to bar the defense of express assumption of the risk by arguing, in effect, that no jury could have found the defense to be satisfied. They contend, for instance, that package warnings were too "generic" to notify Mrs. Rose of the dangers associated with smoking. PB 52. First of all, given that Congress specifically found the warnings to be adequate and intentionally barred claims that they are insufficient to put smokers on notice of the risks (DB 40), plaintiffs' assertion that the labels were "too generic" is simply untenable. And even assuming it is open to plaintiffs to advance this contention, the question for this Court is not whether the warnings established the defense as a matter of law, but whether the defendants should have been *allowed* to argue express assumption of the risk to the jury *at all*. It is the jury's role to determine

whether package warnings were adequate, whether they were "generic" or specific, and whether Mrs. Rose was so "addicted" that she couldn't possibly have made a voluntary choice to continue smoking after being warned. The trial court was not entitled to decide these factual issues for the jury, and neither are plaintiffs.

2. Primary Assumption Of The Risk Is Not Limited To Sporting Events.

Plaintiffs offer no principled reason why a defendant in a negligent product design case may not defend itself by arguing that the plaintiff's injuries were caused by obvious risks inherent in the activities she undertook. Citing *Morgan v. New York,* 90 N.Y.2d 471 (1997), plaintiffs claim (PB 54) that the "policy" underlying the doctrine is to encourage "free and vigorous participation" in athletic events. The *Morgan* case did happen to involve plaintiffs who had injured themselves while participating in sports, and in affirming summary judgment against those plaintiffs, the court noted that application of primary assumption of the risk in such cases encouraged participation in sports. But nothing in *Morgan* *limits* assumption of the risk to cases involving sports; indeed, its language is broad and general. And, as we showed in our opening brief (DB 42), the doctrine has been applied throughout the State in cases involving plaintiffs injured through participation in a wide range of dangerous activities. The touchstone of the analysis, as plaintiffs recognize (PB 54), is whether a plaintiff's injury was caused by "obvious risks inherent in the activity."

Plaintiffs also argue that the assumption-of-the-risk defense "is in direct conflict with the social policies underlying products liability law." PB 56. To support this proposition, they rely on *Lamey v. Foley*, 188 A.D.2d 157 (4th Dep't 1993), in which the Fourth Department held that it was improper for a *strict liability* defendant to assert assumption of the risk as a defense to liability. But the fact that the Fourth Department believes that assumption of the risk was inappropriate in that particular strict liability action does not mean that the defense should be barred in *negligence* cases – and there is no reason why it should. See *Anderson v. Hedstrom Corp.*, 76 F. Supp. 2d 422, 433 n.10 (S.D.N.Y. 1999) (holding that *Lamey* applies only to strict liability claims and not negligent design claims).[8]

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[8] Plaintiffs' assertion (PB 55) that "the New York courts have rejected the defense" in cases involving negligent product design is simply wrong. The cases they cite (*Repka v. Arctic Cat, Inc*., 20 A.D.3d 916 (4th Dep't 2005) and *McKeon v. Sears Roebuck & Co*., 242 A.D.2d 503 (1st Dep't 1997)) do not categorically reject assumption of the risk as a defense in product liability suits. The *Repka* court merely concluded that the product defects alleged to have caused injury *in that case* were not "inherent" qualities of the defendant's product. *Repka*, 20 A.D.3d at 919-20 ("Under *the specific circumstances of this case*, we conclude, as a matter of law, that the risk that plaintiff might be injured *** was not inherent in the sporting activity of snowmobiling, nor was it a risk known to plaintiff or understood by him ***.") (emphasis added). The one-paragraph opinion in *McKeon* gives no analysis of this point whatsoever. *McKeon*, 242 A.D.2d at 504.

III. DISMISSAL IS REQUIRED BECAUSE PLAINTIFFS' NEGLIGENT DESIGN CLAIM, AS IT WAS SENT TO THE JURY, IS PREEMPTED BY FEDERAL LAW.

The verdict in this case – which imposed compensatory and punitive damages on defendants for offering consumers a choice among cigarettes with varying levels of nicotine – effectively amounts to a finding of negligence per se from the act of selling cigarettes in New York. Plaintiffs concede that the verdict in this case was premised "on a single theory of liability: that defendants negligently designed and marketed cigarettes containing addictive levels of nicotine." PB 1. And the undisputed trial evidence showed that "[a]ll tobacco products contain substantial amounts of nicotine." DB 48 and sources cited. Indeed, over 90% of cigarettes sold in this State would be effectively banned by the trial court's ruling. We showed in our opening brief (at 44-46) that such consequences are preempted by Congress's clear "intent that tobacco products remain on the market." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 139 (2000). Plaintiffs' responses to this argument are meritless.

A. This Verdict Represents An Effective Ban On Cigarette Sales.

Plaintiffs do not deny that Congress intended to allow the continued sale of cigarettes in this country. Nor do they deny that a complete ban on regular cigarettes by New York would conflict with Congress's intent and would therefore be preempted. Rather, plaintiffs claim that the *FDA* Court was concerned only

about a "direct, regulatory, presumed total ban on cigarettes" (PB 67) and that "the incidental regulatory effect of a tort damage award" for selling cigarettes does not amount to a ban because "a cigarette manufacturer has the option to pay damages to successful plaintiff victims of cigarette smoking as a cost of doing business, and to pass the additional costs onto consumers in [the] market." *Id.* at 68.

This precise argument has been expressly rejected by the United States Supreme Court. The Court has ruled that there is no difference, for preemption purposes, between a state regulation prohibiting the defendant's activities and a state tort rule that deems those activities actionably negligent. That is because, for preemption purposes, courts ordinarily assume that the defendants will comply with obligations imposed by the state's tort law. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 882 (2000) (noting that "this Court's pre-emption cases ordinarily *assume* compliance with the state-law duty in question" and that tort liability for failing to install airbags is tantamount to a state law creating a duty to install airbags) (emphasis in original); see also *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) ("'State regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'") (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)).

B. Congress's Long History Of Comprehensive Regulation Demonstrates An Intent To Foreclose A Cigarette Ban.

In our opening brief (DB 44-47), we argued that the long history of active federal regulation of tobacco products precludes the imposition of tort liability that would effectively ban cigarettes. Congress has evinced a steady, consistent desire since the 1960s to allow sales of cigarettes in this country. In addition, Congress has made a conscious choice to allow manufacturers to produce cigarettes with a range of tar and nicotine levels, subject to oversight by the FTC and the manufacturers' agreement to disclose the tar and nicotine content of their products. When federal agencies other than the FTC have attempted to regulate tar and nicotine yields, or to ban high-yield products, Congress has stepped in and stopped them from doing so, saying explicitly that "further regulation in this sensitive and complex area must be reserved for specific Congressional action." S. Rep. 94-251 at 43 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 993, 1012 (quoted at DB 47).

Plaintiffs mischaracterize our argument when they suggest (PB 59) that we assert preemption based *entirely* on a single sentence in the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq*. Congress's statement of purpose in the Cigarette Labeling Act is an important indicator of its intent, but it is not the only one. Nevertheless, relying on *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988), plaintiffs 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 cigarette sales. PB 60. 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 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 program to accomplish its goals of allowing cigarette sales while assuring that adequate safety/risk information is provided to consumers. Thus, *Isla Petroleum* does not allow plaintiffs to dismiss as irrelevant the fact that "Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products *** and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area." *FDA*, 529 U.S. at 159-60. Moreover, 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) ("In view of its prolonged and acute awareness of so important an issue, Congress' failure to act on the bills proposed on this subject provides added support for concluding that Congress acquiesced ***.").

C. *Cipollone* Is Not On Point.

Finally, plaintiffs argue that *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) "is controlling and mandates rejection of defendants' implied goal conflict pre-emption argument." PB 61. Plaintiffs draw this conclusion from the mistaken assertion that the *Cipollone* Court rejected an argument regarding the preemptive effect of the Cigarette Labeling Act on state claims for negligent design.

Plaintiffs' reliance on *Cipollone* is misplaced for two reasons: First, as discussed above, our argument to this Court does not rely merely on the existence of the Labeling Act, but on a range of conduct reflecting federal policy on the point. More importantly, plaintiffs 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, 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. DB 47-50.

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). *Cipollone* did not address the situation 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.[9]

Indeed, *no court* has *ever* upheld a verdict based on the single theory of liability at issue here – that cigarettes are defective because they deliver more than trace amounts of nicotine. And, as noted in our opening brief (DB 48-50), *many* courts have recognized that a defective design claim is preempted in exactly the circumstances presented by this case. Plaintiffs "disagree" with these decisions and attempt to distinguish them on the grounds that "they proceed under the assumption that the design defects claimed were inherent in all cigarettes, thus effecting a total ban." PB 68 n.12. That argument does not distinguish the cases at all. If the verdict in this case is affirmed, it will be tantamount to a total ban on the sale of regular cigarettes in New York, based simply on qualities inherent in all

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[9] For this reason, plaintiffs' quotation from the respondents' brief in *Cipollone* is irrelevant and misleading. Petitioners were discussing the preemptive force of the Labeling Act's comprehensive regulation of *warnings* and *advertisements*, and contending that such regulation would not bar a state tort suit claiming negligent design. That has nothing to do with the question here under discussion – whether Congress's comprehensive regulatory scheme and consistent decisions to allow the continued sale of cigarettes would preempt a state tort action that resulted in an effective cigarette ban. The same goes for plaintiffs' nod to *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), which held that the FCLAA did not preempt certain Massachusetts regulations governing cigarette *advertising*. The case had nothing to do with a state's attempt to render the sale of cigarettes negligent per se.

tobacco products. This case is the same, in all relevant respects, as those cited in our opening brief. This Court should not depart from the well reasoned conclusions in those cases holding identical claims to be preempted.

IV. THE PUNITIVE AWARD CANNOT STAND.

A. Philip Morris Is Entitled To Judgment As A Matter Of Law.

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

As expected, plaintiffs are unable to cite even a single decision imposing punitive damages on a negligent design claim.[10] Moreover, they fail to give any convincing reasons for making this case the first to do so. Rather, plaintiffs rely on only three categories of evidence to support their claim that the conduct at issue here was willful and wanton: (i) evidence that Philip Morris knew cigarettes were inherently dangerous (PB 72); (ii) evidence that Philip Morris knew nicotine was addictive (PB 73); and (iii) evidence that Philip Morris purposefully marketed cigarettes with more than minimal nicotine levels despite knowing (i) and (ii) (PB 73-76).

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[10] Plaintiffs cite only one case, *Home Insurance Co. v. American Home Products Corp.*, 75 N.Y.2d 196, 204 (1990), for their assertion that punitive damages *might* be available "in product liability cases involving elements of negligence" (PB 78), and that decision is inapposite. In *Home Insurance*, the Court of Appeals held that "punitive damages could be recovered in New York *in a failure to warn case*," and hastened to add that "*we do not suggest* that punitive damage are necessarily appropriate in all types of products liability litigation." 75 N.Y.2d at 204 (emphasis added).

But plaintiffs simply ignore the uncontroverted evidence demonstrating that, in context, Philip Morris' conduct could not rationally be characterized as willful and wanton. That evidence showed (see DB 52) that (i) Congress, the FTC, and public health authorities monitored and actively regulated the products sold by Philip Morris, and chose not to prohibit the sale of regular cigarettes; (ii) Philip Morris complied with all laws and FTC directives and policies requiring the disclosure of the tar and nicotine content of its cigarettes; (iii) Philip Morris had no notice that its conduct in selling regular cigarettes was unlawful; (iv) Philip Morris spent hundreds of millions of dollars developing and marketing low-yield and de-nicotinized cigarettes; and (v) consumers rejected those products. Given this context, Philip Morris's failure to limit its products to those plaintiffs consider a safer alternative design, even if a basis for compensatory liability, cannot be deemed punishable.[11]

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[11] The trial court justified the imposition of punitive damages against Philip Morris by relying on supposed misconduct that was never alleged and that was entirely irrelevant to the conduct that harmed Mrs. Rose. See DB 55-56. Plaintiffs do not defend the trial court's reasoning, characterizing it as "harmless error." PB 80-81. However, the fact that the trial judge was compelled to rely on facts not in evidence to justify the punitive award evidences the overall weakness in the case for punitive damages.

2. Philip Morris Was Not On Notice That Its Conduct Could Result In Punishment.

Plaintiffs argue that Philip Morris did have notice that its conduct was punishable because "there is nothing 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." PB 78. This 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 specific conduct at issue in this case – i.e.*, producing a range of cigarette products. See, *e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996); cf. *People v. Stuart*, 100 N.Y.2d 412, 420 (2003) (stating the "classical notice doctrine" that "no person [should be] punished for conduct not reasonably understood to be prohibited"). As we showed in our opening brief (DB 54), the imposition of liability, much less punishment, for the simple act of selling regular cigarettes is totally novel.[12]

B. Philip Morris Is Entitled To A New Trial On Punitive Damages.

1. The Trial Court Should Have Instructed The Jury On The Clear And Convincing Evidence Standard.

Plaintiffs acknowledge that this Court's holdings in *Camillo v. Geer*, 185 A.D.2d 192 (1st Dep't 1992), *Sladick v. Hudson General Corp.*, 226 A.D.2d 263

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[12] Several decisions have recognized that imposition of punitive damages is inappropriate where a plaintiff's claim is novel, even where, as here, that claim is based on generally-applicable principles of tort law. See DB 54 n.15 (citing cases). Plaintiffs can cite no case suggesting the contrary.

(1st Dep't 1996), and *Munoz v. Puretz*, 301 A.D.2d 382 (1st Dep't 2003) require liability for punitive damages to be established by clear and convincing evidence.[13] However, plaintiffs invite the Court "to reexamine *Camillo* and its progeny," arguing that the preponderance of the evidence standard is mandated by the Court of Appeals' decision in *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58 (1920). PB 82. They ask this Court to follow *Corrigan* instead of *Cleghorn v. New York C & H River R.R.*, 56 N.Y. 44, 48 (1874), which formed the basis for this Court's prior decisions, on the ground that *Cleghorn* is older than *Corrigan*. But as noted in our opening brief (at 58 n.17), *Camillo*, *Sladick*, and *Munoz* all post-date both *Cleghorn* and *Corrigan* by decades and are, therefore, controlling in this Department.[14]

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[13] Plaintiffs do not defend the trial court's strained reading of these cases as "carving out a special exception" for cases involving the imposition of punishment on the basis of *respondeat superior*.

[14] Citing *People v. Brown*, 235 A.D.2d 344, 344 (1st Dep't 1997), and *People v. Hobson*, 39 N.Y.2d 479 (1976), Plaintiffs argue (at 83-85) that the principles of *stare decisis* need not be followed in this case. However, *Brown* stands only for the uncontroversial proposition that where decisions of a *federal* appellate court and the New York Court of Appeal conflict, the Court of Appeal decision controls. 235 A.D.2d at 344. *Hobson* simply recognizes that recent decisions do not necessarily "merit application of a mechanical formula of adherence" where "a prior doctrine [is] more embracing in its scope, intrinsically sounder, and verified by experience." 39 N.Y.2d at 487 (internal quotation marks omitted). Neither of these decisions counsels in favor of this Court abandoning *its own* well-reasoned precedent based on nothing more than an 85-year-old Court of Appeals decision that conflicts with earlier holdings from that same court.

Plaintiffs do not contend that the holding in *Camillo* is based on unsound policy or legal principles. Nor could they. In *Camillo*, this Court recognized the quasi-criminal nature of punitive damages, holding that "New York law provides for punitive damages only for exceptional misconduct which transgresses mere negligence" and that such misconduct "must be close to criminality." 185 A.D.2d at 193-94 (internal quotation marks omitted). Thus, this Court's adoption of the clear and convincing evidence standard merely anticipated the U.S. Supreme Court's holding 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." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003).

This Court is hardly alone in this regard; rather, it is in the majority. The Second Department follows this Court in applying the clear and convincing evidence standard. See *Orange & Rockland Utils., Inc. v. Muggs Pub, Inc.*, 292 A.D.2d 580, 581 (2d Dep't 2002). Nor is the *Camillo* rule outdated; to the contrary, it reflects a strong national trend under which the courts in many states have recognized that "although punitive damages serve an important function in our legal system," a higher standard of proof is warranted because "they can be

onerous when loosely assessed." *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985).[15] This Court should not abandon its precedent on this issue.

2. The Court's Exclusion Of Consumer-Acceptability Evidence Was Reversible Error.

Plaintiffs make a weak attempt to defend the trial court's decision to exclude evidence from the punitive phases relating to consumer acceptability of ultra-light cigarettes. They argue (PB 87) that such evidence was irrelevant because it related only to the tar yield of cigarettes, while the punitive phases concerned only nicotine. This argument, however, simply repeats the trial court's erroneous conclusion that that consumer-acceptability evidence "has to do with taste and taste

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[15] Seven other states and the District of Columbia have adopted the standard by judicial decision. 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*, 494 A.2d at 1363; *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). Another 24 states have done so by statute. 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. § 78–18–1(1)(a).

is about tar." A-5751. Dr. Blackie confirmed that nicotine does play a role in the taste of cigarettes. A-5758. Thus, for example, Dr. Whidby's excluded testimony that "all [Philip Morris's] work on reducing tar and nicotine in the cigarette would be worthless" if Philip Morris did not "have a good-tasting cigarette that people would actually buy and use" (A-2831) clearly bore on whether the continued sale of regular cigarettes was a willful and wanton action. The proffered testimony from Dr. Blackie that consumers rejected low-yield cigarettes because they were "lacking in taste" (A-4028) was relevant for the same reasons.

Plaintiffs also contend (PB 87-88) that Philip Morris was not prejudiced by the trial court's exclusion of this evidence because the court admitted some evidence indicating that nicotine has effects desired by the consumer and that de-nicotinized tobacco has not been accepted by consumers. The admission of bits and pieces of evidence does not render the trial court's evidentiary error harmless, because it is no substitute for the opportunity to put on a clear, organized defense. See *People v. Douglas*, 29 A.D.3d 47, 52 (1st Dep't 2006) (ordering new trial on grounds that "court's evidentiary rulings seriously impaired defendant's constitutional right to present a complete justification defense, and the error was not harmless"). In addition to the evidence described above, the jury was precluded from considering that Dr. Wynder, a leading public health official, recommended that cigarette manufacturers "develop[] 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-5445-46) (emphasis added). The excluded evidence would also have demonstrated that plaintiffs' proposed alternative design did not satisfy the criteria set forth by the public-health authorities. Philip Morris should not be punished without being afforded a full opportunity to defend itself to the jury.

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

Plaintiffs attempt to defend their heavy reliance on sales data and national market share during Phase II of the trial by arguing that the evidence "went directly to the magnitude of Philip Morris's misconduct." PB 89. But plaintiffs' counsel's vague references to "big business" and "billions and billions of cigarettes" (A-5830) were not intended to quantify the "magnitude" of Philip Morris's conduct. Rather, these thinly veiled references to Philip Morris's wealth were used to inflame the jury's passions and improperly invited the jury to punish Philip Morris simply because of its size. See *Rupert v. Sellers*, 48 A.D.2d 265, 272 (4th Dep't 1975).

Equally important, plaintiffs do not deny that their evidence and argument regarding Philip Morris's wealth during Phase III was purposefully designed to encourage the jury to increase the size of the punitive award. In fact, plaintiffs assert as "self-evident" the principle that the amount of punitive damages against a

wealthy defendant must be increased so that such damages cannot "easily be passed on to customers as a cost of doing business." PB 90. Far from being "self-evident," this argument, as applied to corporations accused of economically motivated wrongdoing, has been rejected by courts and scholars alike. See *Zazú Designs v. L'Oréal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) ("Corporate assets finance ongoing operations and are unrelated to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law.").[16]

Plaintiffs' argument (at PB 91) also misinterprets recent Supreme Court decisions. The Supreme Court has never endorsed the use of wealth to enhance a punitive award, even if the resulting award falls within a constitutionally acceptable ratio. To the contrary, the Court has repeatedly warned against the prejudicial effects that wealth evidence can have in a fair determination of punitive damages. See DB 64.

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[16] See also, *e.g.*, Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of the Defendant's Wealth*, 18 J. LEGAL STUD. 415, 417 (1989) ("The defendant's wealth or lack of it is thus irrelevant to the deterrence of socially undesirable conduct ***."); *accord*, 2 A.L.I., REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 254-55 (1991); Bruce Chapman & Michael J. Trebilcock, *Punitive Damages: Deterrence in Search of a Rationale*, 40 ALA. L. REV. 741, 824-26 (1989); Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1176-77 (1989); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 910-14 (1998).

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

Plaintiffs argue (PB 92) that the $17.1 million punitive award in this case, which represents a 10:1 ratio of punitive to compensatory damages, "comfortably falls within constitutional guidelines." Their analysis of the *BMW* guideposts, however, is deeply flawed.

1. Philip Morris's Conduct Was Not Highly Reprehensible.

Plaintiffs' argument in favor of upholding the jury's award rests almost entirely on the supposed reprehensibility of Philip Morris's conduct. However, as they did in discussing punitive liability, plaintiffs simply ignore the vast evidence demonstrating that Philip Morris's conduct was not reprehensible. The circumstances outlined above (at IV.A.1, *supra*) and in our opening brief (at 52-53, 66-67) make it entirely unjust to impose a substantial punitive award in this case. This Court has the constitutional obligation to undertake a *de novo* review of the record, viewing the evidence without any presumption in favor of the verdict. See DB 65-66. Viewed in its totality, the record demonstrates that it cannot be considered highly reprehensible for Philip Morris to have continued to sell regular cigarettes, while complying with federal labeling laws, especially where Congress and the public health community never suggested it do otherwise. See DB 66-67; pp. 25-26, *supra*.

2. A 10:1 Ratio Is Grossly Excessive Here.

Plaintiffs acknowledge (PB 95) that in *State Farm*, the Supreme Court held 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. Our opening brief argued (DB 68-70) that a ratio of 1:1 is the maximum allowable punishment in this case because the compensatory damages were undeniably substantial and there were no factors that would justify a higher punitive award.

Plaintiffs respond by arguing that the $1.7 million compensatory award in this case should not be considered "substantial" because Mrs. Rose suffered physical injuries. Plaintiffs' argument that the substantiality of a compensatory award should be assessed by reference to the nature of the plaintiff's injury finds no support in the law. The Supreme Court held that a lower ratio is appropriate in cases where a large compensatory award is imposed, because compensatory damages themselves serve a deterrent function. The greater the compensatory award, the less the need for the additional deterrence that punitive damages provide. See *State Farm*, 538 U.S. at 419. Thus, as the cases cited in our opening brief (at DB 69 n.21) demonstrate, the lower courts have held that the need for *additional* deterrence in the form of punitive damages is limited where the compensatory award constitutes "a lot of money" in absolute terms. *Williams v.*

ConAgra Poultry Co., 378 F.3d 790, 799 (8th Cir. 2004). And plaintiffs do not contend, because they cannot, that the $1.7 million compensatory award understates the injury that Philip Morris allegedly caused Mrs. Rose.

Indeed, even in cases in which the plaintiff suffered physical injury, the principles set forth in *State Farm* have led courts to conclude that a 1:1 ratio is the constitutional maximum where the compensatory award was large. As the Eighth Circuit concluded in a tobacco case similar to this one, a 1:1 ratio is the maximum that "would comport with the requirements of due process" where, as here, "[f]actors that justify a higher ratio, such as the presence of an 'injury that is hard to detect' or a 'particularly egregious act [that] has resulted in only a small amount of economic damages,' are absent." *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005) (quoting *BMW*, 517 U.S. at 582).

3. The Comparable Fines Guidepost Confirms The Excessiveness Of The Award.

Plaintiffs would have this Court disregard the third guidepost, arguing that the "absence of [civil or criminal] sanctions will not prevent a court from awarding substantial punitive damages based on the facts of a particular case." PB 97. However, the Supreme Court has made clear that courts are to "accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue." *BMW*, 517 U.S. at 583. Because Congress has specifically considered, and rejected, legislation that would have made the conduct at issue in

this case illegal, the absence of any civil or criminal sanction represents a legislative decision not to impose *any* punishment for such conduct. That decision commands deference.[17]

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[17] Plaintiffs argue that the Oregon Supreme Court's decision in *Williams v. Philip Morris, Inc.*, 127 P.3d 1165, 1179 (Or. 2006), *cert. granted*, 126 S. Ct. 2329 (2006), supports a conclusion that Philip Morris's conduct in this case was comparable to manslaughter. That decision is currently under review in the U.S. Supreme Court. And even if the unique reasoning of the Oregon Supreme Court were supportable, *Williams* involved allegations of fraud and intentional misrepresentation that are not present in this case. Prior to this case, no court has ever suggested that Philip Morris's decision to market cigarettes with more than minimal quantities of nicotine could subject it to any punishment whatsoever.

CONCLUSION

For the foregoing reasons and those stated in defendants' opening brief, the Court should reverse.

Dated: New York, New York
November 13, 2006

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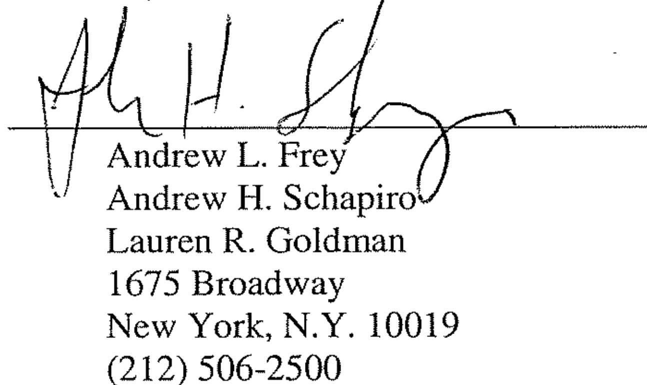

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I, Lauren R. Goldman, attorney for the defendant-appellant Philip Morris USA Inc., hereby certify that this brief is in compliance with § 600.10(d)(1)(v). The brief was prepared using Microsoft Word 2002. The typeface is Times New Roman. The main body of the brief is in 14 point. Footnotes and point headings are in compliance with § 600.10(d)(1)(i). The brief contains 10,298 words as counted by the Microsoft Word word-processing program.

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