

**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA
MAJOR TRIAL DIVISION T**

**FAYE THEIS, Personal Representative of the
Estate of EDWARD FREDERICK THEIS, JR.,**

Plaintiff,

vs.

Case No.: 2011-CA-001941-NC

**R.J. REYNOLDS TOBACCO COMPANY, et al.,
Defendants.**

**PHILIP MORRIS USA INC.'S ANSWER TO PLAINTIFF'S
SECOND AMENDED SEVERED COMPLAINT**

Defendant Philip Morris USA Inc. (hereinafter referred to as "Philip Morris USA") hereby answers Plaintiff's Second Amended Severed Complaint ("Complaint") as follows:

1. Paragraph 1 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA admits that the Florida Supreme Court has issued an opinion in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). Philip Morris USA states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 1 that Plaintiff and/or Plaintiff's decedent are or were members of the class decertified in *Engle* and, therefore, denies the same. Philip Morris USA denies that Plaintiff has stated a valid cause of action against Philip Morris USA or is entitled to the relief sought in the Complaint, or any relief whatsoever. Philip Morris USA denies the remaining allegations of Paragraph 1 and specifically refers to and incorporates herein its Third and Fourth Affirmative Defenses.

2. Philip Morris USA is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 2 and, therefore, denies the same.

3. Philip Morris USA is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 3 and, therefore, denies the same.

4. Philip Morris USA states that it is unable to respond to the allegations of Paragraph 4 in any meaningful manner because the phrase “all times relevant to this action” is not defined in Plaintiff’s Complaint. To the extent a response is required, Philip Morris USA admits that it is a Virginia corporation and that it is authorized to do and does business in the State of Florida, including Sarasota County. Philip Morris USA denies the remaining allegations of Paragraph 4.

5. The allegations of Paragraph 5 are not directed toward Philip Morris USA and, therefore, no response is required. To the extent a response is required, Philip Morris USA admits that Lorillard Tobacco Company was a Delaware corporation. Philip Morris USA is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 5 and, therefore, denies the same.

6. The allegations of Paragraph 6 are not directed toward Philip Morris USA, and, therefore, no response is required. To the extent a response is required, Philip Morris USA admits that Lorillard, Inc. was a Delaware corporation. Philip Morris USA is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 6 and, therefore, denies the same.

7. The allegations of Paragraph 7 are not directed toward Philip Morris USA, and, therefore, no response is required. To the extent a response is required, Philip Morris USA is informed and believes that R. J. Reynolds Tobacco Company is a North Carolina corporation. Philip Morris USA is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 7 and, therefore, denies the same.

8. Philip Morris USA states that pursuant to a Joint Notice and Stipulation for Dropping Defendants Liggett Group LLC and Vector Group Ltd. with Prejudice dated March 14, 2014, Liggett Group LLC was dismissed from this action. The allegations of Paragraph 8 are not directed toward Philip Morris USA, and, therefore, no response is required. To the extent a response is required, Philip Morris USA is informed and believes that Liggett Group LLC is a Delaware limited liability company and that Liggett is a citizen of the State of Florida for federal jurisdictional purposes. Philip Morris USA is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 8 and, therefore, denies the same.

9. Philip Morris USA states that pursuant to a Joint Notice and Stipulation for Dropping Defendants Liggett Group LLC and Vector Group Ltd. with Prejudice dated March 14, 2014, Vector Group Ltd. was dismissed from this action. The allegations of Paragraph 9 are not directed toward Philip Morris USA, and, therefore, no response is required. To the extent a response is required, Philip Morris USA is informed and believes that Vector Group Ltd. is a Delaware corporation. Philip Morris USA is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 9 and, therefore, denies the same.

10. Philip Morris USA states that it is unable to respond to the allegations of Paragraph 10 in any meaningful manner because the phrase “all times relevant to this action” is not defined in Plaintiff’s Complaint. To the extent a response is required, Philip Morris USA is informed and believes that, during its existence, the Council for Tobacco Research - U.S.A., Inc. (formerly known as the Tobacco Industry Research Committee and hereinafter referred to as “CTR”) funded independent research on the issue of smoking and health. Philip Morris USA is

further informed and believes that CTR was dissolved under the New York Not-for-Profit Corporation Laws on November 6, 1998, and has ceased operations. Philip Morris USA is informed and believes that, during its existence, the Tobacco Institute, Inc. (“Tobacco Institute”), like trade associations in other industries, engaged in activities protected by the First Amendment to the United States Constitution on behalf of certain of its sponsors. Philip Morris USA is also informed and believes that the Tobacco Institute was dissolved under the New York Not-For-Profit Corporation Laws on September 15, 2000, and has ceased operations. Philip Morris USA denies that the allegations of Paragraph 10 completely or accurately characterize the purpose and operation of CTR and the Tobacco Institute and denies Plaintiff’s innuendo and implication regarding the purpose and operation of CTR and the Tobacco Institute. Philip Morris USA denies the remaining allegations of Paragraph 10.

11. Philip Morris USA states that it is unable to respond to the allegations of Paragraph 11 in any meaningful manner because the phrase “all times relevant to this action” is not defined in Plaintiff’s Complaint. To the extent a response is required and to the extent the allegations of Paragraph 11 are directed toward Philip Morris USA, Philip Morris USA admits that it has manufactured cigarettes in the United States and that it has distributed its cigarettes to its direct customers for ultimate resale to consumers of legal age for purchasing cigarettes throughout the United States, including the State of Florida. Philip Morris USA further admits it was and is a defendant in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). To the extent the remaining allegations of Paragraph 11 are directed toward other Defendants, Philip Morris USA is without knowledge or information sufficient to form a belief as to the truth of those allegations and, therefore, denies the same. Philip Morris USA denies the remaining allegations of Paragraph 11.

12. Paragraph 12 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA admits that the Florida Supreme Court has issued an opinion in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). Philip Morris USA denies the remaining allegations of Paragraph 12 and specifically refers to and incorporates herein its Third and Fourth Affirmative Defenses.

13. Paragraph 13 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA admits that it has designed, manufactured, advertised, and marketed cigarettes in the United States and that it has distributed its cigarettes to its direct customers for ultimate resale to consumers of legal age for purchasing cigarettes throughout the United States, including the State of Florida. Philip Morris USA is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 13 regarding Plaintiff's decedent's alleged residency or purchase, brand, and smoking history and, therefore, denies the same. Philip Morris USA denies the remaining allegations of Paragraph 13.

14. Paragraph 14 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA admits that the Florida Supreme Court has issued an opinion in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). Philip Morris USA states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 14 that Plaintiff and/or Plaintiff's decedent are or were members of the class decertified in *Engle* and, therefore, denies the same. Philip Morris USA denies the remaining allegations of Paragraph 14 and specifically refers to and incorporates herein its Third and Fourth Affirmative Defenses.

15. Paragraph 15 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA admits that as of the date of the filing of the original complaint, less than one year had elapsed since the Florida Supreme Court issued its mandate. Philip Morris USA is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 15 and, therefore, denies the same.

16. Paragraph 16 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA admits that the Florida Supreme Court has issued an opinion in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). Philip Morris USA is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 16 as to Plaintiff's and/or Plaintiff's decedent's alleged class membership and, therefore, denies the same. Philip Morris USA denies the remaining allegations of Paragraph 16 and specifically refers to and incorporates herein its Third and Fourth Affirmative Defenses.

17. Pursuant to Plaintiff's reference in Paragraph 16 that Paragraphs 17 through 24 refer to the *Engle* findings, Philip Morris USA states that Paragraph 17 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA admits that the Florida Supreme Court has issued an opinion in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). Philip Morris USA denies the remaining allegations of Paragraph 17 and specifically refers to and incorporates herein its Third and Fourth Affirmative Defenses.

18. Pursuant to Plaintiff's reference in Paragraph 16 that Paragraphs 17 through 24 refer to the *Engle* findings, Philip Morris USA states that Paragraph 18 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA admits that the Florida Supreme Court has issued an opinion in *Engle v. Liggett Group, Inc.*, 945 So. 2d

1246 (Fla. 2006). Philip Morris USA denies the remaining allegations of Paragraph 18 and specifically refers to and incorporates herein its Third and Fourth Affirmative Defenses.

19. Pursuant to Plaintiff's reference in Paragraph 16 that Paragraphs 17 through 24 refer to the *Engle* findings, Philip Morris USA states that Paragraph 19 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA admits that the Florida Supreme Court has issued an opinion in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). Philip Morris USA denies the remaining allegations of Paragraph 19 and specifically refers to and incorporates herein its Third and Fourth Affirmative Defenses.

20. Pursuant to Plaintiff's reference in Paragraph 16 that Paragraphs 17 through 24 refer to the *Engle* findings, Philip Morris USA states that Paragraph 20 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA admits that the Florida Supreme Court has issued an opinion in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). Philip Morris USA denies the remaining allegations of Paragraph 20 and specifically refers to and incorporates herein its Third and Fourth Affirmative Defenses.

21. Pursuant to Plaintiff's reference in Paragraph 16 that Paragraphs 17 through 24 refer to the *Engle* findings, Philip Morris USA states that Paragraph 21 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA admits that the Florida Supreme Court has issued an opinion in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). Philip Morris USA denies the remaining allegations of Paragraph 21 and specifically refers to and incorporates herein its Third and Fourth Affirmative Defenses.

22. Pursuant to Plaintiff's reference in Paragraph 16 that Paragraphs 17 through 24 refer to the *Engle* findings, Philip Morris USA states that Paragraph 22 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA admits

that the Florida Supreme Court has issued an opinion in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). Philip Morris USA denies the remaining allegations of Paragraph 22 and specifically refers to and incorporates herein its Third and Fourth Affirmative Defenses.

23. Pursuant to Plaintiff's reference in Paragraph 16 that Paragraphs 17 through 24 refer to the *Engle* findings, Philip Morris USA states that Paragraph 23 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA admits that the Florida Supreme Court has issued an opinion in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). Philip Morris USA denies the remaining allegations of Paragraph 23 and specifically refers to and incorporates herein its Third and Fourth Affirmative Defenses.

24. Pursuant to Plaintiff's reference in Paragraph 16 that Paragraphs 17 through 24 refer to the *Engle* findings, Philip Morris USA states that Paragraph 24 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA admits that the Florida Supreme Court has issued an opinion in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). Philip Morris USA denies the remaining allegations of Paragraph 24 and specifically refers to and incorporates herein its Third and Fourth Affirmative Defenses.

25. Paragraph 25 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 25.

26. Paragraph 26 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA admits that Plaintiff's decedent is at fault for his alleged injuries. Philip Morris USA also admits that Plaintiff seeks apportionment of fault on all Counts other than those alleging intentional torts. Philip Morris USA denies that Plaintiff has stated a valid claim upon which relief may be granted and denies that Plaintiff is entitled to the

relief sought in the Complaint or any relief whatsoever. Philip Morris USA denies the remaining allegations of Paragraph 26.

27. Paragraph 27 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 27 and, therefore, denies the same.

COUNT I: STRICT LIABILITY

28. Philip Morris USA restates, realleges, and incorporates by reference its responses to Paragraphs 1 through 27 of the Complaint as if fully set forth herein.

29. Paragraph 29 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 29 and specifically refers to and incorporates herein its Third and Fourth Affirmative Defenses.

30. Paragraph 30 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 30.

31. Paragraph 31 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies that Plaintiff is entitled to the relief requested in Paragraph 31, or any relief whatsoever, and denies the remaining allegations of Paragraph 31.

32. Paragraph 32 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA states that Plaintiff's demand for punitive damages fails as a matter of law for several reasons, including those set forth in *Soffer v. R.J. Reynolds Tobacco Co.*, 106 So. 3d 456 (Fla. 1st DCA 2012) *reh'g denied, clarification granted sub nom.*, 106 So. 3d 465 (Fla. 1st DCA 2013) and *R.J. Reynolds Tobacco Co. v. Ciccone*, 123 So. 3d 604 (Fla. 4th DCA 2013). Philip Morris USA denies the remaining allegations of Paragraph 32.

33. Paragraph 33 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 33.

COUNT II: FRAUD BY CONCEALMENT

34. Philip Morris USA restates, realleges, and incorporates by reference its responses to Paragraphs 1 through 25 and 27 of the Complaint as if fully set forth herein.

35. Paragraph 35 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 35 and specifically refers to and incorporates herein its Third and Fourth Affirmative Defenses.

36. Paragraph 36 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 36.

37. Paragraph 37 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 37.

38. Paragraph 38 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies that Plaintiff is entitled to the relief requested in Paragraph 38, or any relief whatsoever, and denies the remaining allegations of Paragraph 38.

39. Paragraph 39 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 39.

40. Paragraph 40 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 40.

COUNT III: CONSPIRACY TO COMMIT FRAUD BY CONCEALMENT

41. Philip Morris USA restates, realleges, and incorporates by reference its responses to Paragraphs 1 through 25 and 27 of the Complaint as if fully set forth herein.

42. Paragraph 42 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 42 and specifically refers to and incorporates herein its Third and Fourth Affirmative Defenses.

43. Paragraph 43 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 43.

44. Paragraph 44 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 44.

45. Paragraph 45 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies that Plaintiff is entitled to the relief requested in Paragraph 45, or any relief whatsoever, and denies the remaining allegations of Paragraph 45.

46. Paragraph 46 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 46.

47. Paragraph 47 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 47.

COUNT IV: NEGLIGENCE

48. Philip Morris USA restates, realleges, and incorporates by reference its responses to Paragraphs 1 through 27 of the Complaint as if fully set forth herein.

49. Paragraph 49 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 49 and specifically refers to and incorporates herein its Third and Fourth Affirmative Defenses.

50. Paragraph 50 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 50.

51. Paragraph 51 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies that Plaintiff is entitled to the relief requested in Paragraph 51, or any relief whatsoever, and denies the remaining allegations of Paragraph 51.

52. Paragraph 52 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA states that Plaintiff's demand for punitive damages fails as a matter of law for several reasons, including those set forth in *Soffer v. R.J. Reynolds Tobacco Co.*, 106 So. 3d 456 (Fla. 1st DCA 2012) *reh'g denied, clarification granted sub nom.*, 106 So. 3d 465 (Fla. 1st DCA 2013) and *R.J. Reynolds Tobacco Co. v. Ciccone*, 123 So. 3d 604 (Fla. 4th DCA 2013). Philip Morris USA denies the remaining allegations of Paragraph 52.

53. Paragraph 53 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 53.

Philip Morris USA states that Plaintiff's demand for punitive damages fails as a matter of law for several reasons, including those set forth in *Soffer v. R.J. Reynolds Tobacco Co.*, 106 So. 3d 456 (Fla. 1st DCA 2012) *reh'g denied, clarification granted sub nom.*, 106 So. 3d 465 (Fla. 1st DCA 2013) and *R.J. Reynolds Tobacco Co. v. Ciccone*, 123 So. 3d 604 (Fla. 4th DCA 2013). Philip Morris USA denies that Plaintiff is entitled to the relief requested in the unnumbered WHEREFORE paragraph or any relief whatsoever.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint, and each count thereof, fails to state a cause of action upon which relief can be granted against Philip Morris USA.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's claims against Philip Morris USA, if any, are barred, in whole or in part, by the applicable statutes of limitations, statutes of repose, and/or the doctrines of laches, waiver, *res judicata*, claim preclusion, and estoppel.

THIRD AFFIRMATIVE DEFENSE

Plaintiff and Plaintiff's decedent do not qualify as members of the *Engle* class that has been ordered decertified in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), and therefore Plaintiff is not entitled to receive any benefits that may be afforded to *Engle* class members for the following reasons, among others:

(a) the statute of limitations on any personal injury claims or causes of action, asserted by the Plaintiff that accrued more than four (4) years prior to the filing of this lawsuit, or any wrongful death claim asserted by the Plaintiff that accrued more than two (2) years prior to the filing of this lawsuit, was not postponed, tolled, suspended, or otherwise affected as a result of the *Engle* litigation;

(b) the statute of limitations on any personal injury claims that could have been asserted by Plaintiff's decedent expired without suit having been filed prior to his death, and, therefore, this wrongful death action is barred under Florida law; and

(c) the findings made by the jury in Phase I of the *Engle* litigation [hereinafter, "the *Engle* Phase I findings"] may not be given *res judicata* or preclusive effect with respect to the claims or causes of action asserted by Plaintiff.

FOURTH AFFIRMATIVE DEFENSE

If and to the extent Plaintiff and/or Plaintiff's decedent are deemed to qualify as members of the *Engle* class, the *Engle* Phase I findings may not be given *res judicata* or preclusive effect with respect to the claims or causes of action asserted by Plaintiff.

(a) The *Engle* Phase I findings are generalized and non-specific conclusions returned by jurors after the presentation of evidence and argument about numerous different alleged acts or omissions by multiple entities over a span of many years, without any indication of, or basis for discerning, which acts or omissions by which entities at what points in time and affecting which products were determined by the *Engle* Phase I jury. The *Engle* Phase I findings also cannot legally or equitably be given any *res judicata* or preclusive effect in this case, because some of the acts or omissions on which the *Engle* Phase I findings may have been based are not pertinent to the claims or causes of action asserted by Plaintiff, and because the *Engle* Phase I findings are inadequate and lack sufficient specificity to support an individualized determination of liability, legal causation, and damages in this action for the following reasons, among others:

(1) The *Engle* Phase I findings on Question No. 3 (Strict Liability – that the Defendants placed cigarettes on the market that were defective and unreasonably dangerous) and Question No. 6 (Breach Of Implied Warranty – that all of the Defendants sold or supplied cigarettes that were defective in that they were not reasonably fit for the uses intended) do not identify the product defect or defects, or the manufacturing dates, brands, types, or designs of cigarettes found to be defective, and therefore it is impossible to determine from those findings whether any alleged defect in a product manufactured by a particular Defendant at a particular time caused Plaintiff's and/or Plaintiff's decedent's alleged injuries.

(2) The *Engle* Phase I findings on Question No. 7 (Breach Of Express Warranty – that the Defendants sold or supplied cigarettes that did not conform to representations of fact

made by Defendants either orally or in writing) do not identify the representations, manufacturing dates, brands, types, or designs of cigarettes; the dates or places that such representations of fact were made; and whether they were oral or written. Therefore, it is impossible to determine from these findings whether any such representations or cigarettes manufactured by a particular Defendant at any particular time caused Plaintiff's and/or Plaintiff's decedent's alleged injuries.

(3) The *Engle* Phase I findings on Question No. 4(a) (Fraud By Concealment – that the Defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading, or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes) and Question No. 5(a) (Civil Conspiracy – Concealment – that the Defendants agreed to conceal or omit information regarding the health effects of cigarette smoking or the addictive nature of cigarette smoking with the intention that smokers and the public would rely on this information to their detriment) do not identify what information was concealed or omitted, or the date or dates that such information was concealed or omitted, and therefore it is impossible to determine whether, if such allegedly concealed or omitted information had been disclosed, Plaintiff and/or Plaintiff's decedent would have relied upon such information to alter his or her behavior in a way that would have prevented his or her injury, or whether the alleged concealment or omission of such information legally caused injury to Plaintiff and/or Plaintiff's decedent.

(4) The *Engle* Phase I finding on Question No. 8 (Negligence – that all of the Defendants failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances) does not identify the negligent conduct, or whether it was based on a failure to warn or negligent design, and therefore it is impossible to identify the acts

or omissions of a particular manufacturer that constituted the negligence, and then determine whether that conduct legally caused injury to Plaintiff and/or Plaintiff's decedent.

(b) The *Engle* Phase I findings are generalized and non-specific conclusions, which cannot be given *res judicata* or preclusive effect in this individual action without violating Philip Morris USA's right to due process of law under the United States Constitution.

(c) The *Engle* Phase I findings cannot be given *res judicata* or preclusive effect in this individual action because *res judicata* requires a judgment on the merits that resolves a claim or cause of action. As a matter of law, the *Engle* Phase I findings did not determine liability and do not constitute a judgment that resolved any claim or cause of action.

(d) The *Engle* Phase I findings are generalized and non-specific conclusions, which do not identify any wrongful conduct of any Defendant that can be linked to Plaintiff's and/or Plaintiff's decedent's alleged injuries in this action and, if given *res judicata* effect in this case, would make it impossible to properly determine comparative fault, thereby violating Philip Morris USA's rights under the United States Constitution, including, without limitation, its rights to due process of law and the full protection of the Seventh Amendment, and Florida law.

(e) The *Engle* Phase I findings cannot be given *res judicata* or preclusive effect in this individual action without violating federal and/or Florida constitutional limitations on bifurcation and the prohibition against re-examination by one jury of issues decided by another jury or without denying Defendant's due process by requiring that the *Engle* Phase I findings be applied as conclusive, irrebuttable presumptions.

(f) The *Engle* Phase I findings cannot be used as a basis for determining punitive damages, because those findings do not identify the conduct that the jury found to be wrongful,

and punitive damages must be based upon the wrongful conduct causing Plaintiff's and/or Plaintiff's decedent's alleged injuries.

(g) The *Engle* Phase I findings cannot be used as a basis for determining punitive damages, because those findings were made in relation to non-parties to this litigation. Philip Morris USA may not be punished in this litigation for alleged harm to non-parties.

(h) The *Engle* Phase I findings cannot legally or equitably be given *res judicata* or preclusive effect in this individual action consistent with the requirements of due process and notions of fundamental fairness, because issues as to the validity of such findings were properly raised by Defendants in appellate review proceedings in *Engle*, but were never adjudicated or decided in those proceedings, and thus Defendants have been denied meaningful appellate review of those issues, including but not limited to the following:

(1) The trial court improperly allowed the *Engle* plaintiffs to assert claims preempted by federal law;

(2) The trial court improperly allowed the jury to impose liability and punishment for conduct protected by the First Amendment, including the *Noerr-Pennington* Doctrine;

(3) The trial court improperly entered a "final judgment" even though judicial labor was incomplete;

(4) The *Engle* Phase I jury instruction on "materiality" was defective;

(5) The *Engle* Phase I jury instruction on "scientific causation" was defective;

(6) The *Engle* Phase I verdict form question concerning "fraudulent concealment" was defective;

(7) The trial court's failure to dismiss the "emotional distress" claim was erroneous;

(8) The trial court's admission of privileged documents was erroneous.

(i) The *Engle* Phase I findings cannot be given *res judicata* or preclusive effect in this individual action consistent with the requirements of due process and notions of fundamental fairness for the following reasons among others:

(1) The judge who presided over the *Engle* trial was himself a member of the *Engle* class;

(2) Counsel for the *Engle* plaintiffs was permitted to make improper jury nullification arguments;

(3) Counsel for the *Engle* plaintiffs was permitted to make appeals to racial prejudice and was allowed to engage in other misconduct that was designed to, and did in fact, influence the jury to render a verdict based on improper considerations;

(4) The *Engle* Phase I jury was improperly permitted to base its findings on a "composite" plaintiff asserting a fabricated claim rather than an actual person with a specific cause of action;

(5) The *Engle* Phase I jury's findings were tainted by the admission of evidence relating to claims that were not properly joined or issues that were not properly subject to consideration, which was materially prejudicial to the *Engle* defendants;

(6) The *Engle* decision improperly requires that all legal issues arising in the application of the *Engle* Phase I findings to individual actions be resolved based on Florida law, rather than in accordance with prevailing choice-of-law principles;

(7) The *Engle* decision's *sua sponte*, post-trial certification of an "issues" class to salvage certain jury findings that determine only some general aspects of the liability issues was unprecedented, improper, and unconstitutional;

(8) The *Engle* decision's ruling that allowed class representative Angie Della Vecchia to qualify as a class member improperly expanded the class definition on grounds never previously addressed and improperly effectively revived time-barred claims.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's derivative claims for loss of consortium and medical expenses fail to state a cause of action and should be stricken because (i) the complaint, from which these claims are derived, fails to state a cause of action, and therefore all derivative claims must also be dismissed; (ii) it affirmatively appears from the class definition contained in the *Engle* decision, *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), that spouses are not and never were members of the certified *Engle* class; (iii) it affirmatively appears from the operative *Engle* Second Amended Complaint and the *Engle* Verdict Forms that derivative claims of spouses were neither pled nor proved in the *Engle* class action, and are therefore not permissible in an individual Phase III *Engle* action, which this action purports to be; (iv) by failing to assert such derivative claims in the *Engle* class action, Plaintiff has waived any such claims, and may not now assert such claims for the first time in an individual Phase III *Engle* action, which this action purports to be; and (v) derivative claims by spouses of *Engle* class members are barred by the applicable Florida statute of limitations.

SIXTH AFFIRMATIVE DEFENSE

The claims asserted by Plaintiff as against Philip Morris USA are barred, in whole or in part, by operation of the *Noerr-Pennington* doctrine, to the extent that Plaintiff's claims are premised, in whole or in part, on alleged statements or conduct in judicial, legislative, or administrative proceedings of any kind or at any level of government.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the Supremacy Clause of the United States Constitution, Article VI, § 2, because those claims are preempted and/or precluded by federal law, including, but not limited to, the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331, *et seq.*, and the Federal Trade Commission's policies and regulations regarding the cigarette industry. Specifically, under the doctrine of conflict preemption, because Congress has specifically foreclosed the removal of tobacco products from the market, any claims of liability based on Philip Morris USA's manufacture, marketing, and sale of cigarettes are preempted.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, because they violate Philip Morris USA's rights under the First Amendment to the United States Constitution and the cognate provisions of the Florida Constitution, which protect the rights to freedom of speech, to petition the government, and to freedom of association.

NINTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, because any cigarettes manufactured and sold by Philip Morris USA are, and always have been, consistent with available technological, medical, scientific, and industrial state-of-the-art and comply, and have complied, with all applicable governmental regulations.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, because they do not satisfy the standard of § 402A of the Restatement (Second) of Torts, comment i.

ELEVENTH AFFIRMATIVE DEFENSE

Philip Morris USA avers that it did not know, and in light of the existing, reasonably available scientific, and technological knowledge, could not have known, of (1) the design characteristics, if any, that allegedly caused the injuries and damages complained of herein or the alleged danger of such characteristics, or (2) any alternative design referred to by Plaintiff. Philip Morris USA further avers that any alternative design was not feasible, either scientifically or technologically, nor economically practical.

TWELFTH AFFIRMATIVE DEFENSE

Philip Morris USA avers that § 768.1256, Florida Statutes, the Government Rules Defense, preempts and bars, in whole, or in part, Plaintiff's claims and causes of action.

THIRTEENTH AFFIRMATIVE DEFENSE

Philip Morris USA avers that § 768.1257, Florida Statutes, the State of the Art Defense, bars in whole or in part Plaintiff's cause of action based upon defective design because any cigarettes manufactured by Philip Morris USA and allegedly smoked by Plaintiff's decedent conformed with the state-of-the-art of scientific and technical knowledge and other circumstances that existed at the time such cigarettes were manufactured.

FOURTEENTH AFFIRMATIVE DEFENSE

While denying at all times that any cigarettes manufactured by Philip Morris USA caused or contributed to the injuries and damages alleged in Plaintiff's Complaint, Philip Morris USA avers that Plaintiff's decedent was warned or otherwise made aware of the alleged dangers of cigarette smoking and, further, that any such dangers, to the extent they existed, were not beyond those which would have been contemplated by an ordinary consumer of cigarettes. Plaintiff, therefore, is barred from any recovery on the claims asserted.

FIFTEENTH AFFIRMATIVE DEFENSE

If any defects existed with respect to Philip Morris USA's cigarettes, as alleged in Plaintiff's Complaint, any such defects were open and obvious. Accordingly, Plaintiff cannot recover herein against Philip Morris USA.

SIXTEENTH AFFIRMATIVE DEFENSE

If Plaintiff and/or Plaintiff's decedent were injured and damaged, which injuries and damages are denied, such injuries and damages, if any, were the result of intervening or superseding events, factors, occurrences, or conditions, which were in no way caused by Philip Morris USA and for which Philip Morris USA is not responsible and not liable.

SEVENTEENTH AFFIRMATIVE DEFENSE

Plaintiff has no right to recover, or a verdict should be reduced by, the value of any benefits received by Plaintiff or Plaintiff's decedent, paid on Plaintiff's or Plaintiff's decedent's behalf, or available to Plaintiff or Plaintiff's decedent from any collateral source.

EIGHTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by Plaintiff's and/or Plaintiff's decedent's failure to mitigate any injuries and damages they allegedly suffered.

NINETEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of comparative fault, in that the negligence, fault, or responsibility of Plaintiff and/or Plaintiff's decedent proximately caused or proximately contributed to cause his or her alleged injuries and damages, which bars or reduces Plaintiff's recovery herein.

TWENTIETH AFFIRMATIVE DEFENSE

If Plaintiff and/or Plaintiff's decedent were injured and damaged, which injuries and damages are denied, such alleged injuries and damages were caused solely by the acts, wrongs,

or omissions of Plaintiff and/or Plaintiff's decedent; by preexisting conditions; or by forces and/or things over which Philip Morris USA had no control and for which Philip Morris USA is not responsible and not liable.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Venue is improper. Alternatively, the doctrine of *forum non conveniens* applies to Plaintiff's claims, thereby warranting dismissal of Plaintiff's claims or transfer to a convenient forum.

TWENTY-SECOND AFFIRMATIVE DEFENSE

Plaintiff's fraudulent concealment and conspiracy to commit fraudulent concealment claims are barred because Plaintiff has failed to plead fraudulent concealment and conspiracy to commit fraudulent concealment with particularity, as required by the applicable rules of civil procedure, and must be dismissed for failure to state a cause of action upon which relief may be granted.

TWENTY-THIRD AFFIRMATIVE DEFENSE

To the extent Plaintiff's claims are based on an alleged duty to disclose the risks associated with cigarette smoking, such claims are barred because such risks, to the extent they exist, are and always have been commonly known.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

To the extent Plaintiff alleges claims of fraudulent concealment and conspiracy to commit fraudulent concealment, those claims cannot be sustained because Philip Morris USA did not have a legal duty to disclose any information or facts that it did not in fact disclose to Plaintiff and/or Plaintiff's decedent.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claim for punitive damages against Philip Morris USA cannot be sustained because an award of punitive damages under Florida law would violate Philip Morris USA's due process rights and equal protection rights under the Fifth and Fourteenth Amendments to the United States Constitution and Philip Morris USA's due process rights under cognate provisions of the Florida Constitution.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

Pursuant to, *inter alia*, § 768.73(2)(a), Florida Statutes, Plaintiff's claim for punitive damages cannot be sustained because prior awards of punitive damages against Philip Morris USA have exacted sufficient punishment in actions alleging harm for the same act or single course of conduct for which Plaintiff seeks compensatory damages in this action.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claim for punitive damages is barred by due process under the Federal and State Constitutions to the extent Plaintiff seeks to impose punishment for harm allegedly caused to non-parties.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's pleading of a claim for punitive damages should be dismissed for Plaintiff's failure to make the statutory showing, required under § 768.72, Florida Statutes, of a reasonable basis for such a claim.

TWENTY-NINTH AFFIRMATIVE DEFENSE

Plaintiff and/or Plaintiff's decedent lack either standing or capacity, or both, to bring some or all of the claims alleged in the Complaint.

JURY DEMAND

Philip Morris USA hereby demands a trial by Jury on all issues.

Respectfully Submitted,

/s/ Dana L. Strueby

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by E-mail and through the Florida Court's E-Filing Portal on all counsel listed below this 3rd day of September, 2015.

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