

**IN THE CIRCUIT COURT FOR THE TWELFTH JUDICIAL CIRCUIT  
IN AND FOR SARASOTA COUNTY, FLORIDA  
CIVIL DIVISION**

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

Plaintiff,

vs.

R. J. REYNOLDS TOBACCO COMPANY,  
et al,

Defendants.

CASE NO. 2011-CA-001941 NC

JUDGE DUBENSKY - DIVISION T

**ANSWER, DEFENSES AND JURY DEMAND OF DEFENDANT  
R. J. REYNOLDS TOBACCO COMPANY TO PLAINTIFF'S  
SECOND AMENDED SEVERED COMPLAINT**

Defendant R. J. Reynolds Tobacco Company, individually, as successor-by-merger to Lorillard Tobacco Company, and as successor-in-interest to the U.S. tobacco business of Brown & Williamson Tobacco Corporation (n/k/a Brown & Williamson Holdings, Inc.), which is successor-by-merger to The American Tobacco Company (“Reynolds”), files this Answer, Defenses and Jury Demand to Plaintiff’s Second Amended Severed Complaint (the “Second Amended Severed Complaint”):

**PRELIMINARY STATEMENT**

Plaintiff’s Second Amended Severed Complaint asserts that Plaintiff and/or Plaintiff’s Decedent was a member of the class decertified in *Engle v. R.J. Reynolds Tobacco Co.*, et al., and that Plaintiff is entitled to the benefit of certain findings of fact preserved by the Florida Supreme Court in that case. *See* the Second Amended Severed Complaint, ¶¶ 16-24, 29, 35, 42

and 49; *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). Reynolds denies that Plaintiff is entitled to use those findings of fact in this case.

Reynolds contends that the Florida Supreme Court's decision contains several errors of law and denies the *Engle* defendants their due process rights. By answering Plaintiff's allegations regarding the application of *Engle* to this litigation, Reynolds does not waive any objections to the Florida Supreme Court's opinion or any such issues that may be raised upon further review. To the contrary, as set forth below, Reynolds denies, for a number of substantive reasons, that the *Engle* findings of fact can be applied in this or any subsequent individual action.

First, the Florida Supreme Court invalidated certain Phase I findings as being "nonspecific" and "inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause." *See Engle*, 945 So. 2d at 1246. The preserved *Engle* Phase I findings, however, suffer from the same deficiencies. Those findings are also so generalized and nonspecific that they are inadequate to support an individualized determination of essential issues such as liability, legal causation, and damages in this or any other subsequent individual action. Nothing in the Phase I verdict identifies the misconduct underlying the jury's findings. Giving preclusive effect to these findings in this or any other individual action would subject defendants to liability for conduct that no one can determine the *Engle* Phase I jury found to be tortious, thereby violating Florida law and denying defendants due process and a fair trial. *See Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328, 1344-46 (M.D. Fla. 2008) (Schlesinger, J). Moreover, applying these generic findings in this or any other individual action would mean no jury will make specific findings regarding these issues as they relate to this Plaintiff and/or Plaintiff's Decedent, thereby depriving defendants of their Seventh Amendment

right to a trial by jury in this action. Specifically, the preserved *Engle* Phase I findings are deficient for the following reasons:

- *Engle* Phase I findings numbers 3 (Strict Liability – that the defendants placed cigarettes on the market that were defective and unreasonably dangerous) and 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) are deficient because they do not identify the product(s), defect(s), or manufacturing dates, brands, types, or designs of cigarettes found to be defective. Accordingly, no subsequent court or fact finder can determine whether any product, brand, type, or design used by a particular plaintiff was found defective (or not defective) by the *Engle* jury or whether any such design characteristic found defective by the *Engle* jury caused this Plaintiff's and/or Plaintiff's Decedent's injuries or any other plaintiff's injury. In addition, breach of implied warranty claims under Florida law requires proof of privity. The Phase I findings as to breach of implied warranty did not establish the existence of privity between Plaintiff and/or Plaintiff's Decedent and Reynolds, and Plaintiff must still prove privity in this action to prevail on her claims.
- The Florida Supreme Court rejected *Engle* Phase I findings numbers 4 (Fraud and Misrepresentation) and 5 (Civil Conspiracy – Misrepresentation) because “fraud” was too individualized a claim to allow the finding to be applied in subsequent actions. *Engle* Phase I findings numbers 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 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) suffer from the same deficiency. Findings 4(a) and 5(a) do not identify what information was found to have been misrepresented or concealed, or the date(s) that such information was misrepresented or concealed. Therefore, no subsequent court or fact finder can determine whether a particular plaintiff relied upon a statement or omission found tortious by the *Engle* jury or whether any statement or omission found to be tortious by the *Engle* jury was a legal cause of injury to the plaintiff. Moreover, Florida law does not recognize any fraud claims based on nondisclosure except when there is a fiduciary relationship between the parties. The Phase I findings as to fraudulent concealment did not establish the existence of a fiduciary relationship between Plaintiff and/or Plaintiff's Decedent and Reynolds, and Plaintiff must still prove a fiduciary relationship in this action to prevail on her claims.

- *Engle* Phase I finding number 7 (Breach of Express Warranty – that all of the defendants sold or supplied cigarettes that, at the time of sale or supply, did not conform to representations of fact made by said defendants) is deficient because it does not identify the specific representations of fact, what defendant made the representations, when the representations were made, the product(s), brands, or time of sale of the cigarettes that did not allegedly conform to representations of fact, or how the cigarettes did not conform to those representations as determined by the *Engle* jury. Thus, no subsequent court or fact finder can determine whether any particular plaintiff heard any specific representations of fact or purchased cigarettes in reliance upon those representations of

fact, whether any particular plaintiff's cigarettes did not conform to the specific representations of fact, or whether any breach of express warranty as determined by the *Engle* jury was a legal cause of injury to a particular plaintiff. In addition, breach of express warranty claims under Florida law requires proof of privity. The Phase I findings as to breach of express warranty did not establish the existence of privity between Plaintiff and/or Plaintiff's Decedent and Reynolds, and Plaintiff must still prove privity in this action to prevail on her claims.

- *Engle* Phase I finding number 8 (Negligence – that the defendants failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances) is deficient because it does not identify the negligent conduct, or whether it was based on a failure to warn or negligent design. No subsequent court or fact finder can determine whether the acts or omissions alleged by this Plaintiff or any other plaintiff were found negligent (or not negligent) by the *Engle* jury or whether any conduct found to be negligent by the *Engle* jury was a legal cause of injury to a particular plaintiff.

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

Third, application of the *Engle* Phase I findings in this or any other subsequent individual action would violate the prohibitions set forth in the Seventh Amendment to the United States Constitution and Article I, § 22 of the Florida Constitution against re-examination by one jury of issues decided by another jury because the generic and nonspecific nature of those findings

necessarily requires a subsequent jury to reexamine the Phase I findings to determine what conduct the *Engle* jury determined was tortious.

Fourth, the *Engle* Phase I findings cannot be used as a basis for determining punitive damages because the Phase I findings do not identify the conduct that the *Engle* jury found to be tortious or unlawful, and due process requires that punitive damages be based upon the wrongful conduct causing the injury to the plaintiff.

Fifth, the Florida Supreme Court retroactively changed the basis for class certification from Rule 1.220(b)(3) to Rule 1.220(d)(4)(A), without allowing the defendants to argue the impropriety of certifying the class under Rule 1.220(d)(4)(A), thereby depriving defendants of their due process right to notice and an opportunity to be heard concerning the proper procedure for having the jury arrive at sufficiently specific Phase I findings.

Moreover, additional questions as to the validity of the Phase I findings were raised by the *Engle* defendants in appellate proceedings before the Third District Court of Appeal. These issues, including but not limited to federal preemption, due process, and other constitutional issues, were not fully adjudicated before the Third District Court of Appeal or in the further appellate proceedings before the Florida Supreme Court. These outstanding issues must be resolved to determine whether the *Engle* Phase I findings are valid and capable of being given preclusive effect.

Finally, Reynolds reserves the right to assert that Plaintiff cannot satisfy the requirements established by the Florida Supreme Court in *Engle* for use of the preserved findings of fact and therefore is not entitled to use those findings in this action.

For the reasons set forth above, Reynolds denies that Plaintiff is entitled to the benefit of any *Engle* Phase I findings of fact and denies that those findings of fact can be given *res judicata* or preclusive effect in this or any other subsequent litigation.

The foregoing comments and objections are incorporated, to the extent appropriate, into each heading and numbered paragraph of this Answer. Except as expressly admitted, Reynolds denies the allegations contained in the headings, numbered paragraphs, and unnumbered paragraphs of the Second Amended Severed Complaint, including any factual allegations that are implied or intended to be implied by the headings of the Second Amended Severed Complaint.

### **ANSWER**

**1. Plaintiff is a member of the class of persons described by the Supreme Court of Florida in *Engle v. Liggett Group, Inc.*, 945 So.2d 1246 (Fla. 2006) (“*Engle*”). Plaintiff brings this action pursuant to *Engle*.**

1. Reynolds admits that Plaintiff asserts that this action was brought in accordance with the *Engle* opinion. Reynolds states that the *Engle* opinion referenced in paragraph 1 speaks for itself, but denies that it is fairly or accurately characterized in paragraph 1. Reynolds denies that Plaintiff has any cause of action against Reynolds, denies that Plaintiff is entitled to judgment against, or any relief whatsoever from, Reynolds in this action, and denies the remaining allegations contained in paragraph 1.

**2. Plaintiff, Faye Theis, is the Personal Representative of the Estate of Edward Frederick Theis, Jr. Edward Frederick Theis, Jr., left one “survivor” within the meaning of Florida’s Wrongful Death Act, his spouse Faye Theis.**

2. Reynolds denies that Plaintiff has any cause of action against Reynolds and denies the remaining allegations contained in paragraph 2 that apply to Reynolds. Reynolds is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 2 and, on that basis, denies those allegations.

**3. The Decedent, Edward Frederick Theis, Jr., is referred to herein as the “Decedent” or the “Smoker.”**

3. Reynolds is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 3 and, on that basis, denies those allegations.

**4. Defendant Philip Morris USA Inc. (“Philip Morris U.S.A.”) is a Virginia corporation that conducts business in the State of Florida, including Sarasota County, and did so during all times relevant to this action.**

4. Reynolds states that Plaintiff’s reliance on the intentionally ambiguous and undefined phrase “during all times relevant to this action” in this paragraph and elsewhere in the Second Amended Severed Complaint does not permit Reynolds to formulate a meaningful answer for time periods unknown to Reynolds. To the extent that any answer is required, Reynolds is informed and believes that Philip Morris USA Inc. (“Philip Morris”) is a Virginia corporation. Reynolds is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 4 and, on that basis, denies those allegations.

**5. Lorillard Tobacco Company is, or was, a Delaware corporation that conducts business in the State of Florida, including Sarasota County, and did so during all times relevant to this action. Effective June 12, 2015, Lorillard Tobacco Company was merged into R.J Reynolds Tobacco Company with R.J. Reynolds being the surviving corporation. R.J. Reynolds is the successor-by-merger to Lorillard Tobacco Company and assumes all of Lorillard Tobacco Company’s assets and liabilities, including its interest in this action and the liability for Lorillard Tobacco Company’s historical brands and conduct.**

5. Reynolds admits that prior to June 12, 2015, Lorillard Tobacco Company was a Delaware corporation that conducted business in the State of Florida, including Sarasota County, and that effective June 12, 2015, Lorillard Tobacco Company was merged into R. J. Reynolds Tobacco Company with Reynolds being the surviving entity. Reynolds also admits

that in accordance with provisions of North Carolina law it has assumed responsibility for any liability that Lorillard Tobacco Company may otherwise have had in connection with this action. Reynolds denies the remaining allegations contained in paragraph 5.

**6. Lorillard, Inc. is, or was, a Delaware corporation that conducts business in the State of Florida, including Sarasota County, and did so during all times relevant to this action. Lorillard, Inc. is now known as Lorillard, LLC.**

6. Reynolds admits that prior to June 12, 2015, Lorillard, Inc. was a Delaware corporation that at one time conducted business in the State of Florida. Reynolds is informed and believes that Lorillard, Inc. has not manufactured, advertised, or sold tobacco products since December 29, 1989. Upon information and belief, effective June 12, 2015, Lorillard, Inc.'s name was changed to Lorillard, LLC. Reynolds denies the remaining allegations contained in paragraph 6.

**7. Defendant R.J. Reynolds Tobacco Company, individually and as successor-by-merger to Lorillard Tobacco Company, individually and as successor by merger to Brown & Williamson Tobacco Corporation, individually and as successor by merger to The American Tobacco Company, is a North Carolina corporation that conducts business in the State of Florida, including Sarasota County, and did so during all times relevant to this action.**

7. Defendant R. J. Reynolds Tobacco Company ("Reynolds") admits that it is (a) successor-by-merger to Lorillard Tobacco Company; (b) the successor-in-interest to the U.S. tobacco business of Brown & Williamson Tobacco Corporation (n/k/a Brown & Williamson Holdings, Inc.), which is the successor-by-merger to The American Tobacco Company; and (c) a corporation organized under the laws of the State of North Carolina that, at relevant times, conducted business in the State of Florida, including in Sarasota County. Except as admitted, Reynolds denies the allegations of paragraph 7.

**8. Liggett Group, LLC ("Liggett") is a Delaware limited liability company that conducts business in the State of Florida, including Sarasota County, and did so during all**

**times relevant to this action. Liggett is a “citizen” of Florida for purposes of 28 U.S.C. §1331 because one or more of the members of Liggett is a “citizen” of Florida.**

8. Reynolds is informed and believes that Liggett Group LLC (“Liggett”) is a Delaware limited liability company. Reynolds is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 8 and, on that basis, denies those allegations.

**9. Vector Group, Ltd., Inc. (“Vector”) is a Delaware corporation that conducts business in the State of Florida and has its principal place of business in Miami, Dade County, Florida, making it a “citizen” of Florida for purposes of 28 U.S.C. §1331. Vector is the successor to Liggett or the alter ego of Liggett, such that Vector is ultimately or vicariously liable any judgment entered against Liggett herein. Vector and Liggett are also the successors to or alter egos of Liggett, Brooke Group, Ltd., Inc. and Brooke Group Holding, Inc., which were among the defendants in the *Engle* class action.**

9. Reynolds is informed and believes that Vector Group Ltd. is a Delaware corporation with its principal place of business in Miami, Florida. Reynolds is further informed and believes that Liggett and Brooke Group Holding Inc., formerly known as Brooke Group Ltd., were defendants in *Engle*. Reynolds is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 9 and, on that basis, denies those allegations.

**10. The Council for Tobacco Research U.S.A., Inc. (the “Council”) and the Tobacco Institute, Inc. (the “Institute”), at all times relevant to this action, were involved in promotion, lobbying, medical research, legislative and political activities or related ventures throughout Florida and the United States both in connection with and on behalf of the Defendants.**

10. Reynolds states that Plaintiff’s reliance on the intentionally ambiguous and undefined phrase “at all times relevant to this action” in this paragraph and elsewhere in the Second Amended Severed Complaint does not permit Reynolds to formulate a meaningful answer for time periods unknown to Reynolds. To the extent that any answer is required, Reynolds states that The Tobacco Institute, Inc. (“TI”) was dissolved in accordance with the laws

of the State of New York on or about September 15, 2000 and that The Council for Tobacco Research-U.S.A., Inc. (“CTR”) was dissolved in accordance with the laws of the State of New York on or about November 6, 1998. Reynolds admits that CTR was an entity which funded scientific research conducted by scientists affiliated with universities and research institutions throughout the United States and that TI, like trade associations in other industries, engaged in certain lobbying and public relations activities, including activities protected by the First Amendment to the United States Constitution, on behalf of its members. Reynolds denies the remaining allegations contained in paragraph 10.

**11. At all times relevant to this action, Defendants, R.J. Reynolds and Philip Morris, as well as Lorillard and Liggett, manufactured and distributed tobacco products containing nicotine throughout Florida and the United States. All of them, including Vector, were and remain *Engle* defendants.**

11. Reynolds admits that both it and, prior to June 12, 2015, Lorillard, manufactured and distributed cigarettes for resale to adult smokers throughout the United States, including the State of Florida. Reynolds also admits its cigarettes contain tobacco and that nicotine is a naturally occurring constituent of tobacco and tobacco smoke. Reynolds further admits that it and Lorillard were defendants in *Engle*. Reynolds is informed and believes that Liggett and Philip Morris were defendants in *Engle* and that Liggett and Philip Morris manufacture and distribute cigarettes throughout the United States, including the State of Florida. Reynolds denies the remaining allegations contained in paragraph 11 that apply to Reynolds. Except as otherwise expressly admitted elsewhere herein, Reynolds is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 11 that apply to other Defendants and, on that basis, denies those allegations.

**12. In *Engle*, the Florida Supreme Court approved certification for liability purposes of a class including all Florida citizens and residents, and their survivors, who**

**have suffered, presently suffer, or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine.**

12. Reynolds states that the *Engle* opinion referenced in paragraph 12 speaks for itself, but denies that it is fairly or accurately characterized in paragraph 12. Reynolds denies the remaining allegations contained in paragraph 12.

**13. At all times relevant to this action, the Smoker was a Florida resident and citizen (1 ) who was addicted to, purchased, and smoked cigarettes containing nicotine that were designed, manufactured, advertised and marketed by one or more of the Defendants and (2) who did so in sufficient quantities and for a sufficient time period to cause injury in the faun of diseases and medical conditions described herein. The brands smoked included but are not limited to: Chesterfield, Marlboro, Salem, Winston, Carlton and Doral; along with any other brands uncovered during the course of discovery.**

13. Reynolds is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 13 concerning the products that Plaintiff's Decedent smoked, his state of citizenship and/or residence, and his diseases and/or medical conditions and, on that basis, denies those allegations. Reynolds denies the remaining allegations contained in paragraph 13.

**14. The Florida Supreme Court decertified the *Engle* class because class-wide treatment of causation and damages was not feasible. The Florida Supreme Court expressly reserved to class members, including Plaintiff, the right to bring individual actions against Defendants for smoking-related injuries and damages, including punitive damages.**

14. Reynolds admits that the Florida Supreme Court held that the *Engle* class should be decertified. Reynolds states that the *Engle* opinion referenced in paragraph 14 speaks for itself, but denies that it is fairly or accurately characterized in paragraph 14. Reynolds denies that Plaintiff has any cause of action against Reynolds, denies that Plaintiff is entitled to judgment against, or any relief whatsoever from, Reynolds in this action, and denies the remaining allegations contained in paragraph 14.

**15. At the time of the original Complaint in this matter was filed, less than one year had elapsed since the Florida Supreme Court's mandate issued. Therefore, this action is timely, and the filing of this Second Amended Severed Complaint relates back to the date of filing of the original Complaint.**

15. Reynolds admits that the Supreme Court of Florida issued its Mandate on January 11, 2007. Reynolds denies the remaining allegations contained in paragraph 15.

**16. Because Plaintiff was an *Engle* class member, Plaintiff is entitled to the benefit of the Phase I findings and asserts and alleges those findings as conclusively established in this action as follows (¶¶17-24):**

16. Reynolds states that the *Engle* verdict referenced in paragraph 16 speaks for itself, but denies that it can be applied to Plaintiff's lawsuit or to any other individual smoking and health lawsuit. Reynolds denies the remaining allegations contained in paragraph 16.

**17. Smoking cigarettes causes aortic aneurysm, bladder cancer, cerebrovascular disease, cervical cancer, chronic obstructive pulmonary disease, coronary heart disease, esophageal cancer, kidney cancer, laryngeal cancer, lung cancer (specifically, adenocarcinoma, large cell carcinoma, small cell carcinoma, and squamous cell carcinoma), complications of pregnancy, oral cavity/tongue cancer, pancreatic cancer, peripheral vascular disease, pharyngeal cancer, and stomach cancer.**

17. Reynolds admits that Plaintiff purports to summarize the *Engle* verdict in paragraph 17. Reynolds denies that the *Engle* verdict is fairly or accurately characterized in paragraph 17. Reynolds further denies that the *Engle* verdict can be applied to Plaintiff's lawsuit or to any other individual smoking and health lawsuit. Reynolds further admits that cigarette smoking significantly increases the risk of developing lung cancer, heart disease, chronic bronchitis, emphysema, and other serious diseases and adverse health conditions. Reynolds states that individuals should consider the conclusions of the U.S. Surgeon General, the Centers for Disease Control, and other public health and medical officials when making decisions regarding smoking. Reynolds further states that all packages of cigarettes manufactured by Reynolds for sale or distribution in the United States since January 1, 1966 have borne a warning

deemed by Congress to be adequate to inform consumers of any relationship between smoking and health and that, since July 1969, these warnings have been adequate as a matter of law. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). Reynolds denies the remaining allegations contained in paragraph 17.

**18. Nicotine in cigarettes is addictive.**

18. Reynolds admits that Plaintiff purports to summarize the *Engle* verdict in paragraph 18. Reynolds denies that the *Engle* verdict is fairly or accurately characterized in paragraph 18. Reynolds further denies that the *Engle* verdict can be applied to Plaintiff's lawsuit or to any other individual smoking and health lawsuit. Reynolds admits that nicotine in tobacco products is addictive. Reynolds further admits that members of the public health community have stated that nicotine is an addictive substance and that cigarette smoking is addictive. Reynolds also admits that many smokers find it difficult to quit, and some find it extremely difficult, but Reynolds denies that smokers are unable to quit. Reynolds denies the remaining allegations contained in paragraph 18.

**19. Defendants, R.J. Reynolds and Philip Morris, as well as Lorillard and Liggett, placed cigarettes on the market that were defective and unreasonably dangerous.**

19. Reynolds admits that Plaintiff purports to summarize the *Engle* verdict in paragraph 19. Reynolds denies that the *Engle* verdict is fairly or accurately characterized in paragraph 19. Reynolds further denies that the *Engle* verdict can be applied to Plaintiff's lawsuit or to any other individual smoking and health lawsuit. Reynolds denies the remaining allegations contained in paragraph 19.

**20. Defendants, R.J. Reynolds and Philip Morris, as well as Lorillard and Liggett, along with the Council and the Institute, 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 or both.**

20. Reynolds admits that Plaintiff purports to summarize the *Engle* verdict in paragraph 20. Reynolds denies that the *Engle* verdict is fairly or accurately characterized in paragraph 20. Reynolds further denies that the *Engle* verdict can be applied to Plaintiff's lawsuit or to any other individual smoking and health lawsuit. Reynolds denies the remaining allegations contained in paragraph 20.

**21. Defendants, R.J. Reynolds and Philip Morris, as well as Lorillard and Liggett, along with the Council and the Institute, agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment.**

21. Reynolds admits that Plaintiff purports to summarize the *Engle* verdict in paragraph 21. Reynolds denies that the *Engle* verdict is fairly or accurately characterized in paragraph 21. Reynolds further denies that the *Engle* verdict can be applied to Plaintiff's lawsuit or to any other individual smoking and health lawsuit. Reynolds denies the remaining allegations contained in paragraph 21.

**22. Defendants sold or supplied cigarettes that were defective.**

22. Reynolds admits that Plaintiff purports to summarize the *Engle* verdict in paragraph 22. Reynolds denies that the *Engle* verdict is fairly or accurately characterized in paragraph 22. Reynolds further denies that the *Engle* verdict can be applied to Plaintiff's lawsuit or to any other individual smoking and health lawsuit. Reynolds denies the remaining allegations contained in paragraph 22.

**23. Defendants sold or supplied cigarettes that, at the time of sale or supply, did not conform to representations of fact made by Defendants.**

23. Reynolds admits that Plaintiff purports to summarize the *Engle* verdict in paragraph 23. Reynolds denies that the *Engle* verdict is fairly or accurately characterized in

paragraph 23. Reynolds further denies that the *Engle* verdict can be applied to Plaintiff's lawsuit or to any other individual smoking and health lawsuit. Reynolds denies the remaining allegations contained in paragraph 23.

**24. All Defendants were negligent.**

24. Reynolds admits that Plaintiff purports to summarize the *Engle* verdict in paragraph 24. Reynolds denies that the *Engle* verdict is fairly or accurately characterized in paragraph 24. Reynolds further denies that the *Engle* verdict can be applied to Plaintiff's lawsuit or to any other individual smoking and health lawsuit. Reynolds denies the remaining allegations contained in paragraph 24.

**25. As a direct and proximate result of smoking cigarettes manufactured and sold by one or more Defendants and its predecessors in interest, the Smoker suffered from and died due to one or more of the diseases and medical conditions described, including lung cancer, which was caused by his addiction to cigarettes that contain nicotine and each of which manifested during the class period.**

25. Paragraph 25 does not require an answer because it asserts incorrect legal conclusions, rather than stating factual allegations. To the extent that any answer is required, Reynolds is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 25 concerning the cigarettes that Plaintiff's Decedent smoked and his diseases and/or medical conditions and death and, on that basis, denies those allegations. Reynolds denies the remaining allegations contained in paragraph 25.

**26. Plaintiff's Decedent may bear some measure of fault, but less than 100% of the applicable fault, for causing his smoking-related injuries. Plaintiff's Decedent's acts or omissions relating to the frequency and duration of his efforts to quit smoking may have been a partial proximate cause, in combination with the acts and omissions of Defendants, of his injuries and death. In the event that the jury in the trial of this action concludes that Plaintiff's Decedent bears some portion of the applicable fault, Plaintiff seeks apportionment of fault and damages as to her non-intentional tort claims sounding in strict liability (Count I) and negligence (Count IV). Plaintiff does not seek apportionment under any circumstances for her intentional tort claims of fraud by concealment (Count II) and**

**conspiracy to commit fraud by concealment (Count III), and no such apportionment is sought with respect to any recovery or entitlement to punitive damages. Plaintiff expressly pleads and requests application of section 768.81(4), Florida Statutes, which provides that comparative fault principles “do[] not apply to any action . . . based upon an intentional tort.” Because fraud by concealment and conspiracy to commit fraud by concealment are intentional torts, the law does not allow for the reduction of Plaintiff’s damages if she prevails on either or both of these claims.**

26. Paragraph 26 does not require an answer because it asserts legal conclusions, rather than stating factual allegations. To the extent that any answer is required, Reynolds admits that Plaintiff’s Decedent bears fault for causing his alleged smoking-related injuries. Reynolds denies that Plaintiff is permitted to plead comparative negligence or apportionment of damages, as those doctrines are defenses that can only be raised by Reynolds or other Defendants. Reynolds denies that Plaintiff complied with the requirements of Section 768.72, Florida Statutes and denies that Plaintiff is entitled to judgment against, or any relief whatsoever from, Reynolds in this action. Reynolds denies the remaining allegations contained in paragraph 26.

**27. Venue is proper in this Circuit because, at all times material to this action, the Smoker either resided, suffered injuries or died in Sarasota County, Florida.**

27. Paragraph 27 does not require an answer because it asserts legal conclusions, rather than stating factual allegations. Reynolds states that Plaintiff’s reliance on the intentionally ambiguous and undefined phrase “at all times material to this action” in this paragraph and elsewhere in the Second Amended Severed Complaint does not permit Reynolds to formulate a meaningful answer for time periods unknown to Reynolds. To the extent that any answer is required, Reynolds denies that Plaintiff has any cause of action against Reynolds. Reynolds admits that venue is proper in this District. Reynolds is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in

paragraph 27 concerning Plaintiff's Decedent's residency and, on that basis, denies those allegations. Except as otherwise expressly admitted elsewhere herein, Reynolds denies the remaining allegations contained in paragraph 27.

## COUNT I

**28. Plaintiff hereby realleges and incorporates the allegations contained in paragraphs 1-27.**

28. Reynolds incorporates its responses to the allegations re-alleged and incorporated by Plaintiff in this paragraph as if fully restated herein.

**29. The *Engle* Phase I findings conclusively establish that the cigarettes sold and placed on the market by Defendants were defective and unreasonably dangerous.**

29. Reynolds states that the *Engle* verdict referenced in paragraph 29 speaks for itself, but denies that it is fairly or accurately characterized in paragraph 29. Reynolds further denies that the *Engle* verdict can be applied to Plaintiff's lawsuit or to any other individual smoking and health lawsuit. Reynolds denies the remaining allegations contained in paragraph 29.

**30. As a proximate result of smoking the defective cigarettes sold and placed on the market by one or more Defendants, the Smoker died and his Estate and Survivors are entitled to recover all damages specified in Florida's Wrongful Death Act.**

30. Paragraph 30 does not require an answer because it asserts incorrect legal conclusions, rather than stating factual allegations. To the extent that any answer is required, Reynolds denies that Plaintiff is entitled to judgment against, or any relief whatsoever from, Reynolds in this action and denies the remaining allegations contained in paragraph 30.

**31. As a proximate result of the Smoker's death, his Estate is entitled to: trial by jury; judgment against each Defendant for an amount in excess of \$15,000; all damages available under the law; taxable costs; and interest as allowed by law.**

31. Paragraph 31 does not require an answer because it asserts incorrect legal conclusions, rather than stating factual allegations. To the extent that any answer is required,

Reynolds admits that Plaintiff demands a jury trial. Reynolds denies that Plaintiff is entitled to judgment against, or any relief whatsoever from, Reynolds in this action and denies the remaining allegations contained in paragraph 31.

**32. As a proximate result of the Smoker's death, his Estate is entitled to: loss of earnings, if any, of the Decedent from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest and loss of the prospective net accumulations, if any, of the Estate; medical and funeral expenses due to the Decedent's injury and death; and punitive damages.**

32. Paragraph 32 does not require an answer because it asserts incorrect legal conclusions, rather than stating factual allegations. To the extent that any answer is required, Reynolds denies that Plaintiff complied with the requirements of Section 768.72, Florida Statutes. Reynolds also denies that Plaintiff is entitled to judgment against, or any relief whatsoever from, Reynolds in this action and denies the remaining allegations contained in paragraph 32.

**33. As a proximate result of the Smoker's death, his surviving spouse is entitled to: the value of lost support and services from the date of the Decedent's injury to the date of death, with interest, and future loss of support and services from the Decedent's date of death and reduced to present value and the loss of the Decedent's companionship and protection and for mental pain and suffering from the date of injury.**

33. Paragraph 33 does not require an answer because it asserts incorrect legal conclusions, rather than stating factual allegations. To the extent that any answer is required, Reynolds denies that Plaintiff is entitled to judgment against, or any relief whatsoever from, Reynolds in this action and denies the remaining allegations contained in paragraph 33.

## COUNT II

**34. Plaintiff hereby realleges and incorporates the allegations contained in paragraphs 1-25, and 27.**

34. Reynolds incorporates its responses to the allegations re-alleged and incorporated by Plaintiff in this paragraph as if fully restated herein.

**35. The *Engle* Phase I findings conclusively establish that Defendants, R.J. Reynolds and Philip Morris, as well as Lorillard and Liggett, along with the Council and the Institute, 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 or both.**

35. Reynolds states that the *Engle* verdict referenced in paragraph 35 speaks for itself, but denies that it is fairly or accurately characterized in paragraph 35. Reynolds further denies that the *Engle* verdict can be applied to Plaintiff's lawsuit or to any other individual smoking and health lawsuit. Reynolds denies the remaining allegations contained in paragraph 35.

**36. The actions of Defendants, R.J. Reynolds and Philip Morris, as well as Lorillard and Liggett, along with the Council and the Institute, constitute fraud.**

36. Reynolds denies the allegations contained in paragraph 36.

**37. As a proximate result of that fraud, the Smoker died and his Estate and Survivors are entitled to recover all damages specified in Florida's Wrongful Death Act.**

37. Paragraph 37 does not require an answer because it asserts incorrect legal conclusions, rather than stating factual allegations. To the extent that any answer is required, Reynolds denies that Plaintiff is entitled to judgment against, or any relief whatsoever from, Reynolds in this action and denies the remaining allegations contained in paragraph 37.

**38. As a proximate result of the Smoker's death, his Estate is entitled to: trial by jury; judgment against each Defendant for an amount in excess of \$15,000; all damages available under the law; taxable costs; and interest as allowed by law.**

38. Paragraph 38 does not require an answer because it asserts incorrect legal conclusions, rather than stating factual allegations. To the extent that any answer is required, Reynolds admits that Plaintiff demands a jury trial. Reynolds denies that Plaintiff is entitled to judgment against, or any relief whatsoever from, Reynolds in this action and denies the remaining allegations contained in paragraph 38.

**39. As a proximate result of the Smoker's death, his Estate is entitled to: loss of earnings, if any, of the Decedent from the date of injury to the date of death, less lost**

**support of survivors excluding contributions in kind, with interest and loss of the prospective net accumulations, if any, of the Estate; medical and funeral expenses due to the Decedent's injury and death; and punitive damages.**

39. Paragraph 39 does not require an answer because it asserts incorrect legal conclusions, rather than stating factual allegations. To the extent that any answer is required, Reynolds denies that Plaintiff complied with the requirements of Section 768.72, Florida Statutes. Reynolds also denies that Plaintiff is entitled to judgment against, or any relief whatsoever from, Reynolds in this action and denies the remaining allegations contained in paragraph 39.

**40. As a proximate result of the Smoker's death, his surviving spouse is entitled to: the value of lost support and services from the date of the Decedent's injury to the date of death, with interest, and future loss of support and services from the Decedent's date of death and reduced to present value and the loss of the Decedent's companionship and protection and for mental pain and suffering from the date of injury.**

40. Paragraph 40 does not require an answer because it asserts incorrect legal conclusions, rather than stating factual allegations. To the extent that any answer is required, Reynolds denies that Plaintiff is entitled to judgment against, or any relief whatsoever from, Reynolds in this action and denies the remaining allegations contained in paragraph 40.

### COUNT III

**41. Plaintiff hereby realleges and incorporates the allegations contained in paragraphs 1-25, and 27.**

41. Reynolds incorporates its responses to the allegations re-alleged and incorporated by Plaintiff in this paragraph as if fully restated herein.

**42. The *Engle* Phase I findings conclusively establish that Defendants, R.J. Reynolds and Philip Morris, as well as Lorillard and Liggett, along with the Council and the Institute, agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment.**

42. Reynolds states that the *Engle* verdict referenced in paragraph 42 speaks for itself, but denies that it is fairly or accurately characterized in paragraph 42. Reynolds further denies that the *Engle* verdict can be applied to Plaintiff's lawsuit or to any other individual smoking and health lawsuit. Reynolds denies the remaining allegations contained in paragraph 42.

**43. The actions of Defendants, R.J. Reynolds and Philip Morris, as well as Lorillard and Liggett, along with the Council and the Institute, constitute a successful conspiracy to commit fraud.**

43. Reynolds denies the existence of, and its participation in, any alleged conspiracy and denies the remaining allegations contained in paragraph 43.

**44. As a proximate result of Defendants' conspiracy to commit fraud, the Smoker died and his Estate and Survivors are entitled to recover all damages specified in Florida's Wrongful Death Act.**

44. Paragraph 44 does not require an answer because it asserts incorrect legal conclusions, rather than stating factual allegations. To the extent that any answer is required, Reynolds denies the existence of, and its participation in, any alleged conspiracy, denies that Plaintiff is entitled to judgment against, or any relief whatsoever from, Reynolds in this action and denies the remaining allegations contained in paragraph 44.

**45. As a proximate result of the Smoker's death, his Estate is entitled to: trial by jury; judgment against each Defendant for an amount in excess of \$15,000; all damages available under the law; taxable costs; and interest as allowed by law.**

45. Paragraph 45 does not require an answer because it asserts incorrect legal conclusions, rather than stating factual allegations. To the extent that any answer is required, Reynolds admits that Plaintiff demands a jury trial. Reynolds denies that Plaintiff is entitled to judgment against, or any relief whatsoever from, Reynolds in this action and denies the remaining allegations contained in paragraph 45.

**46. As a proximate result of the Smoker's death, his Estate is entitled to: loss of earnings, if any, of the Decedent from the date of injury to the date of death, less lost**

**support of survivors excluding contributions in kind, with interest and loss of the prospective net accumulations, if any, of the Estate; medical and funeral expenses due to the Decedent's injury and death, and punitive damages.**

46. Paragraph 46 does not require an answer because it asserts incorrect legal conclusions, rather than stating factual allegations. To the extent that any answer is required, Reynolds denies that Plaintiff complied with the requirements of Section 768.72, Florida Statutes. Reynolds also denies that Plaintiff is entitled to judgment against, or any relief whatsoever from, Reynolds in this action and denies the remaining allegations contained in paragraph 46.

**47. As a proximate result of the Smoker's death, his surviving spouse is entitled to: the value of lost support and services from the date of the Decedent's injury to the date of death, with interest, and future loss of support and services from the Decedent's date of death and reduced to present value and the loss of the Decedent's companionship and protection and for mental pain and suffering from the date of injury.**

47. Paragraph 47 does not require an answer because it asserts incorrect legal conclusions, rather than stating factual allegations. To the extent that any answer is required, Reynolds denies that Plaintiff is entitled to judgment against, or any relief whatsoever from, Reynolds in this action and denies the remaining allegations contained in paragraph 47.

#### COUNT IV

**48. Plaintiff hereby realleges and incorporates the allegations contained in paragraphs 1-27.**

48. Reynolds incorporates its responses to the allegations re-alleged and incorporated by Plaintiff in this paragraph as if fully restated herein.

**49. The *Engle* Phase I findings conclusively establish that the Defendants were negligent.**

49. Reynolds states that the *Engle* verdict referenced in paragraph 49 speaks for itself, but denies that it is fairly or accurately characterized in paragraph 49. Reynolds further denies

that the *Engle* verdict can be applied to Plaintiff's lawsuit or to any other individual smoking and health lawsuit. Reynolds denies the remaining allegations contained in paragraph 49.

**50. As a proximate result of the Defendants' negligence, the Smoker died and his Estate and Survivors are entitled to recover all damages specified in Florida's Wrongful Death Act.**

50. Paragraph 50 does not require an answer because it asserts incorrect legal conclusions, rather than stating factual allegations. To the extent that any answer is required, Reynolds denies that Plaintiff is entitled to judgment against, or any relief whatsoever from, Reynolds in this action and denies the remaining allegations contained in paragraph 50.

**51. As a proximate result of the Smoker's death, his Estate is entitled to: trial by jury; judgment against each Defendant for an amount in excess of \$15,000; all damages available under the law; taxable costs; and interest as allowed by law.**

51. Paragraph 51 does not require an answer because it asserts incorrect legal conclusions, rather than stating factual allegations. To the extent that any answer is required, Reynolds admits that Plaintiff demands a jury trial. Reynolds denies that Plaintiff is entitled to judgment against, or any relief whatsoever from, Reynolds in this action and denies the remaining allegations contained in paragraph 51.

**52. As a proximate result of the Smoker's death, his Estate is entitled to: loss of earnings, if any, of the Decedent from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest and loss of the prospective net accumulations, if any, of the Estate; medical and funeral expenses due to the Decedent's injury and death; and punitive damages.**

52. Paragraph 52 does not require an answer because it asserts incorrect legal conclusions, rather than stating factual allegations. To the extent that any answer is required, Reynolds denies that Plaintiff complied with the requirements of Section 768.72, Florida Statutes. Reynolds also denies that Plaintiff is entitled to judgment against, or any relief

whatsoever from, Reynolds in this action and denies the remaining allegations contained in paragraph 52.

**53. As a proximate result of the Smoker's death, his surviving spouse is entitled to: the value of lost support and services from the date of the Decedent's injury to the date of death, with interest, and future loss of support and services from the Decedent's date of death and reduced to present value and the loss of the Decedent's companionship and protection and for mental pain and suffering from the date of injury.**

53. Paragraph 53 does not require an answer because it asserts incorrect legal conclusions, rather than stating factual allegations. To the extent that any answer is required, Reynolds denies that Plaintiff is entitled to judgment against, or any relief whatsoever from, Reynolds in this action and denies the remaining allegations contained in paragraph 53.

**WHEREFORE, as to all counts, Plaintiff demands:**

- **trial by jury;**
- **judgment against each Defendant for an amount in excess of \$15,000;**
- **all damages available under the law;**
- **taxable costs; and**
- **interest as allowed by law.**

**For the Estate:**

- **loss of earnings, if any, of the Decedent from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest and loss of the prospective net accumulations, if any, of the Estate.**
- **medical and funeral expenses due to the Decedent's injury and death;**
- **punitive damages**

**For Surviving Spouse:**

- **the value of lost support and services from the date of the Decedent's injury to his death, with interest, and future loss of support and services from the date of death and reduced to present value.**
- **loss of the Decedent's companionship and protection and for mental pain and suffering from the date of injury.**

Reynolds admits that Plaintiff demands a jury trial. Reynolds denies that Plaintiff complied with the requirements of Section 768.72, Florida Statutes. Reynolds also denies that

Plaintiff is entitled to judgment against, or any relief whatsoever from, Reynolds in this action and denies the remaining allegations contained in the unnumbered paragraphs following paragraph 53 beginning “WHEREFORE.”

### **AFFIRMATIVE DEFENSES**

#### **FIRST AFFIRMATIVE DEFENSE**

The Second Amended Severed Complaint fails to state a claim against Reynolds upon which relief can be granted.

#### **SECOND AFFIRMATIVE DEFENSE**

Plaintiff lacks standing to pursue a claim against Reynolds.

#### **THIRD AFFIRMATIVE DEFENSE**

Any claim or cause of action that Plaintiff may have had is time barred by the applicable statutes of limitation and/or statutes of repose.

#### **FOURTH AFFIRMATIVE DEFENSE**

Reynolds avers that the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.*, as interpreted in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), by the operation of the Supremacy Clause, Article VI, Section 2 of the Constitution of the United States, preempts and bars, in whole or in part, Plaintiff’s claims and causes of action.

#### **FIFTH AFFIRMATIVE DEFENSE**

Plaintiff’s claims against Reynolds are barred, in whole or in part, by the Supremacy Clause, Article VI, Section 2, of the United States Constitution, because those claims are preempted by federal law. 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 Reynolds' manufacture, marketing and sale of cigarettes are preempted.

**SIXTH AFFIRMATIVE DEFENSE**

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

**SEVENTH AFFIRMATIVE DEFENSE**

The State of the Art Defense, Section 768.1259, Florida Statutes, bars in whole or in part, Plaintiff's cause of action based upon defective design because the Reynolds cigarettes Plaintiff and/or Plaintiff's Decedent allegedly smoked conformed with the state of the art of scientific and technical knowledge and other circumstances that existed at the time they were manufactured.

**EIGHTH AFFIRMATIVE DEFENSE**

Reynolds is entitled to set-off, should any damages be awarded against it, in the amount of damages or settlement amounts recovered by Plaintiff or by any entity acting either on its own, on Plaintiff's and/or Plaintiff's Decedent's behalf or in a *parens patriae* capacity on behalf of the citizens of this state, with respect to the same alleged injuries. Reynolds is also entitled to have any damages that may be awarded to Plaintiff reduced by the value of any benefit or payment to Plaintiff and/or Plaintiff's Decedent or to any entity acting either on its own, on Plaintiff's and/or Plaintiff's Decedent's behalf or in a *parens patriae* capacity on behalf of the citizens of this state, from any collateral source.

**NINTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or in part, to the extent that Plaintiff, or any entity acting either on its own, on Plaintiff's and/or Plaintiff's Decedent's behalf or in a *parens patriae* capacity on behalf of the citizens of this state, has released, written off, discounted, written

down, settled, and/or entered into an accord and satisfaction or otherwise compromised Plaintiff's claims, and/or failed to comply with the mandatory provisions of Section 768.76, Florida Statutes, as they pertain to the subrogation and reimbursement rights of collateral source providers.

#### **TENTH AFFIRMATIVE DEFENSE**

If Plaintiff and/or Plaintiff's Decedent was injured or damaged, which injuries and damages at all times are denied, the injuries and any damages were the result of intervening or superseding events, factors, occurrences or conditions, or by the acts or omissions of persons other than Reynolds, whether individual, corporate, associate, or otherwise, whether named or unnamed in the Second Amended Severed Complaint, which were in no way caused by Reynolds and for which Reynolds is not liable.

#### **ELEVENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or part, by the First Amendment to the United States Constitution, by operation of the *Noerr-Pennington*<sup>1</sup> doctrine securing the right to petition government, and by the comparable provisions of the Constitution of the State of Florida.

#### **TWELFTH AFFIRMATIVE DEFENSE**

Any claim or cause of action that Plaintiff may have had is time barred by the doctrines of laches, waiver, and/or estoppel.

#### **THIRTEENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred because the injuries for which Plaintiff seeks to recover were allegedly caused by an inherent characteristic of cigarettes which cannot be eliminated without

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<sup>1</sup> See *Eastern R.R. Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

substantially compromising the products' usefulness or desirability, and which is recognized by the ordinary person with ordinary knowledge common to the community.

#### **FOURTEENTH AFFIRMATIVE DEFENSE**

Plaintiff's Second Amended Severed Complaint should be dismissed for improper venue, or in the alternative, the doctrine of *forum non conveniens* applies to Plaintiff's Second Amended Severed Complaint, requiring dismissal of Plaintiff's claims or transfer to the proper and convenient forum.

#### **FIFTEENTH AFFIRMATIVE DEFENSE**

While denying all averments of negligence, wrongdoing, fault or liability, Reynolds states that it is entitled to reduction of any damage award, in the event Plaintiff settles with any Defendant.

#### **SIXTEENTH AFFIRMATIVE DEFENSE**

In the event that Plaintiff establishes liability on the part of Reynolds, which liability is specifically denied, Reynolds avers that any injury or damages alleged in the Second Amended Severed Complaint were caused by the contributory or comparative negligence of Plaintiff and/or Plaintiff's Decedent, thereby barring Plaintiff's recovery in whole or in part.

#### **SEVENTEENTH AFFIRMATIVE DEFENSE**

Reynolds alternatively avers that Plaintiff and/or Plaintiff's Decedent assumed the risk of or consented to any injury or damages alleged in the Second Amended Severed Complaint, thereby barring any recovery by Plaintiff herein.

**EIGHTEENTH AFFIRMATIVE DEFENSE**

Reynolds alternatively avers that Plaintiff and/or Plaintiff's Decedent had a duty to mitigate any damages from which Plaintiff and/or Plaintiff's Decedent may have suffered, which failure bars or reduces any recovery by Plaintiff herein.

**NINETEENTH AFFIRMATIVE DEFENSE**

If the products allegedly involved in this action were defective or unreasonably dangerous, which Reynolds expressly denies, Plaintiff and/or Plaintiff's Decedent was aware thereof and unreasonably proceeded to make use of the product in that condition.

In the Second Amended Severed Complaint, Plaintiff asserts she is entitled to punitive damages and prays for such relief. Reynolds denies that Plaintiff has satisfied the requirement of Section 768.72, Florida Statutes. Nonetheless, because Plaintiff prays for punitive damages, Reynolds raises the following affirmative defenses.

**TWENTIETH AFFIRMATIVE DEFENSE**

Plaintiff's claim for punitive damages against Reynolds cannot be maintained, because any award of punitive damages under Florida law would be by a jury that (1) is not provided standards of sufficient clarity for determining the appropriateness, and the appropriate size, of a punitive damages award, (2) is not adequately instructed on the limits on punitive damages imposed by the applicable principles of deterrence and punishment, (3) is not expressly prohibited from awarding punitive damages, or determining the amount of an award of punitive damages, in whole or in part, on the basis of invidiously discriminatory characteristics, including the residence, wealth, and corporate status of Reynolds, (4) is permitted to award punitive damages under a standard for determining liability for punitive damages that is vague and arbitrary and does not define with sufficient clarity the conduct or mental state that makes

punitive damages permissible, and (5) is not subject to adequate trial court and appellate judicial review for reasonableness and furtherance of legitimate purposes on the basis of objective standards. Any such verdict would violate Reynolds' due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, Section 9 of the Florida Constitution, and would be improper under the common law and public policies of the State of Florida.

#### **TWENTY-FIRST AFFIRMATIVE DEFENSE**

Plaintiff's claims for punitive damages are barred to the extent that they are based upon conduct unrelated to Plaintiff's and/or Plaintiff's Decedent's alleged harm.

#### **TWENTY-SECOND AFFIRMATIVE DEFENSE**

Plaintiff's claims for punitive damages are barred by due process under the federal and state constitutions to the extent Plaintiff seeks to impose punishment for harm allegedly caused to nonparties.

#### **TWENTY-THIRD AFFIRMATIVE DEFENSE**

Reynolds denies liability for any award of punitive damages not based solely on the specific allegations of Reynolds' conduct made the subject of this lawsuit and that allegedly affected Plaintiff and/or Plaintiff's Decedent, because consideration of other conduct would subject Reynolds to impermissible multiple punishments for the same conduct, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the comparable provisions of the Florida Constitution.

#### **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

Plaintiff's claims for punitive damages are barred to the extent that they are predicated upon lawful conduct by Reynolds.

**TWENTY-FIFTH AFFIRMATIVE DEFENSE**

Plaintiff's claims for punitive damages against Reynolds are barred or limited by Section 768.73, Florida Statutes.

**TWENTY-SIXTH AFFIRMATIVE DEFENSE**

The monetary relief sought, which is intended in part to punish Reynolds, is barred under the Eighth Amendment of the United States Constitution and the comparable provisions of the Florida Constitution as the imposition of an excessive fine.

**TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims for punitive damages are barred absent the safeguards guaranteed by the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and the comparable provisions of the Florida Constitution in that these claims invoke or authorize proceedings and remedies which, though nominally civil, are in reality so punitive in purpose and effect that they transform the relief that Plaintiff seeks into a criminal penalty.

**TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

Plaintiff's claims for punitive damages cannot be sustained because an award of punitive damages exceeding the limits authorized by the criminal laws or other comparable laws of Florida would violate Reynolds' due process and equal protection rights guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and the comparable provisions of the Florida Constitution and would be improper under the law and public policies of the State of Florida.

**TWENTY-NINTH AFFIRMATIVE DEFENSE**

Plaintiff's claims for punitive damages cannot be sustained under Florida law because any award of punitive damages, without the apportionment of the award separately and severally

between or among the alleged joint tortfeasors, as determined by the alleged percentage of the wrong committed by each alleged tortfeasor, would violate Reynolds' due process rights and equal protection rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and the comparable provisions of the Florida Constitution, and would be improper under the common law and public policies of Florida.

#### **THIRTIETH AFFIRMATIVE DEFENSE**

Plaintiff's claims for punitive damages against Reynolds cannot be sustained because an award of punitive damages in this case, combined with any prior, contemporaneous or subsequent judgments or settlements against Reynolds that include punitive damages arising out of the same design, development, manufacture, distribution, marketing, sale or use of Reynolds' cigarettes, would be impermissible multiple punishment in violation of the due process and equal protection rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and the comparable provisions of the Florida Constitution.

#### **THIRTY-FIRST AFFIRMATIVE DEFENSE**

Any award of punitive damages that is disproportionate to the amount of actual damages that does not bear a reasonable relationship to actual damages and that does not correlate to the actual cause of any injury violates Reynolds' rights under the Due Process clause of the Fourteenth Amendment to the United States Constitution and the comparable provisions of the Florida Constitution.

#### **THIRTY-SECOND AFFIRMATIVE DEFENSE**

Plaintiff's claims for punitive damages are barred to the extent that they are based upon conduct occurring outside the State of Florida.

**THIRTY-THIRD AFFIRMATIVE DEFENSE**

To the extent that the laws of other jurisdictions apply, Reynolds invokes each and every constitutional defense available to it under the Constitutions (or similar charters) of each of the other forty-nine states, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States. This specifically includes, but is not limited to, provisions relating to due process, access to the courts, freedom of speech, freedom of association, freedom to petition the government for redress of grievances, and limitations on compensatory and punitive damages.

Reynolds hereby gives notice that it may rely upon any other defense that may become available during the discovery proceedings in this case and hereby reserves its right to amend its answer to assert any such defense. Reynolds also reserves the right to assert other and related defenses as may become available in the event of a determination that the action, or some part thereof, is governed by the substantive law of a state other than Florida.

**JURY DEMAND**

Reynolds demands a trial by jury of all claims triable as of right by jury.

Respectfully submitted,

s/ Troy A. Fuhrman

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**individually and as successor-by-merger to**  
**Lorillard Tobacco Company**

**CERTIFICATE OF SERVICE**

I HEREBY certify that on September 3, 2015, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Filing Portal.

I HEREBY FURTHER CERTIFY that a true and correct copy of the foregoing was served by E-Mail on Plaintiff's counsel and Defendants' counsel listed below this 3<sup>rd</sup> day of September, 2015.

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