

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK

CITY OF NEW YORK and THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Plaintiffs,

- against -

THE TOBACCO INSTITUTE, INC., PHILIP MORRIS INCORPORATED, BROWN & WILLIAMSON TOBACCO CORPORATION, R.J. REYNOLDS TOBACCO COMPANY, B.A.T. INDUSTRIES P.L.C., LORILLARD TOBACCO COMPANY, THE AMERICAN TOBACCO COMPANY, LIGGETT GROUP, INC., UNITED STATES TOBACCO COMPANY, and THE COUNCIL FOR TOBACCO RESEARCH -- U.S.A, INC.,

Defendants.

## COMPLAINT

Index No.                /96

Filed with the Clerk of the Court on October 17, 1996

The plaintiffs, the City of New York ("City") and the New York City Health and Hospitals Corporation ("HHC") (collectively, the "plaintiffs"), by their attorney, Paul A. Crotty, Corporation Counsel of the City of New York, allege:

## INTRODUCTION

Tobacco-related diseases have killed and continue to kill millions of Americans and New Yorkers. In the name of profits, tobacco companies have chosen and continue to choose to ignore and suppress the truth about the hazards of using tobacco.

This action arises out of a decades-long combination of willful and intentional wrongdoing by the leading tobacco companies and their trade associations, which together comprise virtually the entire industry in New York City and are defendants herein. As a paramount industry responsibility deriving from their sale, distribution and marketing of a product under suspicion as a profound risk to health, these defendants voluntarily undertook a duty to conduct research and disclose to the public complete and accurate information about the relationship between tobacco use and disease and to cooperate closely with public officials who safeguard the public health. Yet these same defendants have known for decades from their own secret, internal studies that their products are deadly and addictive. Instead of disclosing this knowledge, the defendants intentionally chose to engage in a unified campaign of deceit and misrepresentation. They also suppressed the development of safer cigarettes, manipulated the level of addictive nicotine

in their products, and promoted and marketed their products to minor children. This course of conduct was intended by the defendants to control and maintain their markets, to maximize their profits, and to minimize their legal exposure -- all the "self preservation" of the industry. Despite the duration and the severity of the misconduct, the industry has enjoyed virtual immunity because of its economic and political power, its scorched-earth litigation tactics, and its fraudulent concealment of unlawful conduct.

The defendants' collective conduct has resulted in an unprecedented impact on the public health, in both human and economic terms. On information and belief, the death toll in one year alone from tobacco use equals the number of American lives lost in battles in all the wars this country has fought this century. Overwhelmingly, the new recruits in this death march are children and adolescents. The City, its residents, and HHC have suffered and incurred enormous expenses as a result of the defendants' misconduct. New York City residents have become ill and died from tobacco-related diseases such as lung and other cancers, emphysema, and heart disease. Because of tobacco-related diseases, the City and HHC expend hundreds of millions of dollars annually in payments for Medicaid recipients, non-Medicaid indigent care, and City employee health insurance.

The City and HHC bring this action to impose upon the industry the legal responsibility for the consequences of its actions. The premise of this action is that the tobacco industry -- and not the City, its residents, or HHC -- should pay for the staggering health care costs caused by the industry's actions in violation of the laws of New York.

In particular, the City and HHC bring this action to protect the citizens and the public health of the City of New York by seeking equitable relief. The City and HHC also bring this action for damages for economic injuries to the plaintiffs which were caused by the unlawful actions of the defendants. Such damages include, but are not limited to, increased expenditures for:

a. New York's Medicaid plan, N.Y. Social Services Law Secs. 363 et seq. and 42 U.S.C. Secs. 1396 et seq. Under the Medicaid plan, the City pays approximately 25% of the costs of Medicaid. N.Y. Social Services Law Sec. 368-a. In fulfilling its statutory duties, the City has expended and will expend substantial sums of money due to the cost of providing health care services for the diagnosis and treatment of tobacco-related illness and diseases for Medicaid recipients. These expenditures have been caused by the unlawful actions of the defendants.

b. Non-Medicaid indigent care in HHC facilities, N.Y. Unconsolidated Laws Secs. 7381 et seq., and other State and federal laws. Pursuant to New York State statute, it is the mission of HHC to provide care and treatment for the ill and infirm regardless of ability to pay or availability of reimbursement from third party payors. N.Y. Unconsolidated Laws Sec. 7382. In fulfilling its statutory mission, HHC has expended and will continue to expend substantial sums of money to diagnose and treat tobacco-related diseases and addiction in uninsured or underinsured, non-Medicaid, indigent persons. In addition, the City also expends substantial sums of money for that tobacco-related, non-Medicaid, indigent care by (i) contributing, pursuant to State and federal law, to bad debt and charity

care pools, including those pools in which HHC participates, and (ii) providing a subsidy to HHC whenever necessary, as required by State law. Plaintiffs' expenditures have been caused by the unlawful actions of the defendants.

c. The City of New York Health Benefits Program. As an employer, the City makes available health coverage for its more than 500,000 employees and retirees and their families, pursuant to statute and its employment contracts, and is mandated by law to offer hospital and medical health coverage and benefits. That coverage includes treatment of tobacco-related diseases. In order to provide those benefits, the City has entered into contractual agreements with certain health care service providers and insurance plans, for which the City pays premiums. The City has paid and will continue to pay substantial sums of money for the costs of premiums, including the cost of providing health care services for treatment of tobacco-related diseases for City employees and retirees. These expenditures have been caused by the unlawful actions of the defendants.

## PARTIES

Plaintiff the City was and is a municipal corporation existing by and under the laws of the State of New York.

Plaintiff HHC was and is a New York public benefit corporation created pursuant to New York Unconsolidated Laws Secs. 7381 et seq. to provide hospital services, including outpatient services, to the population of New York City.

The Tobacco Institute, Inc. ("TI") is a nonprofit corporation organized under the laws of the State of New York with its principal place of business at 1875 I Street N.W., Suite 800, Washington, D.C. 20006. TI at all relevant times was a trade association of the tobacco companies, was funded and controlled by them, and operated as their public relations and lobbying arm.

Philip Morris Incorporated ("Philip Morris") is a cigarette manufacturer and a Virginia corporation whose principal place of business is 120 Park Avenue, New York, New York 10017.

R.J. Reynolds Tobacco Company ("R.J. Reynolds") is a cigarette manufacturer and a New Jersey corporation whose principal place of business is 4th and Main Streets, Winston-Salem, North Carolina 27102.

Brown & Williamson Tobacco Corporation ("Brown & Williamson") is a cigarette manufacturer and a Delaware corporation whose principal place of business is 1500 Brown & Williamson Tower, Louisville, Kentucky 40202.

B.A.T. Industries P.L.C. ("B.A.T. Industries") is a British corporation with its principal place of business at Windsor House, 50 Victoria St., London, England SW1H 0NL. Upon information and belief, through a succession of intermediary corporations and holding companies, B.A.T. Industries is the sole shareholder of Brown & Williamson. Through

Brown & Williamson, B.A.T. Industries has placed cigarettes into the stream of commerce with the expectation that substantial sales of cigarettes would be made in the United States and in New York City. In addition, B.A.T. Industries conducted, or through its agents and/or co-defendants conducted, critical research for Brown & Williamson on the issue of tobacco and health. Further, Brown & Williamson is believed to have sent to England research conducted in the United States on the issue of tobacco and health in an attempt to remove sensitive and inculpatory documents from United States jurisdiction, and these documents are subject to the control of B.A.T. Industries. B.A.T. Industries has been involved in the actions described herein and its actions have affected and caused harm in New York City.

Lorillard Tobacco Company ("Lorillard") is a cigarette manufacturer and a Delaware corporation whose principal place of business is 1 Park Avenue, New York, New York 10016.

The American Tobacco Company ("American Tobacco") is a cigarette manufacturer and a Delaware corporation whose principal place of business is 281 Tresser Boulevard/ 6 Stamford Forum, Stamford, Connecticut 06904.

Liggett Group, Inc. ("Liggett") is a cigarette manufacturer and a Delaware corporation whose principal place of business is 700 West Main Street, Durham, North Carolina 27702.

United States Tobacco Company ("U.S. Tobacco") is a manufacturer of smokeless tobacco products (snuff and chewing tobacco) and a Delaware corporation whose principal place of business is 100 West Putnam Avenue, Greenwich, Connecticut. The word "defendants" as used herein does not include defendant U.S. Tobacco in the context of allegations concerning the manufacture, marketing, and/or sale of cigarettes, including the deliberate refusal on the part of cigarette manufacturers to research, develop and market a safer cigarette, the manipulation of nicotine content in cigarettes, and the marketing of cigarettes to minors; the aforementioned allegations are not to be construed as applying to defendant U.S. Tobacco.

The Council for Tobacco Research - U.S.A., Inc. ("CTR"), successor in interest to the Tobacco Institute Research Committee ("TIRC"), is a nonprofit corporation organized under the laws of the State of New York with its principal place of business at 900 Third Avenue, New York, New York 10022. At all relevant times CTR and TIRC were trade associations of the tobacco companies and were funded and controlled by them.

As used in this Complaint, the terms "defendant" and "defendants" include all named defendants and all predecessor and successor entities to the named defendants. As used in this Complaint, the term "tobacco companies" refers to all defendants except TI and CTR, and the term "trade associations" refers to defendants TI and CTR.

All defendants did and continue to: do business in New York State; make contracts to be performed in whole or in part in New York State; manufacture, test, sell, offer for sale,

supply, or place in the stream of commerce, cigarettes or other tobacco products, or in the course of business materially participate with others in so doing; and perform such acts as are intended to, and do, result in the sale and distribution in New York State of cigarettes or other tobacco products from which the defendants derive substantial revenue. All defendants also caused and continue to cause tortious injury by acts or omissions in New York State, or caused and continue to cause tortious injury in New York State by acts or omissions outside New York State.

## THE HEALTH CONSEQUENCES OF TOBACCO

The human tragedy of smoking-related disease is enormous. Cigarette smoking is the leading cause of premature death in the United States. According to the federal Centers for Disease Control and Prevention, each year smoking-related illnesses kill more than 400,000 Americans, on information and belief exceeding the combined death caused by automobile accidents, AIDS, alcohol use, use of illegal drugs, homicide, suicide and fires. Smoking-related illnesses account for one of every five deaths each year in the United States.

On information and belief, at least 43 chemicals in the smoke inhaled by persons using defendant cigarette manufacturers' products have been determined to be carcinogenic. On information and belief, cigarette smoking causes as much as 85% of all lung cancer. Tobacco products are also linked to cancers of the mouth, larynx, esophagus, stomach, pancreas, uterus, cervix, kidney and colon, among others. On information and belief, all told, tobacco use is responsible for at least 30% of all deaths from cancer.

On information and belief, smoking is the cause of more than 80% of deaths from pulmonary diseases such as emphysema and bronchitis.

Smoking is also responsible for thousands of deaths from cardiovascular diseases, including stroke, heart attack, peripheral vascular disease and aortic aneurysm. Tobacco use is also linked to a large number of other serious illnesses.

The health consequences of smoking among women are of special concern because of the deleterious effect on reproduction. On information and belief, smoking reduces fertility, increases the rate of miscarriages and stillbirths, retards uterine fetal growth, and results in lower birth weight in infants.

As a direct result of the unrestrained and unlawful conduct of the tobacco industry, tobacco use has become the most pervasive public health issue of our time and the single most preventable cause of death in our society. Cigarettes and other tobacco products kill when used as intended, and on information and belief there is no known level of safe consumption.

## THE ECONOMIC TOLL OF TOBACCO IN NEW YORK CITY

The Columbia University Center on Addiction and Substance Abuse, Joseph Califano, Chairman, issued a report earlier this year on the impacts of tobacco, drugs and alcohol on New York City's economy. The Columbia study estimates that New York City government spent \$592 million on health costs related to substance abuse in 1994, with roughly 50%, or almost \$300 million, of direct costs to the City attributable to tobacco use. This amount does not include the indirect costs of tobacco use to the City, such as loss of income from smokers whose illnesses render them unable to work. Nationwide, the federal Centers for Disease Control estimates health care costs for tobacco-related diseases are \$50 billion annually. These costs have been increasing at a precipitous rate, more than doubling in the period from 1987 to 1993.

## THE CONCENTRATION OF THE INDUSTRY

Cigarette manufacturing has been one of the most concentrated industries in the United States throughout this century. Together, Philip Morris, R.J. Reynolds, Brown & Williamson, American Tobacco, Lorillard, and Liggett comprise the Big Six cigarette manufacturers, which control virtually 100% of the market in the United States. Philip Morris and R.J. Reynolds are the industry leaders, with, on information and belief, national market shares of approximately 42% and 29%, respectively. On information and belief, the approximate market shares of the other Big Six cigarette manufacturers are: Brown & Williamson, 12%; Lorillard, 7%; American Tobacco, 7%; and Liggett, 3%. On information and belief, U.S. Tobacco manufactures 88% of the smokeless tobacco products sold in the United States.

In part because of its concentration, the tobacco industry has long been one of America's most profitable businesses, with, on information and belief, profit margins estimated in at least the 30% range. The industry continues to harvest billions of dollars in profits each year from domestic sales alone.

In addition, the concentration of the industry has allowed the defendants to engage in a decades-long conspiracy relating to smoking, health and addiction and to direct their considerable profits to further that conspiracy.

## THE NATURE OF THE CONSPIRACY

This action arises out of an ongoing conspiracy by the leading tobacco companies and their trade associations, which together control the industry supplying tobacco products to consumers in New York City.

Defendants have pursued a conspiracy of deceit and misrepresentation against the public designed to protect tobacco product sales. The means by which the defendants carried out their conspiracy were: first, they agreed falsely to represent to the public that questions about tobacco and health would be answered by a new, unbiased, and trustworthy source and counted on the resulting public trust more effectively to misrepresent, suppress and confuse the facts about the health dangers of tobacco, including addiction; and second, they agreed not to market safer cigarettes.

With respect to those activities, each defendant is sued as a primary violator and as an aider and abettor who rendered substantial assistance in the accomplishment of the acts or omissions alleged herein. In acting to aid and abet and substantially assist the commission of the fraud and other wrongful conduct complained of herein, each defendant acted with an awareness of the fraud and other wrongful conduct and realized that its conduct would substantially assist the accomplishment of the fraud and was aware of its overall contribution to the conspiracy, scheme and common course of wrongful conduct alleged herein.

Defendants set their plan in motion by creating a joint industry research organization in 1954. Since that time, they have used the credibility gained by claims of industry-funded "disinterested" researchers better to misrepresent the material facts to the public. In what has become the industry mantra, defendants claim that there is insufficient research to determine whether tobacco use causes disease and that tobacco is not addictive.

Defendants' misrepresentation of their objectivity to gain credibility and use of that credibility better to deceive the public about tobacco and health have continued for more than four decades. Defendants have engaged in a continuing conspiracy to deceive the public regarding facts material to the decision to purchase cigarettes and other tobacco products.

Moreover, as internal industry research confirmed the health dangers and addictiveness of tobacco use, defendants' deception rose to a new level: they concealed their own negative health and addiction research results from both the public and public health officials. These research results still have not been voluntarily released. But the internal research that has become available directly contradicts what defendants have, for decades, told and continue to tell the public.

Defendants have also concealed from the public the fact that they manipulate and control the nicotine content and delivery of their products to create and sustain users' addiction to tobacco.

The success of the industry's campaign of deceit and misinformation has depended on defendants acting in concert. Without the agreement of each defendant to suppress the truth, the deception that the joint industry research efforts were objective would be revealed, and the substantive claim that "not enough facts are known" to indict tobacco use as the cause of disease would fail. Defendants agreed to come together and to stay together in order to accomplish what could not have otherwise occurred: the unified and consistent distortion of public information on tobacco use, health and addiction.

Finally, defendants conspired to suppress the development, testing and marketing of safer cigarettes, while fraudulently maintaining that their products are safe or that there are no safer alternatives to their products.

#### THE BEGINNING OF THE CONSPIRACY

The industry conspiracy and combination began as early as the 1950s, when the tobacco companies were confronted with the publication of several scientific studies which sounded grave warnings on the health hazards of tobacco. One of the first of these studies was published in 1952 by Dr. Richard Doll, a British researcher. On information and belief, Dr. Doll, in a statistical analysis, found that lung cancer was more common among people who smoked and that the risk of lung cancer was directly proportional to the number of cigarettes smoked. A second study was published in December 1953 by Dr. Ernest Wynder of the Sloan-Kettering Institute. Dr. Wynder painted the shaved backs of laboratory mice with a residue of cigarette smoke. Malignant tumors grew in 44% of the mice, providing biological confirmation of the cancer-causing properties of cigarettes.

The Doll and Wynder studies generated widespread public concern about the health hazards of cigarettes. Confronted with this evidence, the presidents of the leading tobacco companies, including all of the defendant tobacco companies except Liggett, met at an extraordinary gathering in the Plaza Hotel in New York City on December 15, 1953. Hill and Knowlton, a public relations agency, coordinated the meeting and later prepared a memorandum summarizing the discussions of that day. According to the Hill and Knowlton memorandum:

- a. The companies had not met together before because two previous antitrust decrees had prohibited "many group activities." However, the companies viewed the current problem "as being extremely serious and worthy of drastic action."
- b. Another indication of the seriousness of the problem was "that salesmen in the industry are frantically alarmed and that the decline in tobacco stocks on the stock exchange market has caused grave concern...."
- c. The problem was viewed entirely in terms of a public relations problem, as opposed to a public health concern. The industry leaders "feel that the problem is one of promoting cigarettes and protecting them from these and other attacks that may be expected in the future" and that the industry "should sponsor a public relations campaign which is positive in nature and is entirely 'pro-cigarettes.'"
- d. All of the leading manufacturers, except Liggett, agreed to "go along" with the public relations strategy. Liggett decided not to participate at that time "because that company feels that the proper procedure is to ignore the whole controversy."
- e. The group discussed forming an association "specifically charged with the public relations function."
- f. Hill and Knowlton was to play a central role in the industry association. "The current plans are for Hill and Knowlton to serve as the operating agency of the companies, hiring all the staff and disbursing all funds."

Thus, the Tobacco Industry Research Committee ("TIRC"), a trade association, was conceived and born. Five of the Big Six cigarette manufacturers and U.S. Tobacco were original members. Liggett did not join until 1964, the same year that the Surgeon General issued his first report on smoking and health in which he found that cigarette smoking was a cause of lung cancer. TIRC was physically established in the Empire State Building in New York City, one floor below the Hill and Knowlton offices. Internal documents confirm that Hill and Knowlton, and not independent scientists, actually ran TIRC. A "highly confidential" internal memo reported:

"Since the [TIRC] had no headquarters and no staff, Hill and Knowlton, Inc. was asked to provide a working staff and temporary office space. As a first organizational step, public relations counsel assigned one of its experienced executives, W.T. Hoyt, to serve as account executive and handle as one of his functions the duties of executive secretary for the [TIRC]." In 1954, 35 staff members of Hill and Knowlton worked full or part time for TIRC. In that year, TIRC spent \$477,955 on payments to Hill and Knowlton, over 50% of TIRC's entire budget. In 1964 TIRC changed its name to the Council for Tobacco Research ("CTR"). A second trade association, the Tobacco Institute, was formed by the tobacco companies in 1958.

#### THE INDUSTRY'S PROMISE TO PURSUE AND DISCLOSE THE TRUTH

At the time of forming TIRC, the industry undertook an unambiguous continuing duty to protect the public health by representing that it would conduct and disclose unbiased and authenticated research on the health risks of tobacco use. When they made this promise, the tobacco companies knew or should have known that New York City consumers would consider it material to their decision to purchase and use tobacco products. At that time, and continuing to the present, the tobacco companies knew or should have known that failure to fulfill this duty would increase both the public health risks of tobacco use and the costs of health care.

The tobacco industry announced the formation of TIRC on January 4, 1954, with newspaper advertisements placed in 448 newspapers in 258 cities nationwide -- virtually every city with a population of 50,000 or more, including New York City, reaching a circulation of more than 43 million Americans. The advertisement was captioned "A Frank Statement to Cigarette Smokers" and was run under the auspices of TIRC with, inter alia, five of the Big Six cigarette manufacturers (all except Liggett) and U.S Tobacco listed by name. The advertisement stated, in part:

- a. "Recent reports on experiments with mice have given wide publicity to a theory that cigarette smoking is in some way linked with lung cancer in human beings."
- b. "Although conducted by doctors of professional standing, these experiments are not regarded as conclusive in the field of cancer research."
- c. "[T]here is no proof that cigarette smoking is one of the causes" of lung cancer.

d. "We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business."

e. "We believe the products we make are not injurious to health."

f. "We always have and always will cooperate closely with those whose task it is to safeguard the public health."

g. "We are pledging aid and assistance to the research effort into all phases of tobacco use and health."

h. "For this purpose we are establishing a joint industry group consisting initially of the undersigned. This group will be known as TOBACCO INDUSTRY RESEARCH COMMITTEE."

i. "In charge of the research activities of the Committee will be a scientist of unimpeachable integrity and medical repute. In addition there will be an Advisory Board of scientists disinterested in the cigarette industry. A group of distinguished men from medicine, science, and education will be invited to serve on this Board. These scientists will advise the Committee on its research activities."

j. "This statement is being issued because we believe the people are entitled to know where we stand on this matter and what we intend to do about it."

By the spring of 1955, the self-defense strategy recommended by Hill and Knowlton and implemented by the industry through the "Frank Statement" was largely successful. Hill and Knowlton reported to TIRC:

a. "[P]rogress has been made.... The first 'big scare' continues on the wane."

b. "The research program of the [TIRC] has won wide acceptance in the scientific world as a sincere, valuable and scientific effort."

c. "Positive stories are on the ascendancy."

Other public statements by the defendants over the years have repeated the representation that the industry was dedicated to the pursuit and dissemination of the scientific truth regarding tobacco use and health.

For example, in 1970, the Tobacco Institute ran an advertisement captioned, "A Statement About Tobacco and Health," which stated, on information and belief:

a. "We recognize that we have a special responsibility to the public -- to help scientists determine the facts about tobacco and health, and about certain diseases that have been associated with tobacco use."

b. "We accepted this responsibility in 1954 by establishing the Tobacco Industry Research Committee, which provides research grants to independent scientists. We pledge continued support of this program of research until all the facts are known."

c. "Scientific advisors inform us that until much more is known about such diseases as lung cancer, medical science probably will not be able to determine whether tobacco or any other single factor plays a causative role -- or whether such a role might be direct or indirect, incidental or important."

d. "We shall continue all possible efforts to bring the facts to light."

Also in 1970, TI ran an advertisement captioned, "The question about smoking and health is still a question." In this advertisement, TI stated, on information and belief:

a. "[A] major portion of this scientific inquiry has been financed by the people who know the most about cigarettes and have a great desire to learn the truth ... the tobacco industry."

b. "[T]he industry has committed itself to this task in the most objective and scientific way possible."

c. "In the interest of absolute objectivity, the tobacco industry has supported totally independent research efforts with completely non-restrictive funding."

d. "Completely autonomous, CTR's research is directed by a board of ten scientists and physicians.... This board has full authority and responsibility for policy, development and direction of the research effort."

e. "The findings are not secret."

f. "From the beginning, the tobacco industry has believed that the American people deserve objective, scientific answers."

Again in 1970, TI stated, on information and belief, "The Tobacco Institute believes that the American public is entitled to complete, authenticated information about cigarette smoking and health." TI further stated, on information and belief, that: "The tobacco industry recognizes and accepts a responsibility to promote the progress of independent scientific research in the field of tobacco and health."

#### INDUSTRY KNOWLEDGE THAT TBACCO USE IS HARMFUL

Even before the sponsors of the "Frank Statement" represented that there is no proof that cigarette smoking is one of the causes of lung cancer, an industry researcher had reported the contrary. On information and belief, as early as 1946, Lorillard chemist H.B. Parmele, who later became Vice President of Research and member of Lorillard's Board of Directors, wrote to his company's manufacturing committee:

"Certain scientists and medical authorities have claimed for many years that the use of tobacco contributes to cancer development in susceptible people. Just enough evidence has been presented to justify the possibility of such a presumption."

In the years following the 1954 "Frank Statement," and continuing to the present, defendants have repeatedly acted fraudulently and failed to carry out their assumed duty to report objective facts on tobacco use and health. As evidence mounted, both through industry research and truly independent studies, that tobacco use causes cancer and other diseases, defendants continued publicly to represent that nothing was proven against tobacco use. Internal documents show that the defendants knew that the truth was very different. Defendants knew and acknowledged internally the veracity of scientific evidence of the health hazards of tobacco use and at the same time suppressed such evidence where they could -- and attacked it when it did appear.

On information and belief, internal industry documents reveal, for example:

a. A 1956 memorandum from the Vice President of Philip Morris' Research and Development Department to top executives at the company regarding the advantages of a "ventilated cigarette" states that "Decreased carbon monoxide and nicotine are related to decreased harm to the circulatory system; as a result of smoking ... decreased irritation is desirable ... as a partial elimination of a potential cancer hazard."

b. A 1958 memorandum sent to the Vice President of Research at Philip Morris, who later became a member of its Board of Directors, from a company researcher states: "the evidence ... is building up that heavy cigarette smoking contributes to lung cancer either alone or in association with physical and physiological factors...."

c. A 1961 document presented to the Philip Morris Research and Development Committee by the company's Vice President of Research and Development included a section entitled "Reduction of Carcinogens in Smoke." The document states, in part:

"To achieve this objective will require a major research effort, because carcinogens are found in practically every class of compounds in smoke.

This fact prohibits complete solution of the problem by eliminating one or two classes of compounds.

The best we can hope for is to reduce a particularly bad class, i.e., the polynuclear hydrocarbons, or phenols....

Flavor substances and carcinogenic substances come from the same classes, in many instances."

d. A 1963 memorandum to Philip Morris' President and CEO from the company's Vice President of Research describes a number of classes of compounds in cigarette smoke

which are "known carcinogens." The document goes on to describe the link between smoking and bronchitis and emphysema. "Irritation problems are now receiving greater attention because of the general medical belief that irritation leads to chronic bronchitis and emphysema. These are serious diseases involving millions of people. Emphysema is often fatal either directly or through other respiratory complications. A number of experts have predicted that the cigarette industry ultimately may be in greater trouble in this area than in the lung cancer field."

e. Brown & Williamson and its parent company, B.A.T. Industries, researched the health effects of nicotine and were aware early on, as reported at a B.A.T. Group Research Conference in November 1970, that "nicotine may be implicated in the aetiology of cardiovascular disease...."

f. A 1961 "Confidential" memorandum from the consulting research firm hired by Liggett to do research for the company states:

"There are biologically active materials present in cigarette tobacco. These are:

- a) cancer causing
- b) cancer promoting
- c) poisonous
- d) stimulating, pleasurable, and flavorful."

g. A 1963 memorandum from the Liggett consulting research firm states:

"Basically, we accept the inference of a causal relationship between the chemical properties of ingested tobacco smoke and the development of carcinoma, which is suggested by the statistical association shown in the studies of Doll and Hill, Horn, and Dorn with some reservations and qualifications and even estimate by how much the incidence of cancer may possibly be reduced if the carcinogenic matter can be diminished, by an appropriate filter, by a given percentage."

## THE CAMPAIGN OF DECEIT AND MISREPRESENTATIONS

### A. Suppressing Research and Concealing the Facts About Tobacco and Health

Despite overwhelming scientific evidence, and the confirmation of the evidence by their own internal research, defendants continue to this day to repeat -- over and over, in a unified stance -- that there is no causal connection between tobacco use and adverse health effects and that tobacco is not addictive. These representations -- which are fraudulent, misleading, deceptive, and untrue -- are the core of the industry's ongoing conspiracy to market and profit from a product it knows is deadly and addictive.

Moreover, the industry's promises of full disclosure and objective scientific research were never fulfilled. For example, in the late 1960s, R.J. Reynolds had a state-of-the-art laboratory in Winston-Salem, nicknamed "the mouse house." There, scientists conducted research with mice, rats, and rabbits, and began to uncover promising avenues of investigation into the mechanisms of tobacco-related disease. In 1970, this entire research division was disbanded in one day, and all 26 scientists were fired without notice. Company attorneys had collected dozens of research notebooks, still undisclosed, from the scientists several months before the firings.

Instead of the full disclosure and objective research promised, the defendant trade associations -- dominated by public relations officials and attorneys, as opposed to independent scientists -- have served as industry fronts in a campaign of deceit and misinformation aimed at undermining the public perception of the health risks of tobacco use. Internal documents demonstrate that the joint industry research effort undertaken through TIRC (and later through CTR) was not disinterested or objective. Rather, it was designed and used to promote favorable research, to suppress negative research where possible, and to attack negative research where it could not be suppressed, all in order to convince the public that the case against smoking and other uses of tobacco is not closed.

In 1964, the year of the first Surgeon General's Report on Smoking and Health, CTR formed a "special projects division" to assist the industry in concealing unfavorable information, thus making a further mockery of the undertaking to conduct and disclose all of the facts relating to tobacco use and health. Under the auspices of the special projects division, industry research that might indict tobacco use as a cause of illness was diverted and shielded from the public by questionable claims of attorney-client privilege. As the notes of one CTR meeting, written in 1981, stated, on information and belief, "When we started the CTR Special Projects, the idea was that the scientific director of CTR would review a project. If he liked it, it was a CTR special project. If he did not like it, then it became a lawyers' special project." Another memorandum from 1981 explained, on information and belief, "Difference between CTR and Special Four (lawyers' projects). Director of CTR reviews special projects -- if project was problem for CTR, use Special Four."

As with many of its strategies, the industry has been successful in using the CTR special projects division to conceal harmful information. To this day, research from the special projects division remains shielded from public scrutiny.

A 1974 report to the CEO of Lorillard from a research executive described CTR's scientific projects as "hav[ing] not been selected against specific scientific goals, but rather for various purposes such as public relations, political relations, positions for litigation, etc. Thus, it seems obvious that review of such programs for scientific relevance and merit in the smoking and health field are not likely to produce high ratings.... In general, these programs have provided some buffer to public and political attack of the industry, as well as background for litigious [sic] strategy."

On information and belief, a 1978 memo addressed to the CTR file from a Philip Morris official characterized CTR as "an industry 'shield.'" The memorandum goes on to state:

"CTR began as an organization called Tobacco Industry Research Council (TIRC). It was set up as an industry 'shield' in 1954. That was the year statistical accusations relating smoking to diseases were leveled at the industry; litigation began; and the Wynder/Graham reports were issued. CTR has helped our legal counsel by giving advice and technical information, which was needed at court trial.... [T]he 'public relations' value of CTR must be considered and continued.... It is very important that the industry continue to spend their dollars on research to show that we don't agree that the case against smoking is closed.... There is a 'CTR basket' which must be maintained for 'PR' purposes...."

On information and belief, in 1993, a former 24-year employee of CTR stated publicly that the joint industry research efforts were not objective:

"When CTR research found out that cigarettes were bad and it was better not to smoke, we didn't publicize that... the CTR is just a lobbying thing. We were lobbying for cigarettes."

Describing a meeting which included high level officials from various tobacco companies, an industry official wrote in his personal notes that:

"CTR is best & cheapest insurance the tobacco industry can buy and without it the Industry would have to invent CTR or would be dead."

Other internal industry documents also shed light on the true nature of the trade associations, as the following quotations from those documents demonstrate:

a. "Historically, it would seem that the 1954 emergency was handled effectively. From this experience there arose a realization by the tobacco industry of a public relations problem that must be solved for the self-preservation of the industry."

b. "When the products of an industry are accused of causing harm to users, certainly it is the obligation of that industry to endeavor to determine whether such accusations are true or false. Money spent for such purpose should not be regarded as a charitable contribution but as a business expense -- an expense necessary to keep that industry alive. In view of the billions of dollars of annual sales of our industry our expenditures for health research has [sic] been of a minimal order."

c. "For nearly twenty years, this industry has employed a single strategy to defend itself on three major fronts -- litigation, politics, and public opinion. While the strategy was brilliantly conceived and executed over the years, helping us win important battles, it is only fair to say that it is not -- nor was it intended to be -- a vehicle for victory. On the contrary, it has always been a holding strategy, consisting of ... creating doubt about the health charge without actually denying it.... In the cigarette controversy, the public --

especially those who are present and potential supporters (e.g. tobacco state congressmen and heavy smokers) -- must perceive, understand, and believe in evidence to sustain their opinions that smoking may not be the causal factor." This and other evidence demonstrates that the role and purpose of TIRC and CTR in the tobacco companies' strategy was to seek to use the public's trust to propagate pro-tobacco propaganda.

Further, despite defendants' knowledge of the deleterious effects of tobacco use on health and the addictive nature of nicotine, they did not make public their research. For example, on information and belief, the report Liggett presented to the Surgeon General in 1963 omitted all of these views. Instead, it focused on alternative causes of disease, such as air pollution, coffee and alcohol consumption, diet, lack of exercise, and genetics. Liggett criticized the known statistical association between tobacco use and mortality and various diseases as "unreliably conducted" and "inadequately analyzed." The Liggett report concluded that the association between tobacco use and disease was inconclusive and was in fact due to other factors coincidentally associated with tobacco use.

Philip Morris also concealed from the public that it conceded the validity of independent research confirming the relationship between smoking and disease. On information and belief, in a 1971 memorandum, Dr. H. Wakeham, then Vice President of Research and Development, referring to a recent study which found cigarette smoke inhalation caused lung cancer in beagles, stated: "1970 might very properly be called the year of the beagle. Early in the year, the American Cancer Society announced that they had finally demonstrated the formation of lung cancer in beagles by smoke inhalation in the now infamous Auerbach and Hammond study." On information and belief, although Dr. Wakeham criticized the mice cancer studies, he conceded that "the beagle test was a critical one ... for the cigarette causation hypothesis."

Dr. Wakeham's memorandum also demonstrates Philip Morris' approval of the industry's public dismissals of these independent studies. It states, on information and belief, "The strong opposition of the industry to the beagle test is indicative of a new, more aggressive stance on the part of the industry in the smoking and health controversy. We have gone over from what I have called the 'vigorous denial' approach, the take it on the chin and keep quiet attitude, to the strongly voiced opposition and criticism. I personally think this counter-propaganda is a better stance than the former one."

Similarly, B.A.T. Industries' internal recognition of the validity of mouse skin painting experiments to determine the carcinogenic effects of various smoke components differed markedly from the critical view expressed in its public statements. Minutes from a 1969 B.A.T. Industries' research conference state: "[H]istorically, bioassay experiments were undertaken by the industry with the object of clarifying the role of smoke constituents in pulmonary carcinogenesis. The most widely used of the methods [was] mouse-skin painting.... In the foreseeable future, say five years, mouse-skin painting would remain as the ultimate court of appeal on carcinogenic effects." Yet a Brown & Williamson public relations document written only two years later states that "[m]uch of the experimental work involves mouse-painting or animal smoke inhalation experiments ... [T]he results obtained on the skin of mice should not be extrapolated to the lung tissue of the mouse, or

to any other animal species. Certainly such skin results should not be extrapolated to the human lung."

#### B. The "Gentlemen's Agreement" to Suppress Research

There was also a "gentlemen's agreement" among the defendants to suppress independent research by the tobacco companies on the issue of tobacco and health. The general counsels of the Big Six met jointly to review proposals for scientific research. On information and belief, the scientific directors of the Big Six also met jointly and acknowledged "a general feeling that an industry approach as opposed to an individual company approach was highly desirable."

On information and belief, the "gentlemen's agreement" was referenced in a 1968 internal Philip Morris draft memo, which states, "We have reason to believe that in spite of gentlemen's [sic] agreement from the tobacco industry in previous years that at least some of the major companies have been increasing biological studies within their own facilities."

As indicated by this memo, on information and belief, it was believed within the industry that individual companies were performing certain research on their own, in addition to the joint industry research. But the fundamental understanding and agreement remained intact. Harmful information and activities on the health effects of tobacco, including its addictive qualities, would be restrained, suppressed, and/or concealed, as would the research on safer cigarettes.

#### C. Suppressing Safer Cigarettes

At least one manufacturer -- Liggett -- was successful in researching and developing a safer cigarette. But Liggett decided not to market this product, on information and belief, after a threat of retaliation by another manufacturer and after executives expressed concern that marketing a safer cigarette would imply that traditional cigarettes were not safe.

Liggett initiated its safer cigarette project, called XA, in 1968. After an expenditure of only \$14 million, Liggett was able, internally, to proclaim the project a success in 1979. By applying an additive of palladium metal and magnesium nitrate to tobacco to act as a catalyst in the burning process, Liggett found that "[c]igarette tar has been neutralized."

Using this process, Liggett was able to produce cigarettes "of commercial quality." These cigarettes, however, were never marketed.

On information and belief, two reasons apparently led Liggett to abandon its XA project. One was fear that the marketing of a "safer" cigarette would be, in essence, a confession that its -- and the industry's -- other cigarettes were not safe. Thus, on information and belief, one Liggett executive wrote that, "Any domestic activity will increase risk of cancer litigation on existing products." In addition, on information and

belief, there was a threat of retaliation from industry leader Philip Morris if Liggett broke ranks.

James Mold, who was assistant director of research at Liggett during the development of the safer cigarette, has stated, on information and belief:

a. The XA project produced a safer cigarette. "We produced a cigarette which was, we felt, commercially acceptable as established by some consumer tests, which eliminated carcinogenic activity...."

b. After 1975, all meetings on the XA project were attended by lawyers, lawyers collected all notes after the meetings, and all documents were directed to Liggett's law offices to maintain a questionable attorney-client privilege. "Whenever any problem came up on the project, the Legal Department would pounce upon that in an attempt to kill the project, and this happened time and time again."

c. Liggett believed a safer cigarette, "if put on the market, would seriously indict them for having sold other types of cigarettes that didn't contain this, for example." Mr. Dey, the then president of Liggett Tobacco, said that he was told by someone in the Philip Morris company that, if Liggett tried to market such a product, "they would clobber us."

On information and belief, Philip Morris also explored research to develop a safer cigarette, or, in the words of one memorandum to the board of directors, cigarettes with "superior physiological performance." On information and belief, a memorandum noted competitive pressures to produce "less harmful" cigarettes, but, however, was careful to state that "Our philosophy is not to start a war, but if war comes, we aim to fight well and to win." Philip Morris never marketed such a safer cigarette.

A 1987 memorandum authored by an attorney at the firm of Shook, Hardy & Bacon, long-time lawyers for the tobacco industry, confirms, on information and belief, that there was an industry-wide position regarding the issue of a safer cigarette. On information and belief, it states that a smokeless cigarette announced by R.J. Reynolds could "have significant effects on the tobacco industry joint defense efforts" and that "[t]he industry position has always been that there is no alternative design for a cigarette as we know them.... Unfortunately, the Reynolds announcement ... seriously undercuts this component of the industry's defense."

#### D. Suppressing and Concealing Research on Nicotine Addiction

The nicotine in tobacco is addictive. Although defendants conspired to conceal the truth, nicotine is now recognized as addictive by major medical organizations including: the Office of the U.S. Surgeon General, the World Health Organization, the American Medical Association, the American Psychiatric Association, the American Psychological Association, the American Society of Addiction Medicine, and the Medical Research Council in the United Kingdom. All of these organizations acknowledge tobacco use as a form of drug dependence or addiction with severe adverse health consequences. On

information and belief, nicotine is equally addictive as delivered in either cigarettes or smokeless tobacco products, which deliver a similar amount of nicotine.

The industry has developed sophisticated technology to control the levels of nicotine in order to maintain its market. David A. Kessler, M.D., Commissioner of Food and Drugs, testified in 1994 before a Congressional committee that cigarette manufacturers can precisely manipulate nicotine levels in cigarettes and the rate at which the nicotine is delivered in cigarettes and can add nicotine to any part of cigarettes, all in an effort to create and sustain addiction.

In a subsequent appearance before Congress, Dr. Kessler testified that one manufacturer, Brown & Williamson, had developed a tobacco plant code-named Y-1 with perhaps twice the nicotine content of regular tobacco. Brown & Williamson manufactured and marketed cigarettes with Y-1 tobacco in the United State in 1993.

As a result of the industry's actions, as many as 74% to 90% of smokers are addicted. Eight out of ten smokers say they wish they had never started smoking. Two-thirds of adults who smoke say they wish they could quit. Seventeen million try to quit each year, but fewer than one out of ten succeed. A high percentage of smokers who have had surgery for lung cancer or heart attacks return to smoking, as do 40% of smokers who have had their larynxes removed.

Beyond its addictive qualities, nicotine is believed to contribute to cardiovascular disease and death -- a fact which, on information and belief, the tobacco industry has known for a long time.

The tobacco industry has also long known of the addictive property of nicotine, although it continues to this day publicly to deny it. However, internally, cigarette manufacturers have quite explicitly and for a long time viewed the cigarette as a high technology nicotine delivery system.

The tobacco industry has made every effort to conceal and deny that nicotine is a powerfully addictive substance, while it simultaneously studied its addictive character and acted upon that knowledge to maintain tobacco product sales.

This public deception and the industry's secret manipulation of nicotine were and are critically important to the tobacco companies. As objective researchers increased their warnings of the health dangers of tobacco products, nicotine addiction kept people using tobacco and has allowed the tobacco companies to continue to sell their dangerous products even to those who eventually come to doubt the industry's health claims. If a new consumer is fooled for a time by pro-tobacco disinformation on health and takes up the habit, it may well be too late. Instead of a simple decision not to purchase a product, the new consumer must fight an addiction.

Tobacco companies have known since at least the early 1960s of the addictive properties of the nicotine contained in the tobacco products they manufacture and sell. Industry documents are replete with evidence of such knowledge:

a. In 1962, Sir Charles Ellis, scientific advisor to the board of directors of BATCO, Brown & Williamson's parent company, stated at a meeting of BATCO's worldwide subsidiaries, that "smoking is a habit of addiction" and that "[n]icotine is not only a very fine drug, but the technique of administration by smoking has considerable psychological advantages...." He subsequently described Brown & Williamson as being "in the nicotine rather than the tobacco industry."

b. A research report from 1963 commissioned by Brown & Williamson states that, when a chronic smoker is denied nicotine, "[a] body left in this unbalanced state craves for renewed drug intake in order to restore the physiological equilibrium. This unconscious desire explains the addiction of the individual to nicotine." No information from that research has ever been voluntarily disclosed to the public.

c. Addison Yeaman, general counsel at Brown & Williamson, stated in an internal memorandum also in 1963: "moreover, nicotine is addictive. We are, then, in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms."

d. Internal reports prepared by Philip Morris in 1972 and the Philip Morris U.S.A. Research Center in March 1978 demonstrate Philip Morris' understanding of the role of nicotine in tobacco use: "we think that most smokers can be considered nicotine seekers, for the pharmacological effect of nicotine is one of the rewards that come from smoking. When the smoker quits, he foregoes his accustomed nicotine. The change is very noticeable, he misses the reward, and so he returns to smoking."

e. From 1940 to 1970, The American Tobacco Company conducted its own nicotine research, funding over ninety studies on the pharmacological and other effects of nicotine on the body, 80% of all biological studies funded by American Tobacco over this period. In 1969, American Tobacco even test marketed a nicotine-enriched cigarette in Seattle, Washington.

f. In a 1972 document entitled "RJR confidential research planning memorandum on the nature of the tobacco business and the crucial role of nicotine therein," an RJR executive wrote: "In a sense, the tobacco industry may be thought of as being a specialized, highly ritualized, and stylized segment of the pharmaceutical industry. Tobacco products uniquely contain and deliver nicotine, a potent drug with a variety of physiological effects."

The industry's recognition of the extent to which nicotine -- and not tobacco -- defines its product is further illustrated in a 1972 Philip Morris report on a CTR conference, which stated:

"as with eating and copulating, so it is with smoking. The physiological effect serves as the primary incentive; all other incentives are secondary. The majority of the conferees

would go even further and accept the proposition that nicotine is the active constituent of cigarette smoke. Without nicotine, the argument goes, there would be no smoking.

-- . . .

"Why then is there not a market for nicotine per se, to be eaten, sucked, drunk, injected, inserted or inhaled as a pure aerosol? The answer, and I feel quite strongly about this, is that the cigarette is in fact among the most awe-inspiring examples of the ingenuity of man. Let me explain my conviction.... The cigarette should be conceived not as a product but as a package. The product is nicotine.

-- . . .

"Think of the cigarette pack as a storage container for a day's supply of nicotine.... Think of the cigarette as a dispenser for a dose unit of nicotine."

On information and belief, in the early 1980s, researchers working at a Philip Morris laboratory in Richmond confirmed the addictive nature of nicotine and worked to develop a synthetic form of nicotine that would avoid its cardiovascular complications.

On information and belief, the research, led by Victor J. DeNoble and Paul C. Mele, was kept so secret that laboratory animals were brought in at night, under cover. On information and belief, the researchers discovered that nicotine demonstrated addictive qualities and that the animals self-administered the substance, pressing levers to obtain nicotine. On information and belief, the researchers also discovered nicotine analogues -- artificial versions of nicotine which affected the brain much like nicotine; but the analogues did not seem to produce the harmful cardiovascular effects of nicotine, so that rats using the analogue behaved as if they had a nicotine "high," but did not show signs of heart distress like rapid heart beat.

By 1983, the research was becoming problematic. A number of personal injury cases had been filed against the industry, with nicotine dependence a critical issue. In June 1983, on information and belief, DeNoble was called to the Philip Morris headquarters in New York to brief top executives, and, following the meeting, company lawyers visited the lab and reviewed research notebooks. On information and belief, there were discussions about shifting the research out of the company, perhaps to DeNoble and Mele as outside contractors or to a lab in Switzerland, in order to distance Philip Morris from the results.

On information and belief, in April 1984, the researchers were abruptly told to halt their work, kill all rats, and turn in their security badges. On information and belief, the researchers were threatened with legal action if they did not withdraw a paper on the addictive qualities of nicotine, even after it had been accepted for publication in a scientific journal; and they were fired and coerced into remaining silent pursuant to confidentiality agreements, a silence maintained until 1994, when some of them testified before Congress.

## E. Denying the Hazards of Tobacco Before Congress

As yet another example of the defendants' ongoing pattern of deception and suppression, cigarette manufacturer executives testified before Congress in 1994 that tobacco use is not a proven cause of disease and death, and that nicotine is not addictive.

Despite a substantial body of evidence, including evidence developed by the tobacco companies themselves, dating back at least forty years, proving that nicotine is not only addictive, but is the main reason why people continue to use tobacco, the chief executives of the defendant cigarette manufacturers testified under oath in 1994 before the Subcommittee on Health and the Environment of the Committee on Energy and Commerce, U.S. House of Representatives, chaired by Congressman Waxman ("Waxman Subcommittee") that nicotine is not addictive. These executives knowingly made a number of material misrepresentations and omissions to the Waxman Subcommittee about tobacco use, health and addiction. These statements were made with the knowledge that they would be communicated to New York City consumers. The testimony included:

a. Andrew Tisch, then CEO of Lorillard, asserted that smoking does not cause cancer: "We have looked at the data and the data that we have been able to see has all been statistical data that has not convinced me that smoking causes death."

b. Philip Morris President and CEO William I. Campbell, said that:

i. "Philip Morris does not manipulate nor independently control the level of nicotine in our products."

ii. "Cigarette smoking is not addictive."

iii. "Philip Morris research does not establish that smoking is addictive."

c. RJR CEO James W. Johnston said that, "smoking is no more addictive than coffee, tea or Twinkies."

The tobacco companies continue to this day to deny that nicotine is addictive and instead use various misleading euphemisms to describe the role of nicotine, such as "satisfaction", "impact", "strength", "rich aroma" and "pleasure". Nonetheless, there is widespread agreement in the medical and scientific communities that the primary, if not sole function of nicotine is to produce pharmacological effects on the user that constitute and lead to addiction.

## F. Brown & Williamson: Confirming Causation, Removing "Deadwood"

Brown & Williamson documents disclose the far-ranging deceptions of that company in particular, and of the industry in general.

Brown & Williamson, like the other manufacturers, was aware early on of the dangers of tobacco products. Its documents include a review of published statistical research, including the 1952 report by Dr. Doll. On information and belief, the review notes that the studies offered "frightening testimony from epidemiological studies."

Its documents show that by 1957, one of Brown & Williamson's British affiliates, which conducted much of the health research for the U.S. company, was using the code name "zephyr" for cancer. On information and belief, for example, in a March 1957 report, the British affiliate stated, "As a result of several statistical surveys, the idea has arisen that there is causal relation between zephyr and tobacco smoking, particularly cigarette smoking."

In 1962, Brown & Williamson's London-based parent company conducted a meeting of its worldwide subsidiaries in Southampton, England. On information and belief, the following remarks were made at the meeting:

a. One research executive "thought we should adopt the attitude that the causal link between smoking and lung cancer was proven because then at least we could not be any worse off."

b. Another researcher stated that "no industry was going to accept that its product was toxic, or even believe it to be so, and naturally when the health question was first raised we had to start denying it at the P.R. level. But by continuing that policy, we had got ourselves into a corner and left no room to maneuver. In other words, if we did get a breakthrough and were able to improve our product, we should have to about-face, and this was practically impossible at the P.R. level."

c. The chairman of Brown & Williamson's British affiliate stated that it "was very difficult when you were asked as chairman of a tobacco company to discuss the health question on television. You had not only your own business to consider but the employees throughout the industry, retailers, consumers, farmers growing the leaf, and so on. And you were in much too responsible a position to get up and say, 'I accept that the product which we and all our competitors are putting on the market gives you cancer,' whatever you might think privately."

d. The chairman also stated that, if the company manufactured safer brands, "how to justify continuing the sale of other brands?.... It would be admitting that some of its products already on the market might be harmful. This would create a very difficult public relations situation."

The next year, in 1963, Brown & Williamson engaged in an internal debate over whether to disclose what it knew about the adverse effect of smoking to the Surgeon General, who was preparing his first official report on cigarettes. Some of the documents generated by Brown & Williamson as part of this process were shared with its London-based parent company, as well as other tobacco companies and TIRC/CTR. In fact, on information and belief, Addison Yeaman, who was then general counsel at Brown &

Williamson and who authored some of the most critical memoranda from this time, subsequently became a director of CTR.

On information and belief, Yeaman wrote in a 1963 analysis that:

- a. "[N]icotine is addictive."
- b. "We are, then, in the business of selling nicotine, an addictive drug...."
- c. Cigarettes "cause, or predispose, lung cancer...."
- d. "They contribute to certain cardiovascular disorders...."
- e. They may well be truly causative in emphysema, etc. etc."

Yeaman suggested, on information and belief, that Brown & Williamson "accept its responsibility" and disclose the hazards of tobacco products to the Surgeon General and noted that this would allow the company openly to research and develop a safer cigarette.

On information and belief, Yeaman warned, however, that one danger of candid disclosure was that jurors would learn that the tobacco companies knew of the hazards of their products and had the means to make safer cigarettes, but did not do so; he noted that this might cause an "emotional reaction" in jurors. Ultimately, on information and belief, Yeaman's recommendation for full disclosure was rejected.

Subsequently, Brown & Williamson continued to conduct -- and conceal -- biological research on the connection between tobacco use and disease. Some of these research projects confirmed causation between tobacco use and disease.

Although Brown & Williamson conducted extensive biological research and research on a safer cigarette, its research was kept from the public, and, in fact, was eventually silenced. On information and belief, to protect it from disclosure in this country, the more sensitive research was often undertaken by Brown & Williamson's British affiliates, acting on behalf of both companies. On information and belief, much of the work was performed at a British laboratory called Harrogate, which performed work for a number of tobacco companies, and some of this research was shared with these other companies and TI.

On information and belief, Brown & Williamson also attempted to develop a safer cigarette or, in the words of an internal document, "a device for the controlled administration of nicotine." On information and belief, there were at least two safer cigarette projects: Project Ariel, which focused on heating rather than burning tobacco, and Project Janus, which focused on isolating and removing the harmful elements of tobacco. On information and belief, at least some of the work was performed by Battelle Memorial Institute in Geneva. By the end of the 1970s, however, in a pattern that was repeated throughout the industry, Brown & Williamson, on information and belief, closed its research labs and halted work on a safer cigarette.

In 1985, a Brown & Williamson attorney recommended that much of its medical research be declared "deadwood" and shipped to England. On information and belief, the attorney stated, "I have marked with an X documents which I suggested were deadwood in the behavioral and biological studies," and further suggested that the research, development, and engineering department also "should undertake to remove the deadwood from its files."

## MANIPULATING THE DELIVERY OF NICOTINE

On information and belief, American tobacco plants have undergone cumulative increases in total nicotine levels since the 1950s, and nicotine levels in the most widely grown American tobacco plants increased between ten and fifty percent between 1955 and 1980. This increase is the result of the industry's active and controlling participation in efforts to breed and cultivate tobacco for higher nicotine levels.

The nicotine content of raw tobacco is not the only variable manipulated by the cigarette manufacturers to deliver a pharmacologically active dose of nicotine to the smoker. Cigarettes are not simply cut tobacco rolled into a paper tube. Modern cigarettes are painstakingly designed and manufactured to control nicotine delivery to the smoker.

For example, cigarette manufacturers add several ammonia compounds during the manufacturing process which increase the delivery of nicotine and almost double the nicotine transfer efficiency of cigarettes.

In 1995, on information and belief, Brown & Williamson publicly denied that the use of ammonia in the processing of tobacco increases the amount of nicotine absorbed by the smoker. Nevertheless, the company's own internal documents reveal that it and the other cigarette manufacturers use ammonia compounds to increase nicotine delivery. A 1991 Brown & Williamson confidential blending manual states:

"Ammonia, when added to a tobacco blend, reacts with the indigenous nicotine salts and liberates free nicotine.... As the result of such change the ratio of extractable nicotine to bound nicotine in the smoke may be altered in favor of extractable nicotine. As we know, extractable nicotine contributes to impact in cigarette smoke and this is how ammonia can act as an impact booster."

On information and belief, all American cigarette manufacturers except Liggett use ammonia technology in their cigarettes.

Tobacco industry patents also show that the cigarette industry has developed the capability to manipulate nicotine levels in cigarettes to an exacting degree. For example:

a. A Philip Morris patent application discusses an invention that "permits the release ... in controlled amounts and when desired, of nicotine into tobacco smoke."

b. On information and belief, another Philip Morris patent application explains that the proposed invention "is particularly useful for the maintenance of the proper amount of nicotine in tobacco smoke," and notes that "previous efforts have been made to add nicotine to Tobacco Products when the nicotine level in the tobacco was undesirably low."

c. On information and belief a 1991 RJR patent application states that "processed tobaccos can be manufactured under conditions suitable to provide products having various nicotine levels."

The tobacco companies' manipulation and control of nicotine levels is further evidenced by the emergence of independent companies that specialize in manipulating nicotine and that are now offering their services to tobacco companies. On information and belief, a process called tobacco reconstitution, patented and marketed by the Kimberly-Clarke Corporation subsidiary, LTR Industries, is widely used throughout the industry.

Reconstituted tobacco is made from stalks and stems and other waste that cigarette manufacturers formerly discarded and now use to make cigarettes more cheaply. In the reconstitution process, pieces of tobacco material undergo treatment that results in the extraction of some soluble components, including nicotine. The pieces are then physically formed into a sheet of tobacco material, to which the extracted nicotine is re-added. Although denied by tobacco executives, it is publicly reported that this process adjusts nicotine levels in the products, and that one manufacturer "readily admits to setting levels of nicotine ... for the tobacco sheet."

On information and belief, an advertisement in tobacco industry trade publications for the Kimberly-Clarke tobacco reconstitution process states:

"Nicotine levels are becoming a growing concern to the designers of modern cigarettes, particularly those with lower 'tar' deliveries. The Kimberly-Clarke tobacco reconstitution process used by LTR Industries permits adjustments of nicotine to your exact requirements.... We can help you control your tobacco."

The tobacco industry's own trade literature explains, on information and belief, that the Kimberly-Clark process enables manufacturers to triple or even quadruple the nicotine content of reconstituted tobacco, thereby increasing the nicotine content of the final manufactured product.

Another enterprise explicitly specializes in the manipulation of nicotine and its use as an additive. This company does business under the name "The Tobacco Companies of the Contraf Group." An advertisement run by the Contraf Group in the international trade press states, on information and belief: "Don't Do Everything Yourself! Let us do it More Efficiently!" On information and belief, calling itself "The Niche Market Specialists," Contraf lists among its areas of specialization "Pure Nicotine and other special additives."

Manipulation of nicotine levels is also prevalent in smokeless tobacco products. On information and belief, as found by the FDA in its 1995 investigation into nicotine and

tobacco products, smokeless tobacco companies, such as U.S Tobacco, manufacture and sell products with varying nicotine content, for the purpose of introducing users to milder and lower-nicotine brands and then inducing them to switch to more full-bodied brands with higher nicotine content.

The industry's suppression of information regarding nicotine addiction and its manipulation of nicotine levels had the intended effect -- it misled public officials and the public. For example, Joseph Califano, Secretary of Health, Education and Welfare during the Carter Administration, stated recently that, had he known in 1979 what the tobacco companies knew and been privy to their research on addiction and their ability to manipulate the amount of nicotine in cigarettes, "the 1979 Surgeon General's report would have found cigarettes addictive, and we would have moved to regulate them. Unfortunately, the President of the United States, the Secretary of HEW and the Surgeon General were all victims of the concealment campaign of the tobacco companies."

#### MAINTAINING THE MARKET THROUGH SALES TO MINORS

In addition to ensuring a captive market through misrepresentations and deceit and through maintaining the addiction of its customers, the tobacco industry has maintained its sales -- and replaced the hundreds of thousands of tobacco users who die each year -- by the knowing attraction, through advertising and other marketing techniques, of children and adolescents, to whom it is illegal to sell tobacco in any form in New York State.

The Surgeon General found in her 1994 report on Smoking and Health that smoking begins primarily during childhood and adolescence. Eighty-two percent of daily smokers had their first cigarette before age 18, sixty-two percent before age 16, and thirty-eight percent before age 14. Moreover, the younger a person begins to smoke, the more likely he or she is to become a heavy smoker. Sixty-seven percent of children who start smoking in the sixth grade become regular adult smokers and forty-six percent of teenagers who start smoking in the eleventh grade become regular adult smokers. Each day more than 3,000 American teenagers start smoking.

On information and belief, the Surgeon General summarized the problem in her 1994 report as follows:

- a. "Nearly all first use of tobacco occurs before high school graduation; this finding suggests that if adolescents can be kept tobacco-free, most will never start using tobacco."
- b. "Most adolescent smokers are addicted to nicotine and report that they want to quit but are unable to do so...."
- c. "Cigarette advertising appears to increase young people's risk of smoking by affecting their perceptions of the pervasiveness, image, and function of smoking."

d. "In 1990, cigarette advertising and promotional expenditures were almost \$4 billion, making cigarettes the second most promoted consumer products, after automobiles, in the U.S."

Cigarette smoking among children and teenagers is on the rise. A 1995 National Institute of Drug Abuse study found, on information and belief, that between 1991 and 1994, the proportional increase in smoking rates was greatest among eighth graders, rising by 30%.

The most notorious recent example of the industry targeting of minors is the continuing Joe Camel advertising campaign conducted by R.J. Reynolds. On information and belief, when R.J. Reynolds began this cartoon campaign in 1988, Camel's share of the children's market was only 0.5%, but in just a few years, its share of this illegal market has increased to 32.8%, representing sales estimated at \$476 million per year. Another indication of the phenomenal success of this marketing campaign is the fact that, on information and belief, in a recent survey of six-years-old, 91% of the children could correctly match Old Joe with a picture of a cigarette, and both the silhouette of Mickey Mouse and the face of Old Joe were nearly equally well recognized by almost all children.

On information and belief, the model who portrayed the "Winston Man" for RJR's Winston brand cigarettes testified before Congress in 1994: "I was clearly told that young people were the market that we were going after." He further testified, on information and belief, that "it was made clear to us that this image was important because kids like to role play, and we were to provide the attractive role models for them to follow.... I was told I was a live version of the GI Joe...."

An RJR affiliate studied in detail the motivations of young smokers. On information and belief, a "Youth Target" study was the first of a planned series of research studies in the lifestyles and value systems of young men and women in the 15-24 age range, the stated purpose of which was to "provide marketers and policy makers with an enriched understanding of the mores and motives of this important emerging adult segment which can be applied to better decision making in regard to products and programs directed at youth." On information and belief, the study focused on the "primary elements of lifestyles and values among the youth of today," in learning how to market products to children and teens.

On information and belief, Philip Morris tracked hyperactive children in grade school to research whether they would become smokers and conducted market research concerning minors who smoke or are apt to smoke. On information and belief, Philip Morris has recently begun a program which is directed in part to the minor market and which offers premiums for coupons obtained from cigarette packages, a marketing practice which RJR also engages in. In a recent letter to the Attorney General of Washington, on information and belief, Philip Morris recently proposed to address "the issue of youth smoking" by voluntarily banning tobacco advertisements near schools and playgrounds and in youth-oriented publications, prohibiting tobacco brand names, logos and characters on promotional items like t-shirts and caps, banning cigarette vending machines, limiting tobacco brand name sponsorship to events with primarily adult audiences, and banning

advertising in video arcades and family-oriented centers -- thus effectively admitting that all of these marketing methods are designed to and in fact attract minors to tobacco use and have been used by the industry for that purpose.

U.S. Tobacco has, on information and belief, also engaged in an ongoing campaign to induce minors to use its smokeless tobacco products. On information and belief, its lower-nicotine, milder brands are aimed at new users, mainly cigarette smokers, between ages 15 and 35. On information and belief, a U.S. Tobacco employee told a New York Post reporter:

"A lot of young people are getting into it [smokeless tobacco use].... It's become a status thing. When a kid gets a new pair of jeans, he puts the snuff can in the back pocket and rubs it till the outline shows. It shows he's old enough to chew."

On information and belief, all tobacco companies are aware of the fact that smoking begins primarily among youth who are not yet 18 years of age and direct a substantial portion of their advertising and other marketing efforts at that group.

#### THE INTENT AND FORESEEABLE RESULTS OF DEFENDANTS' CONDUCT

Defendants knew and intended that their unlawful conduct, as outlined above, in suppressing information about health and addiction, distributing misinformation, suppressing safer cigarettes, manipulating nicotine content, and marketing tobacco products to minors, would cause millions of New York City residents to begin to use tobacco, primarily in their youth and adolescence, and would cause millions of New York City residents to continue to use tobacco throughout all or most of their lifetimes.

It was reasonably foreseeable by defendants and, on information and belief, defendants knew that their unlawful conduct would cause disease and addiction in millions of people and would cause them to seek necessary medical care to diagnose and treat that disease and addiction. Despite this knowledge, defendants continued their unlawful conduct.

It was reasonably foreseeable by defendants and, on information and belief, defendants knew that their unlawful conduct would result in plaintiffs expending millions of dollars for medical care, as they must do as set forth above in paragraph 5. Despite this knowledge, defendants continued their unlawful conduct.

#### TOLLING OF APPLICABLE STATUTES OF LIMITATION

Any applicable statutes of limitation have been tolled by defendants' affirmative and intentional acts of fraudulent concealment, suppression of the truth, misrepresentation and denial of the facts, as alleged above. Defendants' acts of fraudulent concealment include intentionally covering up and refusing to disclose internal documents, suppressing and subverting medical and scientific research, and falsely designating documents as protected from disclosure by the attorney-client privilege, all with the intent and effect of suppressing information concerning the health consequences of tobacco use, the addictive properties of

nicotine, the development of a safer cigarette, the manipulation of nicotine levels in their products, and the promoting and marketing of their products to minors. Through such acts of fraudulent concealment, defendants have successfully concealed the truth from plaintiffs and the public. Indeed, defendants' denial, misrepresentations, concealment, and suppression of the truth continue to this day.

In the alternative, defendants are estopped from relying on any statutes of limitation because of the acts of denial, misrepresentation, concealment and suppression of the truth set forth above.

#### STATEMENT OF CLAIMS COUNT I -- FRAUD AND MISREPRESENTATION

Plaintiffs reallege paragraphs 1 through 131.

As described above, defendants knew beginning in at least the early 1950s of the health hazards of tobacco and knew beginning in at least the early 1960s of the addictive properties of nicotine, and their knowledge was repeatedly confirmed thereafter by further research.

As described above, at all relevant times until the present, defendants repeatedly made affirmative misrepresentations concerning the relationship between tobacco use and disease, the addictiveness of nicotine, the tobacco companies' manipulation of nicotine content, and defendants' commitment to conduct and disclose the results of objective research concerning those issues.

Defendants' statements and representations were materially false, incomplete and fraudulent and omitted material facts known to defendants at the time they made such statements and representations. When they made them, defendants knew such statements and representations to be materially false, incomplete and fraudulent and knew that they omitted material facts.

As described above, at all relevant times up to the present, defendants had a duty to disclose material facts concerning the relationship between tobacco use and disease, the addictiveness of nicotine, the tobacco companies' manipulation of nicotine content, and the cigarette companies' ability to research, develop and market a safer cigarette, but defendants intentionally or recklessly failed to disclose those material facts. Moreover, knowing that their failure to disclose would help to induce children and teenagers to use tobacco, defendants nevertheless directed much of the promotion and advertising of their products to minors in order to attract that market.

Defendants, motivated by economic gain, intended that consumers, in deciding whether to begin or continue using tobacco, would rely on defendants' materially false, incomplete and/or fraudulent statements and representations and would be lulled and induced by defendants' suppression of and failure to disclose material facts into believing that tobacco is safe. Defendants further intended thereby to deceive and defraud consumers and to induce them to purchase and use tobacco products.

Numerous consumers began or continued to use tobacco in reasonable reliance on defendants' materially false, incomplete and/or fraudulent statements and representations, and/or in reasonable reliance upon defendants' failure to disclose material facts, and numerous consumers were thereby induced to purchase and use tobacco products.

As a result, plaintiffs have suffered substantial injuries and damages for which defendants are jointly and severally liable.

## COUNT II -- NEW YORK ANTITRUST LAW COMBINATION TO UNREASONABLY RESTRAIN TRADE AND COMMERCE

Plaintiffs reallege paragraphs 1 through 131.

New York General Business Law ("GBL") Sec. 340.1. provides:

Every contract, agreement, arrangement or combination whereby

A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby

Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby

For the purpose of establishing or maintaining any such monopoly or unlawful interference with free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void.

Beginning at least as early as the 1950s, and continuing until the present date, defendants entered into a contract, combination, agreement, arrangement or conspiracy to restrain competition or the free exercise of activities in the conduct of business, trade or commerce by: restraining and suppressing research on the harmful effects of tobacco use and the addictive nature of nicotine; restraining and suppressing the dissemination of information on the harmful effects of tobacco use and the addictive nature of nicotine; waging a campaign of false and deceptive promotion and advertising to the exclusion of alternative, truthful promotional activities; and restraining and suppressing the research, development, production, and marketing of a higher quality and safer cigarette. This has resulted in adverse health effects in millions of people.

As a result of defendants' unlawful activity, plaintiffs have suffered and will continue to suffer substantial injuries and damages to their business and property for which defendants are jointly and severally liable.

Unless enjoined from doing so, defendants will continue to violate this statute, for which violations plaintiffs have no adequate remedy at law.

COUNT III -- DECEPTIVE TRADE PRACTICES: GBL Sec. 349

Plaintiffs reallege paragraphs 1 through 131.

GBL Sec. 349 provides in part:

(a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

-- . . .

(h) In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, which ever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

Defendants, by engaging in the conduct described above, have committed deceptive acts and practices in the conduct of their business and have violated and continue to violate GBL Sec. 349.

As a result of defendants' deceptive acts and practices, plaintiffs have suffered and will continue to suffer substantial injuries and damages for which defendants are jointly and severally liable.

Unless enjoined from doing so, defendants will continue to violate this statute, for which violations plaintiffs have no adequate remedy at law.

COUNT IV -- FALSE ADVERTISING: GBL Sec. 350

Plaintiffs reallege paragraphs 1 through 131.

GBL Sec. 350 provides:

False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful.

GBL Sec. 350-a provides:

The term "false advertising" means advertising, including labeling, which is misleading in a material respect and in determining whether any advertising is misleading, there shall be taken into account (among other things) not only representations made by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertising fails to reveal facts material in the light of such representations with respect to the commodity to which the advertising relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.

GBL Sec. 350-d provides, in part:

3. Any person who has been injured by reason of any violation of section three hundred fifty or three hundred fifty-a of this article may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

Defendants, by engaging in the conduct described above, violated and continue to violate GBL Sec. 350.

As a result of defendants' false advertising, plaintiffs have suffered and will continue to suffer substantial injuries and damages for which defendants are jointly and severally liable.

Unless enjoined from doing so, defendants will continue to violate this statute, for which violations plaintiffs have no adequate remedy at law.

#### COUNT V -- UNDERTAKING OF SPECIAL DUTY

Plaintiffs reallege paragraphs 1 through 131.

Defendants assumed a special responsibility and duty, within the meaning of Restatement (Second) of Torts Sec. 323, to render services for the protection of the public health and a duty to those who advance and protect the public health, including the City of New York and HHC, by their representations and undertakings to: accept an interest in the public's health as a basic and paramount responsibility; cooperate closely with those who safeguard the public health; aid and assist the research effort into all aspects of tobacco use and health; continue research and all possible efforts until all the facts were known; and provide complete and authenticated information about tobacco use and health, including disclosing any information which indicated that tobacco use was not safe.

Defendants recognized that their undertaking was necessary for the protection of the public health and protection of their product. Defendants recognized that their conduct would affect the habits and health of millions of Americans and the cost of medical care.

Defendants have breached and continue to breach their special responsibility and duty.

As a result of defendants' conduct, plaintiffs have suffered and will continue to suffer substantial injuries and damages for which defendants are jointly and severally liable.

#### COUNT VI -- STRICT LIABILITY

Plaintiffs reallege paragraphs 1 through 131.

Defendant tobacco companies processed, manufactured, designed, developed, tested, packaged, inspected, sold, distributed, supplied, delivered, marketed and/or promoted tobacco products that were defective and not reasonably safe for the uses for which they were intended.

These tobacco products were likely to cause injury to persons who used them as intended, which was without any substantial change from the products as sold and which included regular and prolonged consumption of the products over a period of years, indeed over a lifetime. The injury to those consumers and the public as a whole far outweighed the utility of the tobacco products sold.

At least since 1979, alternative designs for the tobacco products sold by defendant tobacco companies were available to them that would have made the products safer and less defective, without unreasonable cost, or such alternative designs would have been available to them had they undertaken appropriate, adequate and proper research and development.

Large numbers of consumers used these tobacco products in a reasonably foreseeable manner as intended by defendant tobacco companies, which included regular and prolonged consumption of the products over a period of years. As a result of that use and the defective and unreasonably dangerous nature of the products, many of those consumers became addicted to tobacco and/or ill and required substantial medical care.

As a result, plaintiffs have suffered and will continue to suffer substantial injuries and damages for which defendant tobacco companies are jointly and severally liable.

#### COUNT VII -- NEGLIGENT PRODUCT DESIGN

Plaintiffs reallege paragraphs 1 through 131.

At all relevant times, defendant tobacco companies knew or should have known that use of their tobacco products as intended imposed unreasonable and grave risks to the health of consumers and imposed an unreasonable and grave risk of addiction. Defendant tobacco companies knew of the grave risks caused by their products from investigations and testing performed by themselves or others, or, to the extent they did not fully know of those risks,

it was because they unreasonably failed to perform appropriate, adequate and proper investigations and tests that would have disclosed those risks.

At least since 1979, alternative designs for the tobacco products sold by defendant tobacco companies were available to defendants that would have made the products safer and less defective without unreasonable cost. Defendant tobacco companies knew of these alternative designs, but nevertheless unreasonably failed to implement them. To the extent that they did not know of alternative, safer designs for their products, defendant tobacco companies should have known of them and would have known of them had they conducted appropriate, adequate and proper research and development.

Large numbers of consumers used tobacco products designed, manufactured, sold and distributed by defendant tobacco companies in a reasonably foreseeable manner and as intended by the manufacturers, which included regular and prolonged consumption of the products over a period of years. As a result of that use and the unreasonably dangerous nature of the products, many of those consumers became addicted and/or ill and required substantial medical care.

As a result, plaintiffs have suffered and will continue to suffer substantial injuries and damages for which defendant tobacco companies are jointly and severally liable.

#### COUNT VIII -- BREACH OF EXPRESS AND IMPLIED WARRANTIES

Plaintiffs reallege paragraphs 1 through 131.

The defendants made affirmations or promises regarding the health effects of their products to the public. Starting with the "Frank Statement" in 1954 and continuing to the present day, defendants claimed their tobacco products were safe and not addictive and promised to fully disclose to the public the results of research they committed themselves to undertake on the health effects of tobacco use.

These affirmations, as well as the extensive advertising of the industry, became the basis of the bargain for many individuals, both in beginning to use tobacco or continuing to use tobacco. Many consumers relied on these continuing affirmations in buying and using the defendants' products and relied on defendants' representations that tobacco products are safe and fit for use by humans.

Defendants have breached the express warranties contained in their affirmations and advertising, because defendants' products are not safe and fit for use as intended and are addictive, and because defendants did not undertake adequate research on the health effects and addictiveness of tobacco use and did not disclose the results of the research they did undertake.

In addition, defendants have breached their implied warranty of merchantability because their products are not fit for their intended purposes. Further, defendants knew their tobacco products were unfit for use as intended.

As a result of the defendants' breach of the express warranties and the implied warranties of merchantability and fitness for a particular purpose, plaintiffs have suffered substantial injuries and damages for which the defendants are jointly and severally liable.

#### COUNT IX -- NEGLIGENT AND INTENTIONAL ENTRUSTMENT

Plaintiffs reallege paragraphs 1 through 131.

Defendant tobacco companies distributed and marketed tobacco products through third persons in the City of New York for use by others, tobacco consumers, whom defendant tobacco companies knew or had reason to know to be likely to use the products in a manner involving unreasonable risk of physical harm to themselves, including the health risks of smoking and the risk of addiction.

Defendant tobacco companies knew or should have known that their tobacco products would be sold to and used by large numbers of minor children in New York City; indeed, as set forth above, they directed their marketing efforts with the intent and purpose of inducing minors to purchase and use their tobacco products. Such sale of tobacco products to minor children under the age of 18 years was and is in violation of New York Penal Law Sec. 260.21 and New York Public Health Law Secs. 1399-cc, et seq. Defendant tobacco companies knew or had reason to know that those minor children, because of their youth, incompetence and inexperience, would be unable to use tobacco products in a manner that would avoid addiction and that would not cause them an unreasonable and serious risk of physical harm.

Because of the foregoing, numerous persons in New York City have become addicted to cigarettes and have suffered physical harm.

As a result, plaintiffs have suffered substantial injuries and damages for which the defendant tobacco companies are jointly and severally liable.

#### COUNT X -- PUBLIC NUISANCE

Plaintiffs reallege paragraphs 1 through 131.

By the wrongful conduct alleged above, including defendants' distribution and marketing of tobacco products to the public without disclosure of information in their sole possession relating to the harmful health effects and addictive properties of their products, their deliberate and intentional campaign to confuse and deceive the public concerning those addictive and harmful health effects, their distribution and marketing of harmful and addictive tobacco products when they knew that safer cigarettes were available, their manipulation of addictive nicotine levels in their products, and their marketing of tobacco products with the intent to induce minors to use them, defendants have unreasonably endangered and injured the public health and interfered with the public's right to be free

from the widespread distribution of substances causing disease and dependency and to be knowledgeable concerning the dangers of defendants' products.

As a result of the foregoing, plaintiffs have incurred special damages not common to the public at large, for which defendants are jointly and severally liable.

Unless defendants are enjoined and restrained from continuing their harmful activities and ordered to undertake affirmative steps to undo and abate the harm and confusion caused by their harmful activities, the unreasonable endangerment of the public health as described above will continue, for which plaintiffs have no adequate remedy at law.

#### COUNT XI -- INDEMNITY

Plaintiffs reallege paragraphs 1 through 131.

Defendants breached duties to the public and to tobacco consumers, including but not limited to the duty not to place in the stream of commerce unreasonably dangerous tobacco products, the duty not to fraudulently conceal or suppress information and research on the safety of tobacco products and the addictiveness of nicotine, the duty undertaken by them to conduct research into the health effects of tobacco use and to disclose the results of that research, the duty to make their products safe and non-addictive, and the duty not to market tobacco products to children.

As a result of their breach of those duties, defendants became obligated to pay for the harm caused by their wrongful conduct, yet defendants have not done so. Instead, the defendants embarked on a campaign of denial, subterfuge, and deceit to deny responsibility, to maintain their profits, and to avoid paying for the consequences of the harm they have caused.

As set forth in paragraphs 5.a and 5.b above, plaintiff the City of New York has been and will be required by federal and New York State Medicaid statutes to expend large sums of money to pay the costs of diagnosing and treating Medicaid patients in New York City with tobacco-related diseases and addiction; and pursuant to various State and federal laws, both HHC and the City expend substantial sums of money to diagnose and treat non-Medicaid, indigent patients in New York City with tobacco-related diseases and addiction.

As set forth in paragraph 5.c above, the City is obligated by statute and by its employment contracts to provide health coverage to its employees and retirees. The City pays a substantial portion of the costs of that coverage, and a substantial portion of those costs is attributable to health care services provided for the diagnosis and treatment of tobacco-related diseases and addiction.

As a result of defendants' wrongful activities, and as a result of plaintiffs' statutory and contractual obligations, plaintiffs have paid costs resulting from defendants' breach of duty and have discharged a duty that should have been discharged by defendants. Plaintiffs are entitled to indemnity from defendants, jointly and severally, for those costs.

## COUNT XII -- RESTITUTION

Plaintiffs reallege paragraphs 1 through 131.

Defendants breached duties, including but not limited to the duty not to place in the stream of commerce unreasonably dangerous tobacco products, the duty not to fraudulently conceal or suppress information and research on the safety of tobacco and the addictiveness of nicotine, the duty undertaken by them to conduct research into the health effects of tobacco use and to disclose the results of that research, the duty to make their products safe and non-addictive, and the duty not to market tobacco products to children.

As a result of their breach of those duties, defendants became obligated to pay for the harm caused by their wrongful conduct, yet they have not done so. Instead, the defendants embarked on a campaign of denial, subterfuge and deceit to deny responsibility, to maintain their profits, and to avoid paying for the consequences of the harm they have caused.

Plaintiffs have expended large sums of money to pay for the costs of the harm caused by defendants' wrongful conduct, including the costs of treating Medicaid patients and non-Medicaid, indigent patients in New York City with tobacco-related diseases and addiction, and including the costs of providing medical coverage and benefits to the City's employees to the extent attributable to tobacco-related diseases. Plaintiffs' expenditures were and continue to be immediately necessary to protect the health and safety of the public and of the City's employees.

Plaintiffs had and continue to have the intent to charge and recoup from defendants these sums of money.

As a result of defendants' wrongful activities and the necessity of plaintiffs' expenditures, plaintiffs have paid costs resulting from defendants' breach of duty. Defendants are the actual wrongdoers and had and have the duty to pay the costs resulting from their breach of duty; therefore defendants must jointly and severally make restitution to the plaintiffs for having paid those costs.

## COUNT XIII -- UNJUST ENRICHMENT

Plaintiffs reallege paragraphs 1 through 131 and paragraphs 195 through 198.

Defendants, through their wrongful conduct as described above, have reaped substantial profits from the sale of tobacco products in New York City, profits which would have been reduced by the costs resulting from defendants' wrongful conduct had defendants not failed and refused to undertake their duty to pay those costs and not stood by while plaintiffs paid those costs.

In equity and good conscience, it would be unjust and unconscionable to permit defendants to enrich themselves at the expense of plaintiffs and to retain the benefit of

plaintiffs' expenditures without fair compensation to plaintiffs; therefore, defendants must disgorge their unjustly acquired profits.

## PUNITIVE DAMAGES

Defendants' actions described above were performed willfully, intentionally and with reckless disregard for the rights of plaintiffs and the public.

Accordingly, plaintiffs seek and are entitled to punitive or exemplary damages in an amount to be determined at trial.

## JOINT LIABILITY

### A. Civil Conspiracy

Defendants reached a common agreement or understanding to commit tortious acts, including, but not limited to: restraining and suppressing research on the harmful effects of tobacco use and the addictiveness of nicotine; restraining and suppressing the dissemination of information on the harmful effects of tobacco use and the addictiveness of nicotine; engaging in affirmative misrepresentations on the harmful effects of tobacco use and the addictiveness of nicotine; concealing from or misleading local, state and federal governments and regulators about such research and information; and restraining and suppressing the research, development, production, and marketing of a safer cigarette. With respect to those activities, each defendant is sued as a co-conspirator, and the liability of each arises from the common agreement or understanding among them knowingly to pursue a common course of conduct involving the commission of or participation in the unlawful acts, plans, schemes, transactions, and practices to defraud alleged herein.

Defendants' collective activities were knowingly and purposefully designed for defendants' economic and pecuniary benefit and were performed in furtherance of defendants' respective and joint business interests.

As a result, defendants are jointly and severally liable.

### B. Concert of Action

Defendants, for the benefit of the tobacco industry in general and defendants' respective business interests and economic benefit in particular, had an understanding, express or tacit, to participate in a common plan or design to commit tortious acts, including, but not limited to: restraining and suppressing research on the harmful effects of tobacco use and the addictiveness of nicotine; restraining and suppressing the dissemination of information on the harmful effects of tobacco use and the addictiveness of nicotine; engaging in affirmative misrepresentations on the harmful effects of tobacco use and the addictiveness of nicotine; concealing from or misleading local, state and federal governments and

regulators about such research and information; and restraining and suppressing the research, development, production, and marketing of a safer cigarette.

Each defendant knew or should have known that this understanding to participate in a common plan or design to so market, produce and promote tobacco products subjected consumers to an unreasonable and hazardous threat of personal harm, constituting numerous breaches of legal duties, and defendants gave substantial aid and encouragement, each to the other, to further such common plan or design.

Defendants assisted and encouraged one another to commit the aforementioned tortious activities, and the conduct of defendants, separately considered, subjected the residents of the City to unreasonable threats of harm, constituting numerous breaches of legal duties.

As a result, defendants are jointly and severally liable.

#### C. Enterprise Liability

Defendants, acting collectively, followed an industry course of action, developed collectively by them, of refusing to acknowledge, disseminate, provide, or advise the public, including plaintiffs and plaintiffs' health officials and including tobacco consumers, of the health hazards and addictiveness of their tobacco products.

Defendants had a joint awareness of the risks at issue and had the joint capacity to reduce, minimize or affect those risks, but chose instead, for economic gain, to suppress, discourage and retard research, testing and the public dissemination of information concerning the hazards to health of their tobacco products.

As a result, defendants are jointly and severally liable.

#### D. Alternative and Market Share Liability

The different brands of cigarettes smoked by consumers are of substantially similar composition and are commercially fungible. Similarly, the different brands of smokeless tobacco products used by consumers are of substantially similar composition and are commercially fungible.

On information and belief, the health effects of cigarettes produced by different manufacturers are essentially indistinguishable, as are the health effects of smokeless tobacco products produced by different manufacturers.

The passage of time, the lack of information in many cases of the brand of tobacco product used at various points of time by an individual consumer, and the switching of brands by many consumers during the time they used tobacco make it impossible in many cases to identify the manufacturer responsible for any consumer's particular tobacco-related disease.

Upon information and belief, during the relevant time period, defendants, except for defendants TI and CTR, individually and/or collectively, accounted for virtually the entire production of tobacco products in the United States.

Under alternative liability, each defendant tobacco company is, therefore, jointly and severally liable.

Under market share liability, each defendant tobacco company is, therefore, severally liable for its proportionate share of the market.

#### PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that this Court grant the following relief:

A. Enjoining defendants and their respective agents, servants, officers, directors, employees, and all persons acting in concert with them, directly or indirectly, from engaging in unlawful and deceptive trade practices, false advertising, and unreasonable restraints of trade;

B. Enjoining defendants to fulfill the promise and duty undertaken by them since 1954 by disclosing, disseminating, and publishing all research previously conducted directly or indirectly by themselves and their respective agents, affiliates, servants, officers, directors, employees, and all persons acting in concert with them, that relates to the relationship between tobacco use and health and that relates to nicotine addiction;

C. Enjoining defendants to take affirmative steps to be determined by the Court after trial to undo the harm to the public in New York City caused by defendants' campaign of deceit and suppression of research concerning the health hazards and addictiveness of tobacco. Such affirmative steps shall include funding a corrective public education campaign, administered and controlled by an independent third party, relating to the relationship between tobacco use and disease and nicotine addiction, and funding clinical smoking cessation programs, including the provision of nicotine replacement therapy for dependent tobacco users, in the City of New York;

D. Enjoining defendants to take reasonable and necessary affirmative steps to prevent the distribution and sale of tobacco products to minors under the age of 18;

E. Enjoining defendants to cease targeting minors in their advertising campaigns;

F. Enjoining defendants to disclose the nicotine yields of their products based on machine tests and human confirmation studies for each brand;

G. Awarding damages in an amount to be determined at trial, including but not limited to (i) plaintiffs' costs under the Medicaid program of providing medical care to the extent those costs are related to tobacco use, (ii) plaintiffs' costs of providing medical care to non-Medicaid indigent persons to the extent those costs are related to tobacco use and (iii)

the City's costs of providing health coverage for its employees and retirees to the extent those costs are related to tobacco use; together with interest and costs;

H. Awarding treble damages pursuant to the New York Donnelly Act, GBL Sec. 340.5;

I. Awarding actual damages in an amount to be determined at trial, or fifty dollars, whichever is greater, for each separate violation of deceptive trade practices and false advertising laws alleged herein, pursuant to GBL Secs. 349(h) and 350-d.3., and trebling those damages;

J. Ordering defendants to pay restitution in an amount to be determined at trial;

K. Ordering defendants to disgorge profits from the sale of tobacco products in New York City in an amount to be determined at trial;

L. Awarding punitive damages in an amount sufficient to punish defendants and to deter future conduct;

M. Awarding reasonable attorneys' fees, together with costs and disbursements, pursuant to GBL Secs. 340.5, 349(h) and 350-d.3; and

N. Granting such other legal or equitable relief, including costs and attorneys' fees, as the Court deems just and equitable.

Dated: New York, New York October 17, 1996

PAUL A. CROTTY Corporation Counsel of the City of New York Attorney for Plaintiffs  
100 Church Street, Room 3-147 New York, New York 10007 (212) 788-0986

Of Counsel: Paul Kazanoff Gail Rubin Melvin Goldberg Alan Kleinman Marjorie Landa  
John Low-Beer Elizabeth Witten

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