

**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

Case No.: 315249

**STATE, ex rel.**

**THOMAS J. COYNE, JR.  
MAYOR OF THE CITY OF  
BROOK PARK, OHIO  
6161 Engle Road  
Brook Park, Ohio 44142**

**and**

**TIMOTHY F. HAGAN  
CUYAHOGA COUNTY COMMISSIONER  
1219 Ontario Ave.  
Cleveland, Ohio 44115**

**ON BEHALF OF THE STATE OF OHIO  
AND ALL OHIO TAXPAYERS  
Plaintiffs,**

**v.**

**THE AMERICAN TOBACCO COMPANY, INC.  
Six Stamford Forum  
Stamford, Connecticut 06904  
c/o Statutory Agent  
CT Corporation Systems  
441 Vine St., Suite #3810  
Cincinnati, Ohio 45202**

**and**

**AMERICAN BRANDS, INC.  
1700 East Putnum Ave.  
Old Greenwich, CT 06870  
c/o Statutory Agent  
Prentice-Hall Corporation Systems  
380 South 5<sup>th</sup> Street  
Columbus, Ohio 43215**

**and**

**B.A.T. INDUSTRIES P.L.C.  
Windsor House  
50 Victoria Street  
London, England SW 1H ONL**

**and**

**R.J. REYNOLDS TOBACCO COMPANY  
Fourth and Main Streets  
Winston-Salem, NC 27102  
c/o Statutory Agent  
Prentice-Hall Corporation Systems  
380 South 5<sup>th</sup> Street  
Columbus, Ohio 43215**

**and**

**RJR NABISCO, INC.  
1301 Avenue of the Americas  
New York, New York 10015**

**and**

**BROWN & WILLIAMSON TOBACCO  
CORPORATION  
1500 Brown and Williamson Tower  
P.O. Box 35090  
Louisville, Kentucky 40232  
c/o Statutory Agent  
CT Corporation Systems  
441 Vine St., Suite #3810  
Cincinnati, Ohio 45202**

**and**

**BRITISH AMERICAN TOBACCO CO., LTD.  
Millbank, Knowle Green Staines  
Middlesex, England TW181DY**

**and**

**BATUS, INC.  
1500 Brown & Williamson Tower  
Louisville, Kentucky 40202**

**and**

**PHILIP MORRIS, INC.  
119 Fifth Avenue  
New York, New York 10011  
c/o Statutory Agent  
CT Corporation Systems  
815 Superior Avenue, NE  
Cleveland, Ohio 44114**

**and**

**PHILIP MORRIS COMPANIES, INC.  
120 Park Avenue  
New York, New York 10017**

**and**

**LIGGETT & MYERS, INC.**

**c/o Statutory Agent  
CT Corporation System  
815 Superior Ave., N.E.  
Cleveland, Ohio 44114**

**and**

**LIGGETT GROUP, INC.  
c/o Statutory Agent  
CT Corporation System  
815 Superior Ave., N.E.  
Cleveland, Ohio 44114**

**and**

**BROOKE GROUP, LTD.  
300 North Duke Street  
Durham, North Carolina 27701**

**and**

**LORILLARD TOBACCO COMPANY, INC.  
1 Park Avenue  
New York, New York 10016  
c/o Statutory Agent  
Prentice-Hall Corporation Systems  
380 South 5<sup>th</sup> Street  
Columbus, Ohio 43215**

**and**

**LORILLARD, INC.  
c/o Statutory Agent  
Prentice-Hall Corp. System, Inc.  
380 S. 5<sup>th</sup> Street  
Columbus, Ohio 43215-5436**

**and**

**LOEWS CORPORATION  
1 Park Avenue  
New York, New York 10016**

**and**

**UNITED STATES TOBACCO COMPANY  
100 West Putnam Ave.  
Greenwich, CT 06830  
c/o Statutory Agent  
CT Corporation Systems  
441 Vine St., Suite #3810  
Cincinnati, Ohio 45202**

**and**

**UST, INC.  
100 West Putnam Avenue**

**Greenwich, Connecticut 06830**

**and**

**THE COUNCIL FOR TOBACCO RESEARCH --  
U.S.A., INC.  
900 3<sup>rd</sup> Avenue  
New York, New York 10022**

**and**

**TOBACCO INSTITUTE, INC.  
1875 "I" Street, N.W.  
Suite 800  
Washington, D.C. 20006**

**and**

**NOVELART MANUFACTURING COMPANY  
d/b/a A. Topicz & Sons  
2121 Section Road  
Cincinnati, Ohio 45237**

**and**

**THE EBY-BROWN COMPANY  
1982 Commerce Circle  
Springfield, Ohio 45504-2012**

**and**

**THE KROGER CO.  
Cincinnati, Ohio  
c/o Statutory Agent  
Paul W. Heldman  
1014 Vince Street  
Cincinnati, Ohio 45201**

**and**

**RISER FOODS INC.  
Bedford Heights, Ohio 44146  
c/o Statutory Agent  
1600 CNB Corp.  
1375 E. 9<sup>th</sup> Street  
20<sup>th</sup> Floor  
Cleveland, Ohio 44114,  
Defendants.**

**COMPLAINT**

**Jury Demand Endorsed Hereon**

Plaintiffs, on behalf of all taxpayers of the State of Ohio (the "State"), for their Complaint state as follows:

## I. TAXPAYER ALLEGATIONS

1. Thomas J. Coyne, Jr. is a resident, taxpayer and duly elected Mayor of the City of Brook Park, Ohio. Timothy F. Hagan is a resident, taxpayer and one of three duly elected County Commissioners of Cuyahoga County, Ohio. Plaintiffs bring this action on behalf of all taxpayers of the State of Ohio. Plaintiffs are compelled to bring this action on behalf of all Ohio taxpayers as it is futile to believe Ohio Attorney General Betty D. Montgomery will initiate a similar action on behalf of the State of Ohio and its taxpayers against the named defendants, members of the tobacco industry.

2. More than six months ago, on March 8, 1996 officials with the Ohio chapters of the American Cancer Society, the American Heart Association and the American Lung Association sent a letter to Attorney General Betty Montgomery urging her to join the seven state Attorneys General who had already sued the tobacco industry over money *spent* by their respective states on smoking-related illnesses.

3. In May, 1996 Attorney General Montgomery was among representatives of 30 states who met in Chicago to discuss strategies for suing tobacco companies. On May 8, 1996 Attorney General Montgomery announced she would decide by the following week whether to join the eight other states which had filed lawsuits against the tobacco companies. The Attorney General thereafter declined to bring suit.

4. Two months later, in July, 1996 after again being urged by anti-smoking activists to sue the tobacco industry the Attorney General, publicly announced that she was still considering taking action but was still not ready to file the suit.

5. As recent as August 14, 1996 Deputy Attorney General Mark . Weaver said that the Ohio Attorney General still had not decided whether to sue the tobacco companies in order to recoup some of the state's Medicaid costs.

6. As of the filing of this taxpayer action, sixteen states have already sued the tobacco industry to recover the billions of dollars the taxpayers of these states have already paid for Medicaid coverage of smoking-related illnesses.

7. Under Ohio law, the right of a taxpayer to recover, on behalf of the State, public funds utilized under circumstances in which these funds are due to be returned to the State is well established. This right is based upon the taxpayer's equitable ownership

of these funds and the taxpayers' obligations to replenish the public treasury for the deficiency which will be caused by the non-recovery of these funds. Plaintiff further asserts that, the State is responsible to those citizens eligible for Medicaid and other medical and health-related assistance, and pursuant to this responsibility, the State has expended and continues to expend great sums of money for the treatment of its citizens and residents who are suffering and will in the future suffer from tobacco-related injuries, diseases or sicknesses. These expenses have placed and will continue to place significant liability on the Plaintiffs, the State of Ohio and all Ohio taxpayers to replenish the public treasury for the deficiencies caused by these expenditures. As such, Plaintiffs have standing to prosecute this suit.

8. For many years, the State has suffered harm and has incurred significant expenses associated with providing the necessary health care and other such necessary assistance under various State programs to certain eligible citizens who suffer, or who have suffered, from tobacco-related injuries, diseases or sicknesses. This civil action is founded on principles of equity and is brought to avoid a multiplicity of lawsuits in recovering such damages, and for such other relief as equitably may be obtained, for the harm thus unjustly, intentionally and wrongfully done and continuing to be done to the State and to its citizens, residents and taxpayers by the various Defendants, who have been and continue to be unjustly enriched at the expense of the State and therefore, Ohio taxpayers.

9. The health, welfare and property of Ohio taxpayers have been damaged by the Tobacco Industry's unlawful conduct and injurious and unreasonably dangerous products. The Tobacco Companies have placed corporate profits above any concern for the health and prosperity of the consumers of their products. The toll of human misery from the mass addiction, disease and death caused by their products has not been sufficient to deter the Tobacco Companies from their unified campaign of disinformation and denials regarding the dangerousness of their products. The Tobacco Companies have unlawfully shifted the financial responsibility for their tortious and illegal conduct and for their unreasonably dangerous products, to the state and federal governments and ultimately the taxpayers, that provide for the general welfare of the citizens of Ohio.

10. This lawsuit seeks to have the Tobacco Companies' liability to the State judicially recognized and to restore to the State's treasury those funds spent for tobacco-attributable costs, including

but not limited to costs paid from the Medicaid Program, the State Teachers Retirement System, the State Public Employee Retirement System, the health, medical, hospital and surgical benefits provided by the State pursuant to O.R.C. §124.81 *et seq.* charity care, tobacco cessation programs and related wellness and health care programs and other damages to be determined by a jury.

11. The Tobacco Industry has been successful in planning, implementing and executing the largest and most destructive campaign of corporate misinformation in U.S. business history. The Executive Officers and Board of Trustees of the American Medical Association (AMA) have stated that recently disclosed internal Tobacco Industry documents " . . . show us how this industry has managed to spread confusion by suppressing, manipulating, and distorting the scientific record....The evidence is unequivocal -the U.S. public has been duped by the tobacco industry. No right-thinking individual can ignore the evidence."

12. Recently, the states which have already sued the defendant tobacco companies announced that discussions were ongoing to resolve the lawsuits. It was alleged that the tobacco companies in order to cap their damages indicated a willingness to pay billions of dollars to the states having actions pending.

13. Ohio's Attorney General has declined to take the steps necessary to recover the \$168 million Ohio taxpayers paid last year, let alone the millions of tax dollars it has spent yearly in the past and will continue to pay in the future, for Medicaid coverage as a result of smoking-related illnesses.

14. Plaintiffs are ready and able, on behalf of the State of Ohio and its taxpayers, and their legal counsel is capable and experienced to take on some of the most powerful interests in America -- the tobacco industry. Time is critical. Ohio taxpayers can no longer wait to have their interests protected.

15. As members of the Castano Plaintiff's Litigation Committee, which consists of 63 law firms, Plaintiffs' legal counsel have obtained the necessary experience, capability and desire to take on the tobacco industry.

16. Since March, 1994 Plaintiffs' legal counsel have actively participated in the tobacco class action entitled *Castano. et al. v. The American Tobacco Company. et al. Castano* was a nationwide class action which was certified as a nationwide class on February 17, 1995. However, on May 23, 1996, the

United States Court of Appeals for the Fifth Circuit reversed the District Court's class certification order. Castano v. The American Tobacco Company, 84 F.3d 734 (5th Cir. 1996). Nevertheless, the Fifth Circuit encouraged the filing of actions such as this one when it stated:

State courts are more than capable of providing definitive statements regarding the validity of addiction-as-injury claims.

It is far more desirable to allow state courts to apply and develop their own law....

*Id.* at 749.

17. Plaintiffs' legal counsel took up that challenge and on August 14, 1996 filed in Cuyahoga County Common Pleas Court a statewide class action against the tobacco companies entitled *Judith E. Chamberlin. et al. v. The American Tobacco Company. Inc. et al.*, Case No. CV313491 assigned to the Honorable Timothy J. McGinty of this Court.

#### NATURE OF THE CASE

18. This action arises, in part, out of the State's participation in the Medicaid program created by Title XIX of the Social Security Act. The Medicaid program is a cooperative endeavor in which the Federal Government provides financial assistance to participating States, such as Ohio, to aid them in furnishing health care to needy persons. For every dollar spent on Medicaid assistance by the State, the Federal Government provides approximately two dollars in matching funds. The State of Ohio's participation in this federal program is one of many programs conducted by the State to promote the general welfare of its citizens and meet its specific objective of insuring that adequate and high quality health care is available to its citizens and residents who cannot afford it.

19. Plaintiffs are seeking to take all reasonable measures to ascertain the legal liability of third parties to pay for care and services available under the Medicaid Act and Ohio law, and to seek reimbursement to Ohio's General Revenue Fund to the extent of such legal liability. It is believed that the Defendants have been engaged in a protracted and willful course of corporate misconduct and misrepresentation in violating numerous laws, and in the actionable breach of the duties owed to the State and its citizens and taxpayers.

20. The Defendants are cigarette and tobacco manufacturers and/or their trade associations that control virtually the entire cigarette industry in Ohio and the Nation. For decades, the State has incurred significant expenses associated with the provision of necessary health care and other such necessary assistance under various State programs to citizens who suffer, or who have suffered, from tobacco-related injuries, diseases or sickness.

21. This action is based on the deliberate and willful misconduct by Defendants toward the Nation, the State and its citizens and taxpayers. Defendants' misconduct and offenses came to light, in part, as the result of congressional hearings in 1994 and subsequent investigation by private and public entities. The Defendants' misconduct, actions and statements are violations of the following areas of law:

**A. State common law:** The recovery of damages under the common law doctrines of fraud, negligent misrepresentation, restitution-unjust enrichment, equitable estoppel, equitable indemnity, negligence, and public nuisance are applicable to Defendants' manufacture, promotion and sale of tobacco products to Ohio citizens/consumers and taxpayers while knowing, but denying and concealing, that their tobacco products caused injury and sickness, including cancer, emphysema, heart disease and other illnesses causing disability and death. Their tobacco products contain the highly addictive drug nicotine. The Defendants have concealed from the public, including Ohio cigarette consumers, the fact that they have controlled and manipulated the amount of nicotine and/or its bioavailability in their tobacco products for the purpose and with the intent of creating and sustaining addictions to these products.

**B. Ohio Product Liability Law:** The Defendant manufacturers and/or their trade organizations, at all pertinent times, manufactured, tested, designed, promoted, marketed, packaged, sold, distributed, and/or placed into the stream of commerce in and into the State, numerous brands of defective, unreasonably dangerous and hazardous cigarettes, or other tobacco products, or, in the course of business, materially participated with, conspired with and/or

otherwise, abetted and assisted others in so doing, thereby causing damage for which Defendants are responsible under product liability doctrines of strict liability and breach of express and implied warranty.

## II. VENUE

22. Venue is proper in this Court pursuant to Rule 3 of the Ohio Rules of Civil Procedure ("Civil Rules"). Plaintiffs are taxpayers in the State of Ohio and residents of Cuyahoga County, Ohio.

## III. PARTIES

### A. Plaintiffs.

23. Plaintiff Timothy F. Hagan, who is an Ohio taxpayer and one of the three duly elected Cuyahoga County Commissioners. Plaintiff Thomas J. Coyne, Jr. is the duly elected Mayor of the City of Brook Park, Ohio. Both Plaintiffs are of the age of majority and are domiciled in the State of Ohio, the County of Cuyahoga and who further appear on behalf of all other Ohio taxpayers. This suit concerns matters of state-wide interest and is brought by Plaintiffs on behalf of a class composed of all taxpayers of the State of Ohio.

24. As taxpayers of the State of Ohio, Plaintiffs contribute to the Ohio General Revenue Fund which ultimately is used to provide public benefits to eligible recipients of Medicaid assistance and other State assistance programs. The State of Ohio Medicaid Plan and Medical Assistance Plan under O.R.C. S 5111 *et. sea.* and 42 U.S.C. S 1396 *et. sea.*, provide for the payment of benefits to eligible Ohio citizens and residents. Providers who render services to Medicaid recipients are paid by the taxpayers of Ohio, from the Ohio General Revenue Fund 525 Account which is earmarked solely for the benefit of Medicaid recipients and funded solely through tax dollars.

25. Plaintiffs bring this action for declaratory and equitable relief, as well as for economic damages for increased costs for health care services caused by the unlawful actions of the cigarette industry.

### B. Defendants.

26. Defendant The American Tobacco Company, Inc. and its parent, Defendant American Brands, Inc., are Delaware corporations whose principal places of business are located at Six Stamford Forum, Stamford, Connecticut. The American Tobacco

Company and American Brands, Inc. manufacture, advertise, market and sell Lucky Strike, Pall Mall, Tareyton, Malibu, American, Montclair, Newport, Misty, Iceberg, Silk Cut, Silva Thins, Sobrania, Bull Durham and Carlton cigarettes throughout the United States including the State of Ohio. On December 21, 1994, The American Tobacco Company was purchased by B.A.T. Industries P.L.C. who on information and belief has succeeded to the liabilities of the American Tobacco Co. by operation of law or as a matter of fact (collectively "American Tobacco").

27. Defendant R.J. Reynolds Tobacco Company is a New Jersey corporation whose principal place of business is located at Fourth and Main Streets, Winston-Salem, North Carolina. R.J. Reynolds Tobacco Company is a wholly-owned subsidiary of Defendant RJR Nabisco, Inc., a Delaware corporation, whose principal place of business is 1301 Avenue of the Americas, New York, New York. Defendants R.J. Reynolds Tobacco Company and RJR Nabisco, Inc. manufacture, advertise, market and sell Camel, Vantage, Now, Doral, Winston, Sterling, Magna, More, Century, Bright Rite and Salem cigarettes throughout the United States including the State of Ohio (collectively "RJR").

28. Defendant Brown & Williamson Tobacco Corporation is a Delaware corporation. Defendant Batus, Inc. is the parent of Brown & Williamson Tobacco Corporation and is a Wisconsin corporation. Defendant Batus Holdings, Inc. is the parent of Batus, Inc. and is a Delaware corporation. The principal place of business of Defendants Brown & Williamson Tobacco Corporation, Batus, Inc. and Batus Holdings, Inc. is 1500 Brown & Williamson Tower, Louisville, Kentucky. Defendants Brown & Williamson Tobacco Corporation, Batus, Inc. and Batus Holdings, Inc. manufacture, advertise, market and sell Kool, Barclay, BelAir, Capri, Raleigh, Richland, Laredo, Eli Cutter and Viceroy cigarettes throughout the United States including the State of Ohio (collectively "Brown & Williamson"). In addition to manufacturing, marketing and selling cigarettes within the State of Ohio, Brown & Williamson conducts business as a wholesale distributor of cigarettes and other tobacco products within the State of Ohio. Brown & Williamson conducts business as a wholesale distributor of cigarettes and other tobacco products at 3443 Medina Road, Medina, Ohio 44256-3320.

29. Defendant British American Tobacco Co., Ltd. is a British corporation whose principal place of business is Millbank, Knowle Green, Staines, Middlesex, England TW181DY. Brown & Williamson Tobacco Corporation is or was a subsidiary or division of British American Tobacco Co., Ltd.

30. Defendant B.A.T. Industries P.L.C. (hereinafter "B.A.T. Industries") is a British corporation with its principal place of business at Windsor House, 50 Victoria St., London. Through a succession of intermediary corporations and holding companies, B.A.T. Industries P.L.C. is the shareholder of Brown & Williamson Tobacco Corporation. Through Brown & Williamson, B.A.T. Industries P. L. C has placed cigarettes into the stream of commerce with expectation that substantial sales of cigarettes would be made in the United States. In addition, B. A. T. Industries P.L.C. conducted, or through its agents and/or co-conspirators conducted, critical research for Brown & Williamson Tobacco Corporation on the issue of smoking and health. Further, Brown & Williamson Tobacco Corporation is believed to have sent to England research conducted in the United States on the issue of smoking and health in an attempt to remove sensitive and inculpatory documents from United States jurisdiction, and these documents were subject to the control of B.A.T. Industries P.L.C. B.A.T. Industries P.L.C. has been involved in the conspiracy described herein and the actions of B.A.T. Industries P.L.C. has affected and caused harm throughout the United States including the State of Ohio.

31. Defendants Philip Morris, Inc., and its parent, Defendant Philip Morris Companies, Inc., are Virginia corporations whose principal places of business are located at 120 Park Avenue, New York, New York. Defendants Philip Morris, Inc. and Philip Morris Companies, Inc. manufacture, advertise, market and sell Philip Morris, Merit, Cambridge, Marlboro, Benson & Hedges, Virginia Slims, Alpine, Dunhill, English Ovals, Galaxy, Players, Saratoga and Parliament cigarettes throughout the United States including the State of Ohio (Philip Morris").

32. Defendant Liggett & Myers, Inc., is a Delaware corporation whose principal place of business is located at Main and Fuller, Durham, North Carolina. Liggett & Myers, Inc., is a wholly-owned subsidiary of Defendant Liggett Group, Inc., a Delaware corporation whose principal place of business is located at 700 West Main Street, Durham, North Carolina. Defendants Liggett & Myers, Inc., and Liggett Group, Inc., are subsidiaries of Defendant Brooke Group, Ltd., a Delaware corporation, whose principal place of business is located at 300 North Duke Street, Durham, North Carolina. Defendants Liggett & Myers, Inc., Liggett Group, Inc., and Brooke Group, Ltd., manufacture, advertise, market and sell Chesterfield, Decade, L&M, Pyramid, Dorado, Eve, Stride, Generic and Lark cigarettes throughout the United States including the State of Ohio (collectively Liggett & Myers").

33. Defendants Lorillard Tobacco Company, Inc., and Lorillard, Inc., and their parent, Defendant Loews Corporation ("Loews"), are Delaware corporations whose principal places of business are located at 1 Park Avenue, New York, New York. Defendants Lorillard Tobacco Company, Inc., Lorillard, Inc., and Loews manufacture, advertise, market and sell Old Gold, Kent, Triumph, Satin, Max, Spring, Newport and True cigarettes throughout the United States including the State of Ohio (collectively "Lorillard"). In addition, upon information and belief, Loews, holds certain rights to a system that "is especially attractive in enriching the nicotine content of reconstituted tobacco."

34. Defendant United States Tobacco Company and its parent, Defendant UST, Inc., are Delaware corporations whose principal places of business are located at 100 West Putnam Avenue, Greenwich, Connecticut. United States Tobacco Company and UST, Inc. manufacture, advertise, market and sell Sano cigarettes throughout the United States including the State of Ohio ("U.S. Tobacco").

35. The Defendants named in paragraphs 26-34, above are sometimes collectively referred to in this Complaint as the "Tobacco Companies."

36. Defendant, The Council for Tobacco Research -- U.S.A., Inc., successor in interest to the Defendant Tobacco Industry Research Committee ("TIRC") (collectively "CTR"), is a nonprofit corporation organized under the laws of the State of New York with its principal place of business at 900 3rd Avenue, New York, New York 10022. In furtherance of the conspiracy more fully described herein, the CTR, on behalf of the Tobacco Companies, has repeatedly disseminated false information to the public through the print and electronic media within the State of Ohio and the County of Cuyahoga.

37. Defendant Tobacco Institute, Inc. ("Tobacco Institute"), is a New York corporation, whose principal place of business is located at 1875 "I. Street, N.W., Suite 800, Washington, D.C. The Tobacco Institute conducted business within the State of Ohio through its Statutory Agent who was registered with the Ohio Secretary of State up to and including October 20, 1989. The Tobacco Institute operated as the public relations and lobbying arm of the Tobacco Companies and as such the Tobacco Institute was an agent, representative and/or employee of the Tobacco Companies. While engaged in the course of conduct alleged herein, the Tobacco Institute was acting within the course and scope of its agency or employment and was acting with the consent, permission, authorization

and knowledge of the Tobacco Companies. All actions of Tobacco Institute alleged herein were ratified and approved by the officers or managing agents of the Tobacco Companies. The Tobacco Companies, CTR and the Tobacco Institute are sometimes referred to herein collectively as "Defendants" and/or the "Tobacco Industry."

38. Each Defendant is sued individually as a primary violator and as an aider and abettor who rendered substantial assistance in the accomplishment of the acts and/or omissions alleged herein. In acting to aid and abet and substantially assist the commission of the fraud and wrongful conduct complained of herein, each Defendant acted with an awareness and knowledge of the fraud and wrongful conduct and realized that its conduct would substantially assist the accomplishment of that fraud and was aware of its overall contribution to the conspiracy, scheme and common course of wrongful conduct alleged herein, including, but not limited to, the manipulation of nicotine content in cigarettes and the misrepresentation, concealment and suppression of information regarding the addictive nature and properties of nicotine.

39. Each Defendant is also sued as a co-conspirator and the liability of each arises from the fact that each Defendant knowingly entered into an agreement with the other Defendants and other known and unknown third parties to pursue, and knowingly pursued, the common course of conduct to commit or participate in the commission of all or part of the unlawful acts, plans, schemes, transactions, and artifices to defraud alleged herein, including, but not limited to the manipulation of nicotine content in cigarettes and the misrepresentation, concealment and suppression of information regarding the addictive nature and properties of nicotine.

40. Defendant Novelart Manufacturing Company d/b/a A. Topicz & Sons ("Novelart"), located at 2121 Section Road, Cincinnati, Ohio 45237, is a wholesale distributor of cigarettes and other tobacco products who negligently sold the products of the Tobacco Companies to retailers for resale through the State of Ohio and is liable to Plaintiffs and members of the Plaintiff Class pursuant to the negligence, strict liability and warranty claims contained herein.

41. Defendant EBY-Brown Company ("EBY-Brown"), located at 1982 Commerce Circle, Springfield, Ohio 45504-2012, is a wholesale distributor of cigarettes and other tobacco products who negligently sold the products of the Tobacco Companies to retailers for resale throughout the State of Ohio and is liable to Plaintiffs and members of the

Plaintiff Class pursuant to the negligence, strict liability and warranty claims contained herein.

42. The Kroger Co. ("Kroger") whose principal place of business is Cincinnati, Ohio, owns and operates and has owned and operated retail grocery stores throughout the State of Ohio. Kroger has negligently sold cigarettes manufactured by the Tobacco Companies to Plaintiffs and members of the Plaintiff Class, and is liable to the Plaintiffs and the Plaintiff Class pursuant to the negligence, strict liability and warranty claims contained herein.

43. Riser Foods Inc. ("Riser") is a Delaware company whose principal place of business is Bedford, Ohio and who owns and operates, has owned and operated, or is the successor in interest to retail grocery stores throughout the State of Ohio. Riser has negligently sold cigarettes manufactured by the Tobacco Companies to Plaintiffs and members of the Plaintiff Class pursuant to the negligence, strict liability and warranty claims contained herein. The wholesale and retail distributors set forth in paragraphs 40 through 43 herein are sometimes collectively referred to as the "Wholesale/Retail Defendants."

#### **IV. THE IMPACT OF DEFENDANTS' ACTIONS ON THE STATE OF OHIO**

44. Approximately two million Ohioans smoke cigarettes. Tobacco-caused disease has killed, and continues to kill, thousands of Ohioans. The Centers for Disease Control (CDC) has estimated that, currently, more than 18,000 Ohioans die each year from smoking. Additionally, thousands of Ohio citizens, residents and taxpayers receive medical care each year as a result of smoking related illnesses.

45. The economic consequences of smoking cigarettes are equally staggering. Ohio taxpayers spend approximately \$168million a year in Medicaid covering smoking-related illnesses.

46. The State spends millions of dollars each year to provide or pay for health care and other necessary facilities and services on behalf of indigents and other eligible citizens whose health care costs are directly caused by tobacco-induced cardiovascular disease, lung and other cancers, emphysema, other respiratory diseases as well as the complications of pregnancy and childbirth including, but not limited to, low-weight babies.

47. The State has suffered damages from the Defendants' illegal and tortious conduct and as a result of their unreasonably dangerous products. Those damages include, but are not limited to, costs

and expenditures from the public fund in the following areas: the Medicaid Program, the State Teachers Retirement System, the State Public Employee Retirement System, the health, medical, hospital and surgical benefits provided by O.R.C. §124.81 et sea., charity care and related health and wellness programs.

48. The State, as an employer provides health coverage for its employees and retirees pursuant to statutory and contractual obligations and is mandated by law to offer comprehensive and major medical health coverage and benefits that include coverage for treatment of smoking-caused diseases. The State of Ohio has entered into contractual agreements with certain health care service providers and plans in order to make available to its employees health coverage that includes these mandated benefits. Ohio taxpayers, through the State, have paid and will continue to pay substantial sums of money pursuant to these statutory and contractual obligations due to the increased cost of providing health care services for treatment of smoking-caused diseases. These increased expenditures have been caused by the unlawful actions of the Defendants.

49. The State operates a number of health care facilities, including state hospitals and university health centers, that provide medical care to indigent and other qualifying persons who are not eligible for Medicaid. The State, and therefore Ohio taxpayers, pay for all or part of this care. The State has expended and will continue to expend substantial sums of money due to the increased cost of providing health care services for treatment of smoking-related diseases. These increased expenditures have been caused by the unlawful actions of the Defendants and cause direct economic harm to the State of Ohio and therefore to the taxpayers of the State of Ohio.

50. The State has expended and will expend substantial sums of money to fund and promote wellness and healthy lifestyle programs in order to reduce health care costs, including smoking cessation. In addition, the State operates a program of preventive health services for state employees. These expenditures have been and will be increased by the unlawful actions of the Defendants to the detriment of all Ohio taxpayers.

#### **V. FACTUAL ALLEGATIONS COMMON TO ALL COUNTS**

##### **A. The Nicotine in cigarettes is Highly Addictive**

51. The Tobacco Companies reap enormous profits from their manufacture and sale of

cigarettes throughout the United States including the State of Ohio. The Tobacco Companies make, advertise and sell cigarettes despite their knowledge of the following facts: more than 10 million Americans have died as a result of smoking cigarettes; more than 400,000 Americans die every year as a result of smoking cigarettes; almost one death in every five is due to a smoking-related illness; the leading cause of preventable death in the United States today is smoking cigarettes; smoking causes cardiovascular disease and is responsible for approximately one third of all heart disease deaths; smoking causes almost all lung and throat cancers and is responsible for approximately one-tenth of all cancer deaths; smoking causes various pulmonary diseases, including emphysema; smoking causes stillbirths and neonatal deaths among the babies of mothers who smoke; and, cigarettes may contain any number of approximately 700 "additives," including a number of toxic and dangerous chemicals including nicotine. Congressman Henry A. Waxman (D. Calif.), Chairman, House Subcommittee on Health and the Environment stated recently "that cigarettes are the single most dangerous consumer product ever sold."

52. Despite the overwhelming weight of scientific evidence that smoking cigarettes poses serious health risks, and despite the gruesome statistical legacy being left by the Tobacco Industry, approximately 50 million Americans, including over 2 million Ohioans, continue to smoke cigarettes, including 3,000 new teenage smokers everyday. These innocent victims continue to smoke because they are addicted to or dependent upon cigarettes. More specifically, they are addicted to nicotine, the drug in tobacco that causes an addiction similar to that suffered by users of heroin and cocaine.

53. Cigarettes contain nicotine. Nicotine is an addictive substance and the use of cigarettes results in addiction to them. Nicotine causes compulsive use of cigarettes, despite knowledge that they are harmful, if not lethal; nicotine has a psychoactive (mood-altering) affect on the brain; and, nicotine invokes what is called "reinforcing behavior," causing continued use of the nicotine-containing products. Additionally, cigarette smokers suffer an inability to quit, notwithstanding a desire to do so, and those who do quit (or attempt to) endure withdrawal symptoms such as headaches, insomnia, depression, lack of concentration and anxiety.

54. The addictive power of nicotine is further illustrated by these statistical facts: at least two-thirds of adults who smoke say they wish they could quit; 17 million Americans try to quit smoking each year, but fewer than 1 out of 10 succeed; for every

smoker who quits 9 try and fail; 8 out of 10 smokers say they wish they had never started smoking; after surgery for lung cancer, almost half of the smokers resumed smoking; among smokers who suffer heart attack, 38% resume smoking while they are still in the hospital even when a smoker has his or her larynx removed, 40% try smoking again; 70% of young people ages 12 to 18 who smoke say they believe they are already dependent on cigarettes; and 40% of high school seniors who smoke regularly have tried to quit and failed. According to David A. Kessler, M.D., Commissioner of the United States Food and Drug Administration, "once they have started regularly, most smokers are in effect deprived of the choice to stop smoking....Seventeen million Americans try to quit smoking each year. But, more than fifteen million are unable to exercise that choice because they cannot break their addiction to cigarettes.

55. The 1988 Surgeon General's Report, "The Health Consequences of Smoking: Nicotine Addiction" concluded: (1) "Cigarettes and other forms of tobacco are addicting"; (2) "Nicotine is the drug in tobacco that causes addiction"; and (3) "The pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine." Nicotine in cigarettes is now recognized as an addictive substance by such major medical organizations as the Office of 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, the American Public Health Association, and the Medical Research Council in the United Kingdom. The National Institute on Drug Abuse recently called cigarette smoking the most common example of drug dependence in the United States.

56. In its August 1995 Report the U.S. Food and Drug Administration F Department of Health and Human Services ("U. S. F. D. A. 1995 Report"), concluded that:

The vast majority of smokers and many smokeless tobacco consumers, because they are addicted to nicotine, use cigarettes and smokeless tobacco to satisfy nicotine dependence. Many of these consumers also use these products to affect mood and to control weight. (Emphasis supplied).

57. Despite the recognition of nicotine's addictive properties by these and other organizations, the Tobacco Companies continue to misinform the

American public. Although it now appears the Tobacco Companies have known for decades, on the basis of their own long-concealed research and testing, that nicotine is addictive, the Tobacco Companies have denied, and continue to deny, that nicotine is addictive.

## **B. The Tobacco Industry Conspiracy: Deceiving The Public To Increase Profits**

### **1. The Tobacco Industry Conspiracy Commences With The Creation Of The Tobacco Industry Research Committee ("TIRC")**

58. The industry conspiracy began as early as the 1950's, when cigarette manufacturers were confronted with the publication of several scientific studies which sounded grave warnings on the health hazards of cigarettes. One of the first of these studies was published in 1952 by Dr. Richard Doll, a British researcher. Dr. Doll, in a statistical analysis, found that lung cancer was re common among people who smoked and that the risk of lung cancer was directly proportional to the number of cigarettes a person smoked.

59. A report published in December, 1953 by Dr. Ernst L. Wynder of the Sloan-Kettering Institute disclosed to the scientific community and to the Tobacco Companies, a definitive link between smoking and cancer. In these tests, researchers painted, condensed cigarette smoke onto the backs of mice. Malignant tumors grew in 44% of the mice. While previous statistical and epidemiologic studies indicated a relationship between smoking and cancer, Dr. Wynder's study demonstrated a direct biological link between smoking and cancer. "Although Defendants have sought to discredit the Wynder findings, recently disclosed documents include a 1962 letter from Lorillard to Dr. Wynder, regarding his work establishing smoking to be a carcinogen and the principal cause of lung cancer, and stating that Lorillard "considered [Dr. Wynder's] work above reproach, as usual. ")

60. The Doll and Wynder studies generated widespread public concern about the health hazards of cigarettes. The widespread reporting of these studies caused what cigarette company officials later called the "Big Scare."

61. Confronted with this evidence, the presidents of the leading tobacco companies met at an extraordinary gathering in the Plaza Hotel in New York City in December of 1953. The presidents acknowledged the seriousness of the Doll and Wynder studies but viewed these studies and the underlying

scientific evidence entirely in terms of a public relations problem rather than a public health concern. In fact, the public relations firm of Hill & Knowlton, who coordinated this meeting, summarized in an internal memorandum the key issues discussed at the meeting:

(a) the conclusion that the medical and public relations problems confronting the Tobacco Companies were "extremely serious and worthy of drastic action..

(b) the conclusion that the serious nature of this problem was underscored by the fact that "the salesmen in the industry are frantically alarmed and that the decline in tobacco stocks on the stock exchange market has caused grave concern."

Together, all the leading manufacturers, except Liggett & Myers, agreed to launch a concerted public relations strategy to promote the positive nature of cigarettes. Even though at that time, Liggett & Myers chose to confront these issues by ["ignoring"] the whole controversy", Liggett & Myers later became actively involved in the overall conspiracy to addict Plaintiffs and the members of the Plaintiff Class through the manipulation of nicotine levels in cigarettes.

62. Thus, the Tobacco Industry Research Committee (previously designated the "TIRC") was conceived and born. Five of the Big Six cigarette manufacturers, i.e., American Tobacco, Brown & Williamson, Lorillard, Philip Morris, RJR and U.S. Tobacco were original members. Liggett & Myers did not join until 1964, the same year that the Surgeon General issued its first report on smoking and health and concluded that cigarette smoking was a cause of lung cancer. Also in 1964, TIRC changed its named to the Council for Tobacco Research (previously designated the "CTR").

63. The Tobacco Industry announced the formation of the TIRC on January 4, 1954, with a newspaper announcement placed in virtually every city with a population of 50,000 or more, reaching a total circulation of more than 43 million Americans. The announcement, which appeared in both the Cleveland Press and the Cleveland Plain Dealer, was captioned "A Frank Statement to Cigarette Smokers" and was run under the auspices of the TIRC with, inter alia, five of the Big Six manufacturers listed by name.

64. In this announcement, the participating Tobacco Companies expressly represented to the public, including residents and

citizens of Ohio, that they acknowledged and accepted their "special responsibility" to the public concerning the health hazards associated with cigarette smoking, and promised to learn the facts about smoking and health. This advertisement, provided in part:

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.

Although conducted by doctors of professional standing, these experiments are not regarded as conclusive in the field of cancer research. However, we do not believe that any serious medical research, even though its results are inconclusive should be disregarded or lightly dismissed.

\* \* \*

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

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

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

\* \* \*

Regardless of the record of the past, the fact that cigarette smoking today should even be suspected as a cause of a serious disease is a matter of deep concern to us.

Many people have asked us what, we are doing to meet the public's concern aroused by the most recent reports. Here is the answer:

1. We are pledging aid and assistance to the research effort into all phases of tobacco use and health. This joint financial aid will of course be in addition to what is already being contributed by individual companies.

2. 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.

3. In charge of the research activities of the Committee will be a scientist of impeccable integrity and national 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.

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. (Emphasis supplied).

In other words, the participating Tobacco Companies promised to sponsor independent research on the subject, claiming they would make health a basic responsibility paramount to any other consideration in their business. The participating Tobacco Companies also promised to cooperate closely with public health officials. At the time these promises were made, the Tobacco Companies had no intent to honor their promises. In fact, these promises so publicly and dramatically made to the public have been repeatedly breached by the Tobacco Industry.

65. After lulling the public into a false sense of security concerning smoking and health, the TIRC continued to act as a front for the interests of the Tobacco Industry. Despite the initial public statements and posturing, and the repeated assertions over the years that the Tobacco Industry was committed to full disclosure and vitally concerned with public health, the TIRC failed to make the public health of cigarette smokers a concern. Rather the TIRC, at the direction of the Tobacco Companies, acted to protect the Tobacco Industry's profits and failed to protect the public health. Beginning with the January 4, 1954 nationwide newspaper advertisement entitled "A Frank Statement To Cigarette Smokers," a coordinated, industry-wide strategy was designed to actively mislead, confuse and conceal from the public the true dangers associated with smoking cigarettes. Rather than work for the good of the public health and sponsor independent research, as it had promised, the Tobacco Companies, acting through the TIRC/CTR, concealed, undermined and distorted information coming from the scientific and medical community.

## 2. The Tobacco Industry Conspiracy From Its Inception Through Today

66. In 1946, Tobacco Company chemists themselves reported concern for the health of smokers. A 1946 letter from a Lorillard chemist to its manufacturing committee states that "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."

67. The health claim advertising campaigns by the Tobacco Companies were patently false, misleading, deceptive and/or fraudulent. These campaigns were disseminated nationally in popular magazines, press, radio and television and were calculated to induce non-smokers to commence smoking and to induce smokers to continue in their addiction to their harm and injury and to the damage of the Plaintiffs and members of the Plaintiff Clams.

68. In the 1930s, in response to what industry spokesmen referred to as "the health scare, II the Tobacco Companies made express claims and warranties as to the healthiness of their products with reckless disregard to the falsity of their claims and the consequential adverse impact on consumers. Examples of these health warranties include the following: Old Gold - "Not a cough in a Carload;" Camel - "Not a single case of throat irritation due to smoking Camels;" Philip Morris - "The Throat-tested cigarette."

69. In the *New York State Journal of Medicine*, Chesterfield ads began running in 1933. They often carried claims such as, "Just as pure as the water you drink and practically untouched by human hands."

70. In 1942, Brown and Williamson claimed that Kools would keep the head clear and/or give extra protection against colds.

71. For 15 years, Philip Morris used various claims, including one it ran in the *New York State Medical Journal* in 1935 touting studies that purportedly showed Philip Morris cigarettes were less irritating. An ad by the company in a 1943 issue of the *National Medical Journal* read: "'Don't smoke' is advice hard for patients to swallow. May we suggest instead 'Smoke Philip Morris!' Tests showed three out of every four cases of smokers' cough cleared on changing to Philip Morris. Why not observe the results for yourself?" An ad by the company in *JAMA* in 1949 stated: "Why many leading nose and throat specialists suggest. 'Change to Philip Morris'...."

72. During the 1950's the Tobacco Companies employed yet another method of description in manufacturing and advertising to boost sales to counter the "health scare." The Tobacco Companies manufactured filtered cigarettes that were advertised with explicit and/or implicit warranties of tar/nicotine content and health claims. The Tobacco Companies' health claims and claims as to the effectiveness of the filters in removing tar and nicotine were knowingly deceptive when made, and/or were made with reckless disregard for the health risks to the cigarette smokers.

73. A publication called Tobacco and Health (later Tobacco and Health Research) was created by the Tobacco Industry and was used by them to disseminate false information and create confusion over the causal connection between cigarette smoking and disease. It was distributed to the press, doctors, and health officials. The "Criteria for Selection" of articles for publication included an example of "a report in which smoking-associated diseases are questioned."

74. The deceptions and misrepresentation made by the Tobacco Industry in the 1954 "Frank Statement to Cigarette Smokers" have, over the years, been repeatedly renewed by the Tobacco Industry. For example, in furtherance of the conspiracy, RJR Chairman Bowman Gray told Congress in 1964: "If it is proven that cigarettes are harmful, we want to do something about it regardless of what somebody else tells us to do. And we would do our level best. It's only human."

75. The January 15, 1968 issue of *True Magazine* contained an article written by Stanley Frank called "To Smoke or Not to Smoke -- That is Still the Question. n The article dismissed the evidence against smoking as "inconclusive and inaccurate" and claimed that "[s]tatistics alone link cigarettes with lung cancer - it is not accepted as scientific proof of the cause and effect." A few months later, a similar but shorter article appeared in the *National Enquirer* entitled "Cigarette Cancer Link is Bunk" written by "Charles Golden" (a fictitious name commonly used by the *Enquirer*.) The real author was Stanley Frank. Two million reprints of the *True Magazine* article were distributed to physicians, scientists, journalists, government officials, and other opinion leaders with a small card which stated. "As a leader in your profession and community, you will be interested in reading this story from the January issue of *True Magazine* about one of today's controversial issues." The cost for this was paid by Brown and Williamson, Philip Morris and R.J. Reynolds. It was subsequently disclosed that Stanley

Frank had been paid \$500 to write the article by Joseph Field, a public relations professor working for Brown and Williamson. Brown and Williamson reimbursed Field for that amount.

76. In 1970, in furtherance of the conspiracy, the Tobacco Institute ran a follow-up announcement captioned "A Statement About Tobacco and Health" which stated:

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."(Emphasis supplied).

77. Also, in 1970, the Tobacco Institute ran yet another announcement captioned "The question about smoking and health is still a question.. In this announcement, the Tobacco Institute stated.

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 the 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 nonrestrictive 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.

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

79. These statements, as made public to Ohio consumers, including Plaintiffs and members of the Plaintiff Class, were published on behalf of the Tobacco Industry in furtherance of the conspiracy and with the malicious intent (1) to misrepresent facts I I known or which reasonably should have been known by the Tobacco Industry and/or (2) to withhold material facts which were known or which reasonably should have been known by the Tobacco Industry; these misrepresentations and/or material omissions were made by the Tobacco Industry with the knowledge and intent that such misrepresentations and omissions would be relied upon by Plaintiffs and members of the Plaintiff Class; and these misrepresentations and omissions were in fact relied upon by Plaintiffs and members of the Plaintiff Class.

80. In direct contrast to what the Tobacco Industry was telling the public, a memo from Tobacco Institute vice president Fred Panzer to president Horace Kornegay dated May 1, 1972, acknowledged that the industry had employed a single strategy for nearly 20 years to defend itself on three major fronts: litigation, politics, and public opinion. This strategy consisted of "creating doubt about the health charge without actually denying it-- advocating the public's right to smoke without actually urging them to take up the practice -- encouraging objective scientific research as the only way to resolve the question of health hazard. "Panzer said this strategy had been successful on the litigation front and had

"helped make possible an orderly retreat" on the political front, but that the situation had deteriorated on the public opinion front. To remedy the public opinion problem, the proposed that the Tobacco Industry supply the public with "ready made credible alternatives" to the prevalent view that smoking causes cancer, such as generic and environmental explanations for smoking-related diseases.

81. On April 14, 1994, the chief executives of the Tobacco Companies testified under oath before the Subcommittee on Health and the Environment of the Committee on Energy and Commerce, U.S. House of Representatives, chaired by Congressman Waxman. These executives knowingly made material misrepresentations and/or omissions to the Subcommittee about smoking, health and addiction, and in particular, stated that nicotine is not addictive. These statements were made with the knowledge that they would be communicated to Ohio consumers. This testimony to the Subcommittee included the following:

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:

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

(2) "Cigarette smoking is not addictive."

(3) "Philip Morris research does not establish that smoking is addictive."

c. R.J. Reynolds CEO James W. Johnson said that "smoking is no more addictive than coffee, tea or Twinkies.

82. An announcement placed by Philip Morris in newspapers across the county in April 1994, affirmatively represented that Philip Morris does not "manipulate" nicotine levels in its cigarettes, and that "Philip Morris does not believe that cigarette smoking is addictive."

83. RJR placed a similar announcement in newspapers across the United States in 1994 stating that "we do not increase the level of nicotine in any of

our products in order to addict smokers. Instead of increasing the nicotine levels in our products, we have in fact worked hard to decrease tar and nicotine...." RJR's announcement then touted its use of "various techniques that help us reduce the tar [and consequently the nicotine] yields of our products."

84. These statements mislead the consuming public because, as alleged above, Philip Morris and RJR use various sophisticated techniques to increase the nicotine content in their cigarettes and thus, the actual nicotine delivery to the smokers.

85. The recent disclosures of the sworn testimony of a former research chief for Brown & Williamson Tobacco Corporation, Dr. Jeffrey S. Wigand, and former Philip Morris scientists, Jerome Rivers, Dr. Ian L. Uydess and Dr. William Frone, directly contradict the testimony of the Tobacco Companies regarding addiction, as well as the Tobacco Industry's denial of nicotine manipulation.

### **3. In Furtherance of The Conspiracy The Tobacco Industry Suppressed The "Safer" Cigarette**

86. Even though the Tobacco Companies could have designed and manufactured a safer cigarette, the Tobacco Companies have failed and refused to do so. The need for a "safer" tobacco product results from the harmful chemical compounds occurring in cigarettes and/or formed as a result of burning. These compounds include carbon monoxide, nicotine, nickel, carbon dioxide, benzene, hydrazine, formaldehyde, Polonium-210, ammonia, nicotine sulfate, Freon II, hydrogen cyanide and certain liver toxins known collectively as furans. More than forty (40) known carcinogens are found in cigarette tobacco. The Tobacco Companies artificially add chemicals and flavorings to their products that increase toxicity and/or carcinogenicity.

87. At Liggett & Myers, Dr. James Mold conducted tests to divide the components of cigarette smoke into separate components in order to interrupt the process that produces carcinogens through the use of a catalyst. Liggett & Myers researchers were able to produce a so-called safer cigarette, designated as the "XA Project" that eliminated the carcinogenic activity on mouse skin. However, Liggett & Myers did not want to be identified publicly as the source of the research behind this non-carcinogenic "safer" cigarette.

88. Liggett & Myers instructed its researchers that any meetings held that pertained to the "safer" cigarette project were to be attended by a

lawyer and that all reports, notes or memoranda should go to the Liggett & Myers legal department. The "safer" cigarette was never marketed.

89. Liggett & Myers abandoned its XA Project for two apparent reasons. One was that Liggett & Myers feared that the marketing of a "safer" cigarette would be, in essence, a concession that its -and the Tobacco Industry's other cigarettes were not safe. Second, industry leader Philip Morris threatened to retaliate against Liggett & Myers if it broke ranks with the ongoing Tobacco Industry conspiracy.

90. Dr. Mold, who was assistant director of research at Liggett & Myers during the development of the "safer" cigarette, has provided the following overview of the XA Project and its abandonment:

a. Dr. Mold stated that the XA project produced a safer cigarette. He stated, "We produced a cigarette which was, we felt, commercially acceptable as established by some consumer tests, which eliminated carcinogenic activity...."

b. Dr. Mold stated that after 1975, all meetings on the project were attended by lawyers. Lawyers collected notes after all meetings. All documents were directed to the law department to cloak the documents with the attorney-client privilege. He stated, "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. Dr. Mold was asked why Liggett & Myers didn't market a safer cigarette. He stated,

"Well, I can't give you, you know, a positive statement because I wasn't in the management circles that made the decision, but I certainly had a pretty fair idea why. . . (T)hey felt that such a cigarette, if put on the market, would seriously indict them for having sold other types of cigarettes that didn't contain this, for example. . . (a)t a meeting we held in. . . New Jersey at the Grand Met headquarters. . . at which the various legal people involved and the management people involved and myself were present. At one point, Mr. Dey . . . who at that time, and I guess still is the president of Liggett Tobacco, made the statement that he was told by someone in the Philip Morris Company that if we tried to market such a product that they would clobber us."

91. A memorandum authored by an attorney at the firm of Shook, Hardy & Bacon, long-time lawyers for the Tobacco Industry, confirmed the existence of the conspiratorial nature of the Tobacco Industry's position regarding the production and sales of a "safer" cigarette.

92. The 1987 memorandum was written in the context of the marketing by RJR of a smokeless cigarette, Premier, that heated rather than burned tobacco. The Shook, Hardy attorney wrote that the smokeless cigarette could "have significant effects on the tobacco industry's joint defense efforts" and "(t)he industry position has always been that there is no alternative design for a cigarette as we know them.. The attorney also noted that, "Unfortunately, the Reynolds announcement...seriously undercuts this component of industry's defense."

### **C. Despite Its Knowledge That Nicotine Is Addictive, The Tobacco Industry Falsely Claims That Nicotine Is Not Addictive**

93. By no later than the early 1960s and perhaps as early as 1 the 1940's Defendants were fully aware, based on their own scientific research, that nicotine is an addictive substance and that regular cigarette smoking results in nicotine dependence. For example, an internal Philip Morris report from 1971 describes the difficulties a smoker has in stopping smoking once he or she is addicted to nicotine: "Even after eight months quitters were apt to report having neurotic symptoms, such as feeling depressed, being restless and tense, being ill-tempered, having a loss of energy, being apt to doze off, etc. They were further troubled by constipation and weight gains...."

94. An internal report written in 1973 by William L. Dunn, Jr., a senior scientist with Philip Morris, provides a more startling picture:

The primary incentive to cigarette smoking is the immediate salutatory affect of inhaled smoke upon body function....As with eating and copulating, so it is with smoking. The physiological effects serve as the primary incentive; all other incentives are secondary ....*Without nicotine*, the argument goes, *there would be no smoking*. Some *strong evidence can be marshalled to this argument*:

1) No one has ever become a cigarette smoker by smoking cigarettes without nicotine.

2) Most of the physiological responses to inhaled smoke have been shown to be nicotine-related. (Emphasis supplied).

95. Another internal Philip Morris document, this one from 1981, acknowledges that

*Nicotine is a powerful pharmacological agent with multiple sites of action and may be the most important component of cigarette smoke. Nicotine and an understanding of its properties are important to the continued well being of our cigarette business since this "alkaloid has been cited often as the reason for smoking, and theories have been advanced for "nicotine titration" by the smoker. Nicotine is known to have affects on the central nervous system as well as influencing memory, learning, pain perception, response to stress and level of arousal. (Emphasis supplied).*

96. Additional documents, which are similarly replete with evidence of the Tobacco Industry's knowledge of the addictive nature of nicotine, further demonstrate the Tobacco Industry's wanton and reckless disregard of this knowledge:

(a) In 1962, Sir Charles Ellis, scientific advisor to the board of directors of British American Tobacco Company ("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; in particular, it was not shared with the Committee that was preparing the first United States Surgeon General's report and hence was not reflected in that report.

(c) Addison Yeaman, General Counsel at Brown & Williamson, summarized his view about nicotine in a 1963 internal memorandum:

Moreover, nicotine is addictive. We are, then, in the business of selling nicotine, an addictive drug....

(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 forgoes his accustomed nicotine. The change is very noticeable, he misses the reward, and so he returns to smoking."

(e) 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.

97. Documents from a BATCO study called Project Hippo, uncovered only in May 1994, show that as far back as 1961, this cigarette company was actively studying the physiological and pharmacological effects of nicotine. In furtherance of the Tobacco Industry conspiracy, Project Hippo reports were circulated to other Tobacco Companies and to the TIRC, demonstrating both that the Tobacco Industry's nicotine research was shared and that the individual members of the Tobacco Industry were acting in concert to achieve a single goal -- the

addiction of millions of Americans and therefore Ohioans to obtain as much profit as could be reaped from this senseless addiction. BATCO sent the reports to officials at Brown & Williamson and RJR, and circulated a copy to TIRC with a request that TIRC "consider whether it would help the U.S. industry for these reports to be passed on to the Surgeon General's Committee." Ultimately, these reports were withheld from the Surgeon General's Committee to the detriment of Plaintiffs and members of the Plaintiff Class.

98. Similarly, an RJR-MacDonald Marketing Summary Report from 1983 concluded that the primary reason people smoke "is probably the physiological satisfaction provided by the nicotine level of the product."

99. To this day, the Tobacco Companies, acting in concert with each other and the Tobacco Industry, have actively concealed from public health officials, the public and therefore Plaintiffs and members of the Plaintiff Class their extensive knowledge of the addictive properties of nicotine and its critical role in smoking while continuing to publicly proclaim that nicotine is not addictive and that cigarettes are not harmful to health.

100. As recently as December 1995, the Wall Street Journal reported on an internal Philip Morris draft document analyzing the competitive market for nicotine products for the years 1990-1992. The report describes the importance of nicotine: "Different people smoke for different reasons. But the primary reason is to deliver nicotine into their bodies." It is a physiologically active, nitrogen containing substance. Similar organic chemicals include nicotine, quinine, cocaine, atropine and morphine. While each of these substances can be used to affect human physiology, nicotine has a particularly broad range of influence. During the smoking act, nicotine is inhaled into the lungs in smoke, enters the bloodstream and travels to the brain in about eight to ten seconds."

101. Recently disclosed handwritten notes dated 1965 from Ronald A. Tamol, who until 1993 was Philip Morris' Director of Research and Brand Development, refer to "minimum nicotine ... to keep the normal smoker hooked."

102. Patent filings by the Tobacco Companies further reveal their knowledge of the addictive quality of nicotine. In a 1971 patent filing, Philip Morris talks about maintaining the "nicotine content at a sufficiently high level to provide the desired physiological activity." Years of numerous patent filings by the Tobacco Companies underscore the industry's knowledge that nicotine is addictive.

103. Despite their knowledge that as a result of nicotine, cigarette smoking is extremely addictive, the Tobacco Companies continue to deny that smoking is addictive. Through their sworn testimony to Congress, their individual advertising and public relations campaigns, and collectively through the Tobacco Institute, the Tobacco Companies have successfully promoted and sold cigarettes by concealing and misrepresenting their highly addictive nature.

104. However, at the same time that the Tobacco Companies were publicly denying to Congress and the American people, including Plaintiffs and members of the Plaintiff Class, the addictive nature of nicotine, the U.S. Food and Drug Administration was investigating nicotine addiction from cigarettes. The FDA concluded:

The Food and Drug Administration has conducted an extensive investigation and has engaged in comprehensive analysis regarding the agency's jurisdiction over nicotine-containing cigarettes and smokeless tobacco products.

...

The Agency has obtained evidence concerning the knowledge of cigarette and smokeless tobacco product manufacturers about the pharmacological and addictive effects of nicotine in cigarettes and smokeless tobacco, and their manipulation of nicotine delivery to satisfy users' physiological need for nicotine, from the major manufacturers of these products and from CTR.

(U. S. F. D.A. 1995 Report).

105. On February 25, 1994, David A. Kessler, M.D Commissioner of the FDA, sent a letter to Scott D. Bailin, Esq. Chairman of the Coalition on Smoking and Health asserting:

Evidence brought to our attention is accumulating that suggests that cigarette manufacturers may intend that their products contain nicotine to satisfy an addiction on the part of some of their customers. The possible inference that cigarette vendors intend cigarettes to achieve drug effects in some smokers is -

based on mounting evidence we have received that (1) the nicotine ingredient in cigarettes is a powerfully addictive agent and (2) cigarette vendors control the levels of nicotine that satisfy this addiction.

106. In response to Kessler's letter, on March 15, 1994, in a letter to *The New York Times*, James W. Johnston, Chairman and Chief Executive Officer of RJR, continued to assert that nicotine was not addictive. Johnston based his assertion upon the success rate of American adults who had quit smoking.

107. On March 25, 1994, David Kessler testified before the Waxman Subcommittee that "the cigarette industry has attempted to frame the debate on smoking as the right of each American to choose. The question we must ask is where smokers really have the choice." Dr. Kessler stated:

a. "Accumulating evidence suggests that cigarette manufacturers may intend this result -- that they may be controlling the levels of nicotine in their products in a manner that creates and sustains an addiction in the vast majority of smokers."

b. "We have information strongly suggesting that the amount of nicotine in a cigarette is there by design."

c. "[T]he public thinks of cigarettes as simply blended tobacco rolled in paper. But they are much more than that. Some of today's cigarettes may, in fact, qualify as high technology nicotine delivery systems that deliver nicotine in precisely calculated quantities -- quantities that are more than sufficient to create and sustain addiction in the vast majority of individuals who smoke regularly."

d. "[T]he history of the tobacco industry is a story of how a product that may at one time have been a simple agricultural commodity appears to have become a nicotine delivery system."

e. "[T]he cigarette industry has developed enormously sophisticated methods for manipulating nicotine levels in cigarettes."

f. "In many cigarettes today, the

amount of nicotine present is a result of choice, not change. [S]ince the technology apparently exists to reduce nicotine in cigarettes to insignificant levels, why, one is led to ask, does the industry keep nicotine in cigarettes at all?"

108. On June 21, 1994, Dr. Kessler told the Waxman Subcommittee that FDA investigators had discovered that Brown & Williamson had developed a high nicotine tobacco plant, which the company called Y-1. This discovery followed Brown & Williamson's flat denial to the FDA on May 2, 1994, that it had engaged in "any breeding of tobacco for high or low nicotine levels."

109. When four FDA investigators visited the Brown & Williamson plant in Macon, Georgia on May 3, 1994, Brown & Williamson officials denied that the company was involved in breeding tobacco for specific nicotine levels.

110. In fact, in a decade-long project, Brown & Williamson secretly developed a generically engineered tobacco plant with a nicotine content more than twice the average found naturally in flue-cured tobacco. Brown & Williamson took out a Brazilian patent for the new plant, which was printed in Portuguese. Brown & Williamson and a Brazilian sister company, Souza Cruz Overseas, grow Y-1 in Brazil and shipped it to the United States where it was used in five Brown & Williamson cigarette brands sold in Ohio, including three labeled "light." When the company's deception was uncovered, company officials stated that nearly four million pounds of Y-1 were stored in company warehouses in the United States.

111. As part of its cover-up, Brown & Williamson even went so far as to instruct the DNA Plant Technology Corporation of Oakland, California, which had developed Y-1, to tell FDA investigators that Y-1 had "never [been] commercialized." Only after the FDA discovered two United States Customs Service invoices indicating that "more than a million pounds" of Y-1 tobacco had been shipped to Brown & Williamson on September 21, 1992, did the company admit that it had developed the high-nicotine tobacco.

112. The public, including Plaintiffs and members of the Plaintiff Class, is only now learning of the measures taken by the Tobacco Industry to misrepresent, omit and conceal the truth about nicotine. On March 31, 1994, Congressman Waxman released a copy of a previously secret Philip Morris-funded research study substantiating the addictive nature of nicotine. Philip Morris scientists, upon

conducting tests, found strong evidence concerning the addictive nature of nicotine, which suggested that further testing should be done. The experiment used in the study -- self-administration by rats -- is one of the primary tests used by the U.S. Food and Drug Administration, the U.S. Drug Enforcement Agency and the World Health organization to determine whether a drug is addictive. The research was submitted in 1983 to the scientific journal *Psychopharmacology* and was accepted for publication. Prior to publication, the journal was notified by the scientist that the article was being withdrawn citing "factors beyond my control." The scientist subsequently left Philip Morris and in 1986 resubmitted a revised version of the article to the journal. After the article was again accepted for publication, the scientist was again forced to withdraw it by Philip Morris.

113. Had the Tobacco Companies disclosed their knowledge of the addictive nature of nicotine, the public, including Plaintiffs and members of the Plaintiff Class would have years ago become aware of the fact of the addictiveness of nicotine and the scientific and medical community would have years ago had access to critical secrets of the Tobacco Industry on the subject, which would have resulted in a more rapid popular determination and consensus on the subject. The Tobacco Industry engaged in an ongoing conspiracy to actively misrepresent, omit and conceal the truth about nicotine in order to sustain the addictions of existing cigarette smokers and to "hook" thousands of new smokers every day, including Plaintiffs and members of the Plaintiff Class, so that the Tobacco Companies could continue to profit at the expense of the lives and health of the consuming public. In fact, according to an April 31 1994 article in the *Houston Chronicle*, approximately 25.4 billion packs of cigarettes are sold in the United states each year. Clearly, the Tobacco Industry's "Conspiracy of Death and Addiction" has been successful.

114. Not only did the Tobacco Industry know, misrepresent, omit and conceal that nicotine is an addictive drug, Plaintiffs and the Plaintiff Class are informed and believe that the Tobacco Industry requires that their cigarettes contain sufficient nicotine to satisfy addiction on the part of smokers, and therefore manipulates and controls the levels of nicotine in these products to create and sustain the addiction. It is this scheme to deceive the American public, including Plaintiffs and members of the Plaintiff Class, that enables the Tobacco Companies to not only sell its life threatening and addictive products to over two million Ohio residents and citizens but more importantly, to make these Ohioans captive customers of the Tobacco Industry.

#### **D. The Tobacco Companies Manipulate the Level of Nicotine in Cigarettes with the Intent and Purpose of Creating and Sustainina Addictions to their Product-.**

115. Plaintiffs and members of the Plaintiff Class are informed and believe that the Tobacco Companies control and/or manipulate the levels of nicotine in cigarettes and thus the amount of nicotine which can be absorbed into the human body from cigarette use. The Tobacco Companies developed technology years ago to remove and add nicotine from tobacco and to control precisely the amount of nicotine in cigarettes. Armed with this chronology, the Tobacco Companies manufacture, market and sell their products with levels of nicotine that are sufficient to produce and sustain addiction. Rather than remove nicotine from cigarettes -- and hence remove the addictive drug contained therein - the Tobacco Companies add nicotine to their cigarettes, through a variety of methods, in order to maintain levels of nicotine sufficient to make their cigarettes addictive to consumers. In fact, in a 1972 internal memorandum, a Philip Morris research scientist summed up the real strategy moving the Tobacco Industry:

Think of the cigarette as a dispenser for a dose unit of nicotine.

116. The Tobacco Companies prepare a substantial portion of the contents of their cigarettes through what is called a "reconstitution process." Prior to the 1940s, the waste products from cigarettes - tobacco leaf scraps and stems, dried tobacco dust, adhesive reinforcing fibers, mineral ash modifiers, humectants and other inexpensive materials -- were discarded. Thereafter, the Tobacco Companies began to use these previously unusable materials to make reconstituted tobacco. As part of the process, the Tobacco Companies removed ingredients from these materials at an early stage of the process and replaced some of the nicotine in later stages. The reconstitution process allows the Tobacco Companies to manufacture cigarettes more cheaply, by using less actual tobacco, which is the most expensive part of the cigarette, making up the difference by using reconstituted tobacco. By removing the nicotine and then replacing the nicotine to the levels required for addiction, the Tobacco Industry is able to control the precise mount of nicotine in cigarettes

117. LTR Industries ("LTR"), a subsidiary of Kimberly-Clarke corporation, specializes in the tobacco reconstitution process and, as LTR says, in helping tobacco companies "control" their nicotine. The LTR reconstitution process is the most widely

used in the world. An LTR advertisement, entitled "More Nicotine, Or Less," published in tobacco trade publications 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. These adjustments will not affect the other important properties of customized reconstituted tobacco produced at LTR Industries: low tar delivery, high filling power, high yield, and the flexibility to convey organoleptic modifications. We can help you control your tobacco.

In fact, the process described in the LTR advertisement can raise the level of nicotine beyond that which is naturally found in tobacco materials. In 1985, a Tobacco Journal article describing the LTR process provides: "Those standard reconstituted Tobacco Products contained 0.7-1.0 nicotine, LTR industries offers the possibility of increasing the nicotine content of the final sheet to a maximum of 3.5%.... A dramatic increase in tobacco taste and smoke is noted in the nicotine-fortified reconstituted tobacco."

118. Unbeknownst to cigarette smokers, the Tobacco Companies have long viewed cigarettes in terms of their nicotine delivery function. For example, Philip Morris' William L. Dunn Jr. wrote in a 1973 internal memorandum:

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...

*The cigarette should be conceived not as a product but as a package. The product is nicotine.* The cigarette is but one of many package layers. There is the carton, which contains the pack, which contains the cigarette, which contains the smoke. The smoke is the final package. The smoker must strip off all of these packaged layers to get to that which he seeks ... Think of the cigarette as a storage container for [a] days' supply of nicotine ... Think of the

cigarette as a dispenser for a dose unit of nicotine .... Think of a puff of smoke as the vehicle for nicotine.... Smoke is beyond question the most optimized vehicle of nicotine and the cigarette the most optimized dispenser of smoke.... (Emphasis supplied).

Likewise, a 1981 Lorillard study indicated that "current research is directed toward increasing the nicotine levels while maintaining or marginally reducing the 'tar' deliveries."

119. Evidence of the Tobacco Industry's intent and ability to manipulate nicotine and cigarettes at a sufficiently high level to provide the "desired physiological activity" is found in years of patent applications of the Tobacco Companies. These patents illustrate an intent and ability by the Tobacco Companies: (1) to control the amount of nicotine in cigarettes; (2) to provide desired physiological effects; (3) to increase nicotine content in cigarettes by adding nicotine to various parts of the cigarette; (4) to manipulate nicotine levels in cigarettes; and (5) to manipulate the rate at which the nicotine is delivered in the cigarettes. For example:

(a) A 1966 Philip Morris patent application discusses an invention that "permits the release into tobacco smoke, in controlled amounts, of desirable flavorants, as well as the release, in controlled amounts and when desired, of nicotine into tobacco smoke."

(b) A 1971 Philip Morris patent states:

It has long been known in the Tobacco Industry that in order to provide a satisfactory smoke, it is desirable to maintain a nicotine content of Tobacco Products at a uniform level. However, it is difficult to accomplish this result since the nicotine content of tobacco varies widely, depending on the type of tobacco and the conditions under which the tobacco was grown.

Maintaining the nicotine content at a sufficiently high level to provide the desired physiological activity, taste, an odor which this material imparts to the smoke, without raising the nicotine content through an undesirably high level, can thus be

seen to be a significant problem in the tobacco art. The addition of nicotine to tobacco in such a way that it remains inert and stable in the product and yet is released in a controlled amount into the smoke aerosol when the tobacco is pyrolyzed, is a result which is greatly desirable.

The present invention provides a solution to this longstanding problem and results in accurate control of the nicotine which is released in tobacco smoke. By employing the nicotine releasing agents in methods of the present invention, it is possible to incorporate exact amounts of nicotine into tobacco composition, which will remain constant over extended periods of time and which will ultimately yield a smoke containing a controlled amount of nicotine.

(c) Another 1971 Philip Morris patent application discusses a design to increase the nicotine content in the smoke of the tobacco product by adding nicotine. One of the expressed objects of the invention was to "provide an agent for the treatment of tobacco smoke whereby nicotine is easily released under controlled amounts." The same Philip Morris 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."

(d) A 1980 Loews' Corporation patent application discusses a process which "enables the manipulation of the nicotine content of tobacco material, such as cut leaf and reconstituted leaf, by removal of nicotine from a suitable nicotine tobacco source, or by the addition of nicotine to a low nicotine material."

(e) A 1986 RJR patent indicates that the Tobacco Companies can precisely manipulate the rate at which

the nicotine is delivered in the cigarette: "It is a further object of this invention to provide a cigarette which delivers a larger amount of nicotine in the first few puffs of the cigarette than in the last few puffs."

(f) A 1991 RJR patent application states that "processed tobaccos can be manufactured under conditions suitable to provide products having various nicotine levels."

120. The Tobacco companies' manipulation of the level of nicotine in cigarettes, with the intent and purpose of creating and sustaining addictions to their cigarettes, has only recently come to the public's attention.

121. During the March 25, 1994 Congressional Hearings, FDA Commissioner Dr. David Kessler testified that accumulating evidence suggests that the Tobacco Companies "may be controlling smokers, choice by controlling the level of nicotine in their products in a manner that creates and sustains an addiction in the vast majority of smokers." Dr. Kessler went on to say that some of "today's cigarettes may in fact, qualify as high technology nicotine delivery systems that deliver nicotine in precisely calculated quantities -- quantities that are more than sufficient to create and sustain an addiction in the vast majority of individuals who smoke regularly." During the March 25 Hearing, Dr. Kessler and others presented evidence of the Tobacco Companies' manipulation of nicotine levels, including reference to internal memoranda and more than 30 industry patents, several of which have been identified above.

122. Just as the Tobacco-Companies deny that the nicotine contained in cigarettes is addictive, through their individual advertising and public relations campaigns and collectively through the Tobacco Institute, the Tobacco Companies have denied unequivocally that they are engaged in controlling the level of nicotine in cigarettes for the purpose of developing and sustaining addiction to their products. Since the March 25, 1994 Congressional Hearings, in nationwide television broadcasts and publications, spokespersons for the Tobacco Institute, the Tobacco Companies and therefore the Tobacco Industry have denied and sought to refute all charges that the Tobacco Companies manipulate nicotine levels in cigarettes. During their appearance before Congress on April 14, 1994, the chief executives of each of the Tobacco Companies testified that their companies do not manipulate nicotine levels in or otherwise add nicotine to their cigarettes to create or sustain

addiction to their products.

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

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

125. In furtherance of the Tobacco Industry conspiracy and in an attempt to both perpetrate a fraud upon Plaintiffs and members of the Plaintiff Class as well as to violate Ohio's Consumer Protection Statutes, Brown & Williamson has publicly denied that the use of ammonia in the processing of tobacco increases the amount of nicotine absorbed by the smoker. However, the company's own internal documents reveal that Brown & Williamson and the other Tobacco companies 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.

According to Brown & Williamson's secret manual, all American cigarette manufacturers except Liggett use ammonia technology in their cigarettes.

**VI. CAUSES OF ACTION**

**COUNT ONE UNDERTAKING OF SPECIAL DUTY**

126. Plaintiffs on behalf of all Ohio taxpayers, reallege, as if fully set forth, each and every allegation contained in paragraphs 1 through 125 above, and further allege:

127. Defendants assumed a special responsibility and duty to render services for the protection of the public health and a duty to those who

are economically effected by the public health, including the taxpayers of the State of Ohio; to cooperate closely with those who safeguard the public health; to aid and assist the research effort into all phases of tobacco use and health; to continue research and all possible efforts until all the facts are known; and to provide complete, and authenticated information about cigarette smoking and health.

128. Defendants recognized that their undertaking was necessary for the protection of the public health and that their conduct would affect the smoking habits and health of millions of American and Ohio citizens and taxpayers, the cost of medical care, and the operations of the insurance market.

129. Defendants have breached and continue to breach their special responsibility and duty through their failure to exercise reasonable care in performance of their undertaking. Defendants, failure to exercise such reasonable care increased the risk of harm and the cost of health care, and the expenditure of public funds used to pay for medical treatments to Medicaid eligible Ohioans who received treatment for smoking related causes, and whose treatment were paid for by the taxpayers of Ohio.

130. As a direct and proximate result of Defendants' conduct, Plaintiff and all Ohio taxpayers have suffered and will continue to suffer substantial injuries and damages.

**COUNT TWO - CONSUMER FRAUD**

131. Plaintiffs on behalf of all Ohio taxpayers, reallege, as if fully set forth, each and every allegation contained in paragraphs 1 through 130 above, and further allege:

132. O.R.C. §1345. 02, §1345. 03 and §4165. 02 are designed to protect consumers against unfair, deceptive or fraudulent business practices, unfair competition, and false advertising and unconscionable acts and practices.

a. Defendants' fraudulent, misleading, and deceptive statements and practices relating to the issue of smoking and health, including intentional misrepresentations that there is no causal connection between cigarette smoking and adverse health effects and that cigarette smoking is not addictive;

b. Defendants' fraudulent, misleading, and deceptive statements

and practices relating to the industry's false promises to conduct and disclose objective research on the issue of smoking and health;

c. Defendants' fraudulent, concealment of information relating to the issue of smoking and health and failure to disclose material facts, including intentional concealment and failure to disclose.

133. As a direct and proximate result of Defendants' wrongful activity, Plaintiff, individually along with all Ohio taxpayers have suffered and will continue to suffer substantial economic injuries and damages.

### **COUNT THREE - RESTITUTION**

#### **Performance of Another's Duty to the Public**

134. Plaintiffs on behalf of all Ohio taxpayers, reallege, as if fully set forth, each and every allegation contained in paragraphs 1 through 133 above, and further allege:

Defendants assumed and owe a duty to pay for the harm caused by their wrongful conduct, yet Defendants have repeatedly refused to do so. Instead, Defendants have embarked on a campaign of denial, subterfuge, and deceit to deny responsibility and to avoid paying for the consequences of the harm they have caused to Ohio citizens and residents.

135. The State of Ohio and therefore Ohio taxpayers has been and will be required by statutory and contractual obligations to expend vast sums of money through increased taxes and health care premiums, to pay for the harm caused by the wrongful conduct of Defendants. Ohio taxpayers, through the State of Ohio, have the right to charge and recoup from Defendants these sums of money. These expenditures are immediately necessary to protect the public health and safety.

136. As a result of Defendants' wrongful activity, the State of Ohio has borne a duty that -- in law, equity, and fairness --ought to have been borne by Defendants all to the ultimate economic detriment of Ohio taxpayers.

### **COUNT FOUR - RESTITUTION**

#### **Unjust Enrichment**

137. Plaintiffs on behalf of all Ohio

taxpayers, reallege, as if fully set forth, each and every allegation contained in paragraphs 1 through 136 above, and further allege:

138. Defendants, through their wrongful conduct as described above, have reaped substantial and unconscionable profits from the sale of cigarettes in Ohio. These cigarette sales, in turn, have resulted in increased health care costs directly attributable to cigarette smoking.

139. Without justification, Defendants have failed to pay for the consequences of their unlawful conduct.

140. As a result, the State of Ohio and therefore Ohio taxpayers have been required to pay for the medical costs stemming from Defendants' unlawful acts. The State of Ohio has borne a duty that -- in law, equity, and fairness -- ought to have been borne by Defendants.

141. In equity and good conscience, it would be unjust for Defendants to enrich themselves at the expense of Ohio's taxpayers.

### **COUNT FIVE - CONSPIRACY**

142. Plaintiffs on behalf of all Ohio taxpayers, reallege, as if fully set forth, each and every, allegation contained in paragraphs 1 through 141 above, and further allege:

143. Beginning at least as early as the 1950s, and continuing until the present day, Defendants entered into a conspiracy with the intentional and unlawful purpose and effect of restraining and suppressing research on the harmful effects of smoking; restraining and suppressing the dissemination of information on the harmful effects of smoking; engaging in affirmative misrepresentations on the harmful effects of smoking; and restraining and suppressing the research, development, production, and marketing of a safer cigarette. In furtherance of Defendants' conspiracy, Defendants lent encouragement, substantial assistance, and otherwise aided and abetted each other with respect to these wrongful acts.

144. As a direct and proximate result of Defendants' unlawful conspiracy, the State of Ohio and therefore Ohio taxpayers have suffered and will continue to suffer substantial economic injuries and damages.

145. As a result of Defendants' conspiracy, Defendants are vicariously, jointly and

severally liable with respect to each cause of action described above in each Count of this Complaint.

#### **COUNT SIX - VIOLATION OF CONSUMER PROTECTION STATUTES**

146. Plaintiffs on behalf of all Ohio taxpayers, reallege as if fully set forth, each and every allegation contained in paragraphs 1 through 145 above, and further allege:

147. Plaintiffs and all Ohio taxpayers are consumers who are citizens of the State of Ohio. Ohio has enacted O.R.C. §1345.02, O.R.C. §1345.03 and O.R.C. §4165.02 to protect consumers against unfair, deceptive or fraudulent business practices, unfair competition, and false advertising and unconscionable acts and practices. Ohio allows consumers a private right of action for damages and for equitable relief under these statutes.

148. By their conduct, including manipulation of nicotine levels, suppression, subversion and distortion of medical and scientific research, misrepresentations and non-disclosures of material facts alleged above, Defendants deceived and continue to deceive consumers and subject them to continuing and/or increasing addiction to Defendants' cigarettes. This conduct constitutes unlawful, unfair, unconscionable, deceptive and fraudulent business practices within the meaning of O.R.C. §1345.02, O.R.C. §1345.03 and O.R.C. §4165 . 02.

149. In addition, Defendants' use of various media to promote the sale of Defendants' cigarettes by, among other things, falsely and deceptively representing that nicotine is not addictive and that Defendants' do not manipulate the levels of nicotine in their cigarettes so as to addict or maintain the addiction of consumers constitutes unfair competition and unfair, deceptive, untrue, or misleading advertising within the meaning of Ohio's consumer protection statutes.

150. The above-described unlawful, unfair, and fraudulent business practices, false and misleading advertising, and unfair competition by Defendants continues to present a threat to Ohio citizens and residents. Defendants have systematically perpetrated a fraud upon members of the public and refuse publicly to acknowledge the wrongdoing of their actions. Defendants continue to refuse to admit that nicotine is addictive, that Defendants manipulate the amount of nicotine level in Defendants' cigarettes, or that Defendants intend Plaintiff and all Ohio citizens and residents to become or remain addicted to nicotine.

151. As a result of the conduct described above, Defendants eve been and will continue to be unjustly enriched at the expense of the State of Ohio and therefore Ohio taxpayers. Specifically, Defendants have been unjustly enriched by the receipt of billions of dollars in domestic cigarettes sales each year a part of which flows from the State of Ohio, which products were promoted and sold through advertisements and statements which affirmatively misrepresent, either directly or by implication, that nicotine is not addictive and that the Tobacco Companies do not manipulate the nicotine levels of their cigarettes so as to addict or maintain the addiction of consumers.

152. The State of Ohio and therefore Ohio taxpayers are therefore entitled to the equitable relief described below along with compensatory damages and attorneys' fees.

#### **COUNT SEVEN - BREACH OF EXPRESS WARRANTY**

153. Plaintiffs on behalf of all Ohio taxpayers, reallege, as if fully set forth, each and every allegation contained in paragraphs 1 through 152 hereof, and further allege:

154. Defendants' advertisements and promotional statements alleged above contained broad promises and affirmations of fact claims amounting to a warranty that Defendants' cigarettes were not addictive, that the Tobacco Companies did not manipulate the nicotine levels in Defendants' cigarettes, and that Defendants did not intend to addict or maintain the addiction of Ohio citizens and residents. These promises and affirmations of fact were such that a reasonable person in the position of Ohio's cigarette consumers would believe Defendants had made a promise as to the performance of their cigarettes or made affirmations of facts about the condition of their cigarettes.

155. As alleged above, the Tobacco Companies breached their warranties by offering for sale, and selling as non-addictive, cigarettes that were addictive, and contained levels of nicotine manipulated by the Tobacco Companies to make them addictive.

156. Defendants' breach of their express warranties has caused Ohio citizens and residents to become addicted or remain addicted to nicotine and entitles them to equitable relief as described below and has caused the State of Ohio and therefore Ohio taxpayers to suffer economic damages in an amount to be proven at trial.

**COUNT EIGHT - BREACH OF IMPLIED  
WARRANTY**

157. Plaintiffs on behalf of himself and all Ohio taxpayers, reallege, as if fully set forth, each and every allegation contained in paragraphs 1 through 156 above, and further allege:

158. The Tobacco Companies impliedly warranted that their cigarettes, which they designed and manufactured, and which were sold to Ohio citizens and/or residents, were merchantable and fit and safe for their ordinary use, and that the Tobacco Companies have not manipulated their nicotine levels so as to make them addictive to Ohio cigarette consumers. Not only did Ohio cigarette consumers rely upon these implied warranties but the Tobacco Companies knew or reasonably should have known that these individuals would rely upon these implied warranties when purchasing cigarettes.

159. The cigarettes purchased and consumed by Ohio residents and citizens were addictive, unmerchantable, and unfit for use when sold, and subjected Ohio residents and citizens to addiction and/or increasing addiction. Therefore, the Tobacco Companies breached the implied warranty of merchantability at the time the cigarettes were sold in Ohio in that the cigarettes were not fit for their ordinary purposes.

160. Defendants Novelart and EBY-Brown are liable as wholesale distributors of products for resale in Ohio.

161. Defendants Kroger and Riser are liable as retail distributors of products for sale in Ohio.

162. As a direct and proximate result of Defendants' breach of the implied warranty of merchantability, Ohio residents and citizens are addicted or subject to addiction to Defendants' cigarettes and entitled to the equitable relief described below and have suffered addiction, severe emotional distress, economic damages and have otherwise been damaged.

**COUNT NINE - STRICT PRODUCT LIABILITY**

163. Plaintiffs on behalf of all Ohio taxpayers, reallege, as if fully set forth, each and every allegation contained in paragraphs 1 through 162 above, and further allege against the Tobacco Companies:

164. At all relevant times, the Tobacco Companies were engaged in the business of

manufacturing and selling their cigarettes for ultimate retail sale to consumers. These Defendants manufactured their cigarettes, manipulated the level of nicotine in their cigarettes and together with the other Defendants sold these cigarettes to retailers, who sold them in Ohio to Ohio residents, citizens and taxpayers.

165. Defendants' cigarettes were expected to and did reach Ohio residents, citizens and taxpayers without substantial change in their condition as manufactured, manipulated and sold by Defendants and wholesale Defendants, Novelart and EBY-Brown, along with retail Defendants, Kroger and Riser who aided and abetted in the sale of these addictive products to Ohio cigarette consumers. Thus, the defect alleged below, existed when the product left Defendant's possession.

166. Ohio cigarette consumers reasonably and foreseeably consumed the cigarettes in the manner in which the cigarettes were intended to be used, that is, for personal consumption, causing and/or subjecting Ohio cigarette consumers to become addicted to nicotine.

167. Ohio cigarette consumers were not aware of, and could not in the exercise of reasonable care have discovered, the addictive nature of cigarettes, Defendants' manipulation of the nicotine levels of these cigarettes, and Defendants' intent to addict or maintain the addiction of Ohio cigarette consumers because they were marketed and sold without reasonable warnings of their dangers. These dangers, as alleged above, were known, or should have been known to Defendants, who manufactured and sold addictive products to Ohio cigarette consumers.

168. Because Ohio cigarette consumers could not have discovered the addictive nature of cigarettes at the time they purchased and consumed Defendants' cigarettes and because Ohio cigarette consumers subsequently suffered and continue to suffer from the addictive effects of these cigarettes, Defendants' cigarettes failed to perform as safely as ordinary consumers of Defendants products would have expected and/or the foreseeable risks associated with the cigarettes' design exceeded the benefits associated with that design.

169. As a direct and proximate result of Defendants' design, manufacture, promotion, marketing and sale of Defendants' cigarettes, Ohio cigarette consumers have suffered addiction or are subject to addiction to Defendants' cigarettes and have suffered severe emotional distress, economic damages and have otherwise been damaged.

170. Defendants' cigarettes, containing manipulated levels of nicotine, as manipulated by manufacturing Defendants, which caused or subjected Ohio cigarette consumers to become addicted to nicotine upon personal consumption, constitute a product dangerous for normal use due to their defective design, defective manufacture, and Defendants' inadequate warnings to Ohio cigarette consumers .

171. Thus, Defendants are strictly liable to the State anal therefore Ohio taxpayers in an amount according to proof.

172. The Tobacco Companies which manufactured the cigarettes and the Wholesale/Retail Defendants who sold the cigarettes in a defective condition unreasonably dangerous to Ohio cigarette consumers are strictly liable for the harm caused therefrom because these Defendants are engaged in the business of selling such a product, i.e., cigarettes and the cigarettes were expected to and did reach consumers without substantial change in the condition they were manufactured and sold. As a direct and proximate result of these Defendants' negligent conduct, Ohio cigarette consumers have suffered addiction, severe emotional distress, have incurred economic damages including medical expenses and/or lost wages and have otherwise been damaged.

173. Pursuant to Ohio Revised Code §2307.78(A) (1), the Defendants who acted as wholesale and retail suppliers/distributors of the cigarettes have incurred liability for compensatory damages based on the product liability claims stated in paragraphs 168 to 177 above, as these Defendants:

(a) negligently failed to warn, advise, or instruct consumers of the cigarettes of the design and manufacturing defects which should have been known to these Defendants since, at a minimum 1988, the year the Surgeon General's Report "The Health Consequences of Smoking: Nicotine Addiction" was published;

(b) negligently supplied, distributed, and/or sold the cigarettes when they knew or should have known of the design and manufacturing defects which should have been known to these Defendants since, at a minimum 1988, the year the Surgeon General's Report "The Health Consequences of Smoking: Nicotine Addition" was published.

As a direct and proximate result of these Defendants' negligent conduct, Plaintiffs and members of the Plaintiff Class have suffered addiction, severe emotional distress, have incurred economic damages including medical expenses and/or lost wages and have otherwise been damaged.

174. Brown & Williamson is further liable pursuant to Ohio Revised Code §2307.78 as a supplier as it has acted as a wholesale distributor of cigarettes within the State of Ohio.

#### **COUNT TEN - FRAUD AND DECEIT**

175. Plaintiffs on behalf of Ohio taxpayers, reallege, as if fully set forth, each and every allegation contained in paragraphs 1 through 174 above, and further allege:

176. At all times during the course of dealing between Defendants and Ohio cigarette consumers, through advertising and representations in the mass media and by other communications, Defendants have repeatedly misrepresented and concealed the fact that nicotine is not addictive. Moreover, under oath, the Tobacco Industry has repeatedly stated to Congress that the Tobacco Industry does not manipulate nicotine levels in their cigarettes so as to addict or maintain the addiction of Ohio cigarette consumers.

177. In representations to the American public which includes Plaintiffs and Ohio cigarette consumers, Defendants intentionally misted the following material information: nicotine is addictive and the Tobacco Companies manipulate nicotine levels in their cigarettes so as to addict Ohio cigarette consumers.

178. Defendants were under a duty to disclose to Plaintiffs and Ohio cigarette consumers the addictive nature of nicotine, Defendants' manipulation of the nicotine levels in Defendants' cigarettes, and Defendants' intent to addict Ohio cigarette consumers. Defendants had sole access to nonpublic material facts, which remained in the exclusive possession, custody and control of the Tobacco Industry, concerning: (1) the addictive nature of nicotine, (2) the manipulation of nicotine levels in their cigarettes, and (3) the Tobacco Industry's intent to addict or maintain the addiction of Ohio cigarette consumers. Defendants knew that, prior to such addiction to nicotine, Ohio cigarette consumers could not reasonably have discovered the addictive nature of nicotine, Defendants' manipulation of the nicotine levels in Defendants' cigarettes, and Defendants' intent to addict or maintain the addiction of Ohio cigarette

consumers.

179. The Tobacco Industry knew, or reasonably should have known that this information was crucial to Plaintiffs and Ohio cigarette consumers in making their decision to purchase cigarettes. As a result, Ohio cigarette consumers were deprived of informed consent regarding their ingestion of an addictive drug, and were deprived of any choice in which to make a risk benefit assessment to the detriment of Plaintiffs and Ohio cigarette consumers. In addition, Defendants actively concealed the addictive nature of nicotine, Defendants' manipulation of nicotine levels in Defendants' cigarettes, and Defendants' intent to addict or maintain the addiction of Ohio cigarette consumers. These misrepresentations, omissions and concealments of the Tobacco Industry includes, but are not limited to:

- a. Testifying falsely under oath before the United States Congress;
- b. Providing false explanations to customers and to governmental entities regarding the health hazards of tobacco and the addictive qualities of nicotine;
- c. Conducting activities in furtherance of the conspiracy in secret, including clandestine meetings, using Tobacco Company attorneys to secure documents that might reveal the dangers of cigarettes and the addictive nature of nicotine, closing down research projects and moving research and information facilities outside the United States; and
- d. Requiring employees of the Tobacco Industry to keep secret all information about the dangers of cigarette smoking and the addictive nature of nicotine under threats of severe legal consequences.

180. The representations, omissions and concealments were false when made and Defendants knew or were reckless in not knowing and reasonably should have known that they were false. In fact, nicotine was known to Defendants to be addictive, the level of nicotine in Defendants' cigarettes was known to be manipulated by Defendants, and the intent to addict or maintain the addiction of Ohio cigarette consumers was known to Defendants.

181. The misrepresentations, omissions and concealments were made deliberately, willfully, maliciously and/or recklessly with the intent to mislead

Plaintiffs and Ohio cigarette consumers into reliance upon them and were material in causing Ohio cigarette consumers to purchase Defendants' cigarettes.

182. Plaintiffs and Ohio cigarette consumers had no way to determine that the misrepresentations and concealments were false and misleading, and that they included material omissions, and Plaintiffs and Ohio cigarette consumers reasonably relied thereon.

183. Specifically, until shortly before the filing of the Complaint in this action, Plaintiffs had no knowledge that Defendants were engaged in the wrongdoing alleged herein. Because of the fraudulent and active concealment and omission of the wrongdoing by Defendants, including deliberate efforts -- which continue to this day -- to give Plaintiffs and Ohio cigarette consumers the materially false impression that nicotine is not addictive and that Defendants are not manipulating the nicotine levels of their cigarettes, Plaintiffs and Ohio cigarette consumers could not reasonably have discovered the wrongdoing at any time prior to the filing of the instant Complaint. Defendants have attempted and are continuing their attempts to keep such internal information from reaching Plaintiffs and Ohio cigarette consumers. Indeed, Defendants in furtherance of their fraud and conspiracy continue to refuse to admit that nicotine is addictive and that the Tobacco Industry has manipulated the levels of nicotine in their cigarettes.

184. As a proximate and direct result of their reliance on Defendants' misrepresentations, omissions and concealments, Ohio cigarette consumers are addicted or in danger to become addicted to cigarettes, have suffered severe emotional distress, have incurred economic damages including medical expenses and/or lost wages and have been otherwise damaged. Plaintiffs are therefore entitled to the relief requested herein including but not limited to the equitable relief described in the Thirteenth Claim for Relief and to damages according to proof.

185. Defendants knew that nicotine was addictive, Defendants manipulated the amount of nicotine level in Defendants' cigarettes, and Defendants intended to addict Ohio cigarette consumers by failing to disclose material facts to Ohio cigarette consumers, for the purpose of inducing them to purchase cigarettes, thus causing them to incur economic and other damages in an amount to be proven at trial.

186. Defendants are liable for punitive damages for their reckless or wanton or willful disregard for the safety of the general public, including

but not limited to Ohio cigarette consumers in the manipulation of nicotine, a toxic and hazardous substance in their cigarettes along with the concealment and denial of nicotine's addictive properties, all done to maximize sales and profit by creating a self generating market for cigarettes by dieting Ohio cigarette consumers to nicotine Defendants conduct constitutes malice, oppression, and fraud and thereby warrants the imposition of punitive and exemplary damages against Defendants as provided by Ohio law.

#### **COUNT ELEVEN - NEGLIGENT MISREPRESENTATION**

187. Plaintiffs on behalf of Ohio taxpayers, reallege, as if fully set forth, each and every allegation contained in paragraphs 1 through 186 above, and further allege:

188. By reason of their knowledge and expertise regarding the addictive nature of nicotine, manipulation of the amount of nicotine level in Defendants' cigarettes, and intent to addict, and by reason of their statements to consumers in advertisements and other communications, at all times relevant hereto, Defendants owed Plaintiffs and Ohio cigarette consumers a duty of care which required, among other things, that Defendants be truthful and accurate in their representations to Plaintiffs and Ohio cigarette consumers concerning their cigarettes.

189. Defendants breached their duty of care to consumers by negligently making the material misrepresentations alleged herein.

190. Plaintiffs and Ohio cigarette consumers reasonably relied on Defendants' representations, when in fact those representations constituted negligent misrepresentations.

191. Such reliance was not only foreseeable by Defendants but also intended by them.

192. By reason of their reliance on the Defendants' negligent misrepresentations, Ohio cigarette consumers are addicted or subject to being addicted to cigarettes, have suffered severe emotional distress, have incurred economic damages, including medical expenses and/or lost wages and have been otherwise damaged. Plaintiffs are therefore entitled to the equitable relief described in the Thirteenth Claim for Relief and to damages according to proof.

#### **COUNT TWELVE - NEGLIGENCE**

193. Plaintiffs on behalf of Ohio

taxpayers, reallege, as if fully set forth, each and every allegation contained in paragraphs 1 through 192 hereof, and further allege:

194. At all times relevant to the instant Complaint, the individual Defendants acting alone or in concert and conspiracy with one another, through research and studies such as Brown & Williamson's Project Wheat and the Special Projects Division of the Council for Tobacco Research, had actual and/or constructive knowledge or reasonably should have known that the cigarettes and/or other tobacco products which were designed, manufactured, supplied and placed into the public domain for consumption by Ohio cigarette consumers were dangerous or likely to be dangerous due to the addictive levels of nicotine which had been manipulated and placed into the cigarettes and/or other tobacco products by the Tobacco Companies.

195. Due to the secretive methods, manner and means in which the Tobacco Companies suppressed, failed and refused to disclose the dangerously addictive nature of the manipulated levels of nicotine in the cigarettes of the Tobacco Companies, the Tobacco Companies knew and had no reason to believe that the Ohio cigarette consumers would have no knowledge of the dangerous condition of the cigarettes supplied by the Tobacco Companies to Ohio cigarette consumers.

196. The Defendants, acting alone or in concert and conspiracy with one another, failed to act in a reasonable and prudent manner and exercise reasonable and ordinary care to inform and warn Ohio cigarette consumers of the dangerous nature and condition of cigarettes which contained addictive levels of nicotine or of the facts underlying the dangerous nature and condition of their cigarettes and other tobacco products.

197. The Defendants, acting alone or in concert and conspiracy with one another, knew or reasonably should have known that their failure to warn Ohio cigarette consumers of the dangerously addictive nature of the manipulated levels of nicotine in their cigarettes was likely to result in the addiction of Ohio cigarette consumers with the resultant adverse health problems.

198. Due to the foreseeability of the harm to Ohio cigarette consumers, Defendant Tobacco Companies had a duty to Ohio cigarette consumers to provide a reasonably safe product in design and manufacture, and to warn of the addictive nature of nicotine.

199. Defendants breached their duty of reasonable care to Ohio cigarette consumers by the following acts and omissions:

- (a) failure to design and manufacture cigarettes that were not addictive and/or that did not contain unreasonable levels of nicotine;
- (b) failure to warn consumers of the addictive nature of nicotine when they knew or should have known of nicotine's addictive nature; and
- (c) otherwise failing to exercise due care under the circumstances.

200. As a direct and proximate result of the carelessness and negligence of Defendants, Ohio cigarette consumers have suffered addiction, severe emotional distress, economic damages including medical expenses and/or lost wages and have otherwise been damaged.

#### **COUNT THIRTEEN - EQUITABLE RELIEF**

##### **(Injunctive and/or Declaratory)**

201. Plaintiffs on behalf of Ohio taxpayers, reallege, as if fully set forth, each and every allegation contained in paragraphs 1 through 200 above, and further allege:

202. Ohio taxpayers have no adequate remedy at law, rendering injunctive and other equitable relief appropriate in that damages cannot adequately compensate the State of Ohio and therefore Ohio taxpayers for the injuries suffered and threatened.

203. Accordingly, Plaintiff, individually and on behalf of all Ohio taxpayers, request the following Statewide equitable relief:

- (a) that a judicial determination and declaration be made of the rights of the State of Ohio and therefore Ohio taxpayers and the corresponding responsibilities of Defendants;
- (b) that Defendants be declared to be financially responsible for notifying all Ohio cigarette consumers of nicotine's addictive nature, Defendants' manipulation of nicotine levels in their cigarettes, and Defendants' intent to addict or maintain the addiction of Ohio cigarette consumers, with restitution and refunds to the State of Ohio and therefore to Ohio taxpayers of all or part of the sums paid by them to

purchase Defendants' falsely promoted cigarettes;

(c) that Defendants be ordered to disgorge, for the benefit of the State of Ohio and therefore Ohio taxpayers, all or part of their ill-gotten profits received from the sale of cigarettes and/or to make full restitution to the Ohio cigarette consumers; and

(d) that Defendants be ordered to create a medical monitoring fund, under the continuing jurisdiction and supervision of the Court, to monitor the health of Ohio cigarette consumers and to pay or reimburse the State of Ohio for all medical expenses caused by Defendants' wrongdoing. Ohio cigarette smokers are entitled to a "medical monitoring" fund because, as a result of the addictive nature of nicotine in cigarettes, they are at risk for addiction-related physical, mental and emotional harm and are demonstrably at increased risk for lung disease, heart disease, and other well-established smoking-related ailments. Due to the demonstrably addictive properties of nicotine and the levels designed and delivered by Defendants in their cigarettes, the need for ongoing monitoring is a reasonably certain consequence of Ohio cigarette consumers' exposure to nicotine and all other harmful or carcinogenic ingredients in cigarettes, and the recommended monitoring is reasonable.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff individually and on behalf of the State of Ohio and all Ohio taxpayers pray that this Court issue an order and judgment:

- a. Declaring that Defendants have engaged in fraud, consumer fraud, unlawful trade practices, deceptive trade practices and false advertising in violation of the laws of the State of Ohio;
- b. Enjoining Defendants and their respective agents, servants, officers, directors, employees, and all persons acting in concert with them, directly or indirectly, from engaging in consumer fraud, unlawful trade practices, deceptive trade practices, fraud and false advertising in violation of the laws of the State of Ohio;
- c. Ordering Defendants to disclose, disseminate, and publish 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 issue of smoking and health;

d. Ordering Defendants to fund a corrective public education campaign relating to the issue of smoking and health, administered and controlled by an independent third party;

e. Ordering Defendants to take reasonable and necessary affirmative steps to prevent the distribution and sale of cigarettes to minors under the age of 18;

f. Ordering Defendants to fund clinical smoking cessation programs in the State of Ohio;

g. Ordering the Defendants to dissolve the Council for Tobacco Research and the Tobacco Institute, or, in the alternative, to divest their ownership, sponsorship, and/or membership in the Council for Tobacco Research and the Tobacco Institute;

h. Ordering Defendants to disgorge all profits from sales of cigarettes in Ohio;

i. Ordering Defendants to pay restitution;

j. Awarding money damages in an amount that is sufficient to provide restitution and repay the State and the Medicaid Program for the sums it has spent or will spend, past and present, and such other monetary damages as provided by law on account of the Defendants' wrongful conduct, which amount is to be determined at trial by a jury;

k. Awarding pre-judgment interest, reasonable attorneys' fees, expert witness fees, and all other costs of this action;

l. Awarding the punitive money damages against the Defendants for their intentional and fraudulent wrong-doing in an amount that will sufficiently punish the Defendants for their conduct and that will deter such conduct in the

future;

m. Awarding such other extraordinary equitable, declaratory and/or injunctive relief as permitted by law as necessary to assure the State has an effective remedy; and

n. For such other and further relief, as the Court deems just and proper and that the State is entitled to receive.

### **JURY DEMAND**

Plaintiffs demand a trial by jury on all claims so triable.

Respectfully submitted,

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