[ORAL ARGUMENT NOT YET SCHEDULED]

Nos. 06-5267, 06-5268, 06-5269, 06-5270
06-5271, 06-5272, 06-5332, 06-5367, 07-5102, 07-5103
(Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
and
TOBACCO-FREE KIDS ACTION FUND, *et al.*,
Intervenors,

v.

PHILIP MORRIS USA INC., (f/k/a Philip Morris, Inc.), *et al.*,
Defendants-Appellants.

Appeal from the Judgment of the
United States District Court for the District of Columbia

**FINAL AMICUS CURIAE BRIEF OF PUBLIC CITIZEN, INC.,
AMERICAN COLLEGE OF PREVENTIVE MEDICINE,
AMERICAN PUBLIC HEALTH ASSOCIATION,
ASSOCIATION OF MATERNAL AND CHILD HEALTH PROGRAMS,
NATIONAL ASSOCIATION OF LOCAL BOARDS OF HEALTH,
AND THE ONCOLOGY NURSING SOCIETY
IN SUPPORT OF APPELLEE URGING AFFIRMANCE**

Allison M. Zieve
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

May 22, 2008

Counsel for Amici Curiae Public Citizen, *et al.*

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici: The parties and amici appearing before the district court and in this Court are listed in the Brief for Defendants-Appellants and the Brief for the United States of America.

(B) Rulings Under Review: The rulings under review are listed in the Brief for Defendants-Appellants and the Brief for the United States of America.

(C) Related Cases: References to related cases appear in the Brief for Defendants-Appellants and the Brief for the United States of America.

(D) Statutes and Regulations: Pertinent statutes are reproduced in the addendum to the Brief for the Defendants-Appellants.

DISCLOSURE STATEMENT

Amici Curiae Public Citizen, Inc., the American College of Preventive Medicine, the American Public Health Association, the Association of Maternal and Child Health Programs, the National Association of Local Boards of Health, and the Oncology Nursing Society are all non-profit organizations that have no parents, subsidiaries, or affiliates that have issued shares or debt securities to the public.

_____
Allison M. Zieve

CERTIFICATE OF COUNSEL

In accordance with Circuit Rule 29(d), undersigned counsel certifies that it would not have been practicable for amici Public Citizen, Inc., the American College of Preventive Medicine, the American Public Health Association, the Association of Maternal and Child Health Programs, the National Association of Local Boards of Health, and the Oncology Nursing Society to join any other amicus brief filed in support of the United States in this case. This brief addresses only one issue: defendants' argument that the findings of fraud and the remedy ordered by the district court conflict with FTC policies. These amici believe that no other amicus brief addresses this topic.

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Allison M. Zieve

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GLOSSARY

ACPM	American College of Preventive Medicine
AMCHP	Association of Maternal and Child Health Programs
APHA	American Public Health Association
FTC	Federal Trade Commission
NCI	National Cancer Institute
NALBOH	National Association of Local Boards of Health
ONS	Oncology Nursing Society
RICO	Racketeer Influenced and Corrupt Organizations Act

INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT

This amicus curiae brief in support of the United States is submitted by Public Citizen, Inc., the American College of Preventive Medicine, the American Public Health Association, the Association of Maternal and Child Health Programs, the National Association of Local Boards of Health, and the Oncology Nursing Society. Amici share interests in improving public health and in ensuring the public access to the court system for redress of health-related injuries. Amici file this brief to address the argument of defendants-appellants Philip Morris, *et al.* that the district court's finding that their use of descriptors such as "light" and "low-tar" was fraudulent and that its order that defendants cease using such descriptors conflict with Federal Trade Commission ("FTC") policy and thus must be overturned. Defendants' conflict argument is unfounded because the FTC has never required the use of terms such as "light" and "low tar" on any tobacco product, and the judgment in this case does not pose an obstacle to any federal policy or objective. This Court should reject defendants' plea for protection from the consequences of its own conduct.

Public Citizen is a consumer advocacy organization representing the interests of approximately 90,000 members nationwide. Public Citizen has appeared as amicus curiae in many cases involving tobacco, including *Lorillard v. Reilly*, 533 U.S. 525 (2001), *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), and

Aspinall v. Philip Morris Cos., No. SJC-09981 (Mass.) (pending). Public Citizen lawyers have also represented plaintiffs in numerous appellate cases in which defendants raised preemption defenses, including *Riegel v. Medtronic, Inc.*, 451 F.3d 104 (2d Cir. 2006), and *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996).

Established in 1954, the American College of Preventive Medicine (ACPM) is the national professional society for physicians committed to disease prevention and health promotion. To address the need for proper regulation of tobacco products, ACPM has supported congressional action aimed at increasing regulatory oversight of tobacco products, including "light" and "low tar" cigarettes, and has introduced relevant policy resolutions that were passed by the American Medical Association's House of Delegates.

The Association of Maternal and Child Health Programs (AMCHP) is an important resource and advocate for quality health care for women, children, and families. For more than 70 years, AMCHP has worked to protect the health and well-being of all families, especially low-income families. AMCHP represents state public health leaders who promote the health of America's families. Its members come from the highest levels of state government and include directors of maternal and child health programs, directors of programs for children with special health care needs, and adolescent health coordinators. Members of this national nonprofit

organization also include academic, advocacy, and community-based family health professionals, and families.

The American Public Health Association (APHA) is a national organization devoted to protecting Americans and their communities from preventable serious health threats. Founded in 1872, APHA is the world's oldest and most diverse public health organization. APHA represents a broad array of health providers, educators, environmentalists, policy makers, and health officials at all levels working both within and outside governmental organizations and educational institutions. APHA advocates for national tobacco control measures to protect the public's health from the adverse effects of tobacco products.

The National Association of Local Boards of Health (NALBOH) represents the interests of local boards of health in the United States. There are more than 3,200 local boards of health across the United States with over 20,000 citizen volunteers working to improve the health of their communities. NALBOH's mission is to strengthen boards of health and to empower them to promote and protect the health of their communities through education, training, and technical assistance.

The Oncology Nursing Society (ONS), the largest professional oncology association in the world, is composed of more than 35,000 registered nurses and other healthcare providers dedicated to excellence in patient care, education, research, and

administration in oncology nursing. Because tobacco use is responsible for one in three cancer deaths in the United States, ONS has long supported the regulation of tobacco products to help reduce and prevent tobacco-related disease, disability, and death. ONS maintains a steadfast commitment to supporting policies, programs, and other efforts that seek to reduce adult and youth tobacco use, promote tobacco cessation, protect nonsmokers against secondhand smoke, and help increase access to tobacco use prevention and cessation services.

BACKGROUND

1. The first scientific studies linking cigarette smoking with lung cancer appeared in the early 1950s and led to the publication in 1962 of the Royal College of Physicians' report on "Smoking in Relation to Cancer of the Lung and Other Diseases" and in 1964 to the U.S. Surgeon General's report on smoking and health. As the public began to understand the link between smoking and disease, cigarette companies, seeking to stave off a massive loss in sales, scrambled to develop products that would ease consumers' fears about the health effects of smoking. Developing products to ease fears, however, did not mean developing products to ease health risks. As Philip Morris candidly stated in an internal report: "The illusion of filtration is as important as the fact of filtration." National Cancer Institute, Smoking and Tobacco Control Monograph 13, *Risks Associated with Smoking*

Cigarettes with Low Machine-Measured Yields of Tar and Nicotine 206 (Oct. 2001), *available at* http://cancercontrol.cancer.gov/tcrb/monographs/13 (hereinafter "*NCI Monograph*") (citing 1966 Philip Morris report entitled *Market Potential of a Health Cigarette*).

To reassure consumers, the companies introduced "low-tar" and "light" cigarettes. For health-conscious adults who wanted to quit smoking but were unable to do so because they were addicted, switching to cigarettes with lower tar and nicotine yields seemed an attractive alternative, allowing them to maintain their addiction while supposedly mitigating the health risk. Industry advertising promoted and reinforced this belief. As a result, over the past 25 years or so, most smokers in developed countries switched to "light" and "low-tar" products as a substitute for what they thought were riskier products. *See*, *e.g.*, L. Kozlowski, *et al.*, *Smokers' Misperceptions of Light and Ultra-Light Cigarettes May Keep Them Smoking*, 15 Am. J. of Preventive Med. 9-16 (July 1998); *see generally NCI Monograph* at Ch. 1, Ch. 6. In the United States, for example, 87 percent of cigarettes currently sold are low-tar brands marketed with descriptors such as "light" and "ultra-light." FTC, *Cigarette Report for 2000* at 6 (2002), *available at* www.ftc.gov/os/2002/05/2002cigrpt.pdf.

In fact, however, "light" and "low tar and nicotine" cigarettes are not any safer than regular cigarettes. As the National Cancer Institute has reported, although changes in cigarette design have reduced the amount of tar and nicotine measured by the Cambridge testing method used by the tobacco industry, machine measurements do not accurately show how much tar and nicotine is actually received by the smoker. *See NCI Monograph* at 1, 4. Despite claims that the cigarettes delivered lowered tar and nicotine, there is no meaningful difference in exposure from smoking low-tar brands as compared to regular brands, and therefore no difference in disease risk. *Id.* at 10. Although "[m]any smokers switch to lower yield cigarettes out of concerns for their health, believing these cigarettes to be less risky or to be a step towards quitting," *id.*, "current evidence does not support either claims of reduced harm or policy recommendations to switch to these products." *Id.*

Although the NCI Monograph is only six years old, the industry has been aware for decades that the smoking machines do not accurately measure the behavior of actual smokers. As a 1974 internal document from Philip Morris stated: "People do not smoke like the machine. People smoke cigarettes differently . . . . Generally people smoke in such a way that they get much more than predicted by machine." Philip Morris Tobacco Co., *Some Unexpected Observations on Tar and Nicotine and Smoker Behavior* (1974), *available at* www.pmdocs.com, doc. #2047031987 at

2047031991. Nonetheless, defendant cigarette companies decided to use labels touting "light" and "low tar and nicotine" cigarettes, and fostered and then exploited widespread public misperception about both the true exposure to tar and nicotine and the relative health risks of products. *See also id*. at 2047031992 (recommending use of machine test because "[i]t gives low numbers"); *NCI Monograph* at 32 (citing Philip Morris memo regarding study results showing that Marlboro smokers "did not achieve any reduction in smoke intake by smoking a cigarette (Marlboro Lights) normally considered lower in delivery")

2. The district court held that defendants' use of "light" and "low tar and nicotine" descriptors was part of a scheme to dissuade smokers from quitting:

> As part of a scheme to intercept potential quitters and dissuade them from giving up smoking, Defendants developed and introduced filtered and purportedly "low tar and nicotine" cigarettes. As their internal documents reveal, Defendants engaged in massive, sustained, and highly sophisticated marketing and promotional campaigns to portray their light brands as less harmful than regular cigarettes, and thus an acceptable alternative to quitting, while at the same time carefully avoiding any admission that their full-flavor cigarettes were harmful to smokers' health. Defendants knew that by providing worried smokers with health reassurance, they could keep them buying and smoking cigarettes.

449 F. Supp. 2d 1, 860 (D.D.C. 2006). Among other things, the court ordered the defendants to remove "light" and "low tar" descriptors from cigarette brand names

and packages and to issue corrective statements stating that "light" and "low tar" cigarettes are no safer than "full-flavor" cigarettes. *Id*. at 924-25, 928.

ARGUMENT

THE COURT'S FINDING OF FRAUD AND THE REMEDY ORDERED DO NOT CONFLICT WITH FTC POLICY.

Defendants argue that the finding of fraud and the remedy ordered conflict with FTC policy with respect to measuring tar and nicotine. However, holding cigarette companies accountable for misrepresenting "light" cigarettes as delivering less tar and nicotine is not inconsistent with and does not frustrate the purpose of any FTC regulation, any formal FTC action, or any FTC policy.

The FTC may act in one of three ways. It may prescribe "interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices." 15 U.S.C. § 57a(a)(1)(A). Through notice-and-comment rulemaking, it may issue rules that specify such acts or practices. *Id*. § 57a(a)(1)(B). And it may issue cease-and-desist orders with respect to entities that engage in such acts or practices, and then enforce the orders by suing for civil penalties or other relief. *Id*. §§ 45(b), 45(m), 57(a), 57(b).

With respect to "light" and "low tar and nicotine" descriptors, the FTC has not issued any rule or policy statement. Importantly, the FTC does not require any cigarette company to advertise its cigarettes as "light" or "low tar." Defendants'

suggestion to the contrary is based on two points. First, defendants conflate the FTC's order that tobacco companies disclose the tar and nicotine yields as measured by the Cambridge testing method with a requirement that the companies use descriptors to describe the test results. Defs. Br. 18, 68. But the FTC never ordered use of the descriptors, which defendants long knew were perceived by the public to convey a message that was not true.[1]

Second, defendants rely on a consent order entered in a 1969 lawsuit brought by the FTC against a single company, American Brands. In that order, the FTC agreed not to pursue its lawsuit against American Brand's use of various slogans representing cigarettes to be "lower in tar," and American Brands agreed not to use terms such as "low tar" without also stating in milligrams the tar and nicotine content in the cigarette's smoke. The order did not require any company to use the term "low tar," did not address the term "light" on cigarette labels or in advertisements, and did

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[1]The fact that the FTC twice challenged use of the Cambridge testing results in cigarette marketing material further shows that the agency never gave the companies the free pass that they seek here. *See FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37-39 (D.C. Cir. 1985) (FTC challenge to claim that brand had 1 mg. of tar, where unusual filter design affected test result); *In re American Tobacco Co.*, 119 F.T.C. 3, 4 (1995) (challenging advertising statement about tar obtained by smoking particular brand because the ratings from testing did "not reflect actual smoking"). These cases show that "tar and nicotine claims consistent with the Cambridge Filter Method test results can still amount to unfair or deceptive acts or practices." *Good v. Altria Group*, 501 F.3d 29, 54 (1st Cir. 2007), *cert. granted*, 128 S. Ct. 1119 (2008) (No. 06-1965).

not apply to other tobacco companies. *See also* 15 U.S.C. § 45(m)(1)(B) (FTC consent orders not enforceable against non-parties).

Moreover, the FTC entered into the consent order pursuant to its authority under 15 U.S.C. § 57. However, that statute expressly states that "[r]emedies provided [for violations of cease-and-desist orders] are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law." *Id.* § 57b(e). Accordingly, the 1969 consent decree between the FTC and American Brands does not foreclose the court's finding of fraud here. *See also FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d at 44 ("Because the FTC has not adopted its system of testing pursuant to a Trade Regulation Rule under section 18 of the FTC Act, 15 U.S.C. § 57a (1982), one cannot say that the FTC system constitutes the only acceptable one available for measuring milligrams of tar per cigarette."); *cf. Good v. Altria*, 501 F.3d at 52 (under § 57b, FTC cease-and-desist order "does not supplant state-law rights of action any more than the lawsuit [brought by FTC over violations of such an order] would have").

Defendants (at 68) are correct that in 1970 the FTC proposed a regulation to require cigarette companies to use the Cambridge testing method to calculate tar and nicotine yields stated in advertising. *See* 35 Fed. Reg. 12671 (1970). To begin with, the proposed rule addressed neither labeling nor use of terms such as "light" or "low

tar." *Id.* In fact, in comments filed with the FTC in 1998, Philip Morris, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, and Lorillard Tobacco Company made clear their understanding that descriptors such as "light" and "low tar" were not subject to any federal regulation. In those comments, they stated that no "official guidance" was needed with respect to use of those terms in tobacco marketing because the way in which the terms were "generally" or "usually" used by the companies was clear enough. FF2395; U.S. Ex. 88618 at 94-95. And in 2002, Philip Morris filed a petition for rulemaking with the FTC asking it to issue a regulation governing the use of descriptors such as "light." JE-045823. The petition argued that cigarette companies' use of descriptors was "consistent with the FTC's policy" with regard to measurement of tar and nicotine yields, *id*. at 6, but that regulation of the terms was warranted. In short, the FTC has never established any requirements with respect to the use of the terms "light" or "low tar" in cigarette labels or advertisements. *See* 62 Fed. Reg. 48158, 48163 (F.T.C. Sept. 12, 1997) ("There are no official definitions" for low tar descriptors, and the FTC is "beginning the process" of determining whether there is "a need for official guidance with respect to the terms used in marketing lower rated cigarettes.").

More importantly, as defendants acknowledge, the FTC abandoned the proposed regulation about disclosure of tar and nicotine yields in advertising later in

1970. Although defendants attempt to equate their voluntary decision to adopt the FTC method for measuring yields with an affirmative federal policy, the FTC's decision *not* to regulate is not a preclusive act.

The U.S. Supreme Court drove home this point in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). There, the Court considered whether the Coast Guard's 1990 decision not to issue a regulation addressing propeller guards on motor boats, but instead to study the issue further, impliedly preempted a state-law damages claim based on the theory that the manufacturer's motor boat was unreasonably dangerous because the motor was not protected by a propeller guard. Rejecting the manufacturer's preemption argument, the Court explained that "[i]t is quite wrong" to view a decision declining to impose a requirement as the "functional equivalent" of a prohibition against state regulation of the subject matter. Rather, a decision not to take regulatory action leaves the applicable law "exactly the same" as it was before the agency's consideration of the matter. 537 U.S. at 65; *accord Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995) (where agency standard on antilock brakes had been suspended by court decision, absence of federal regulation did not constitute regulation and had no preemptive effect); *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp*., 485 U.S. 495, 501, 503 (1988) (absent explicit statement of intent, federal inaction has no preemptive effect).

Here, the issue is not federal preemption of state law but federal preclusion of federal law, and so the defendants' conflict argument is weaker. Nonetheless, *Sprietsma* offers a useful analogy. In both cases, the defendant-company premised its conflict argument on agency action *not* taken, as opposed to the agency's imposition of a requirement or prohibition. Indeed, whereas in *Sprietsma* the agency had at least considered whether to impose a requirement and decided not to do so, here the FTC—in each instance recited in defendants' brief—never even considered whether to impose requirements regarding terms such as "light" or "low tar." To be sure, the FTC took some action with respect to the calculation of tar and nicotine yields; for example, it published the results that the companies obtained from smoking machines. Such action, however, cannot properly be deemed a requirement imposed on the industry. And the voluntary agreement among the companies pursuant to which tar and nicotine numbers are included in advertising is not enforceable by the agency—which is not even a party to the agreement. As in *Sprietsma*, the agency's decision to forgo federal regulation about the subject matter at issue does not give rise to an inference that other laws no longer apply.

As the court below noted, the FTC "has long encouraged use of overlapping state deceptive practices statutes." *United States v. Philip Morris*, 263 F. Supp. 2d 72, 78 (D.D.C. 2003) (citing *Kellogg Co. v. Mattox*, 763 F. Supp. 1369, 1381 (N.D.

Tex. 1991)). Thus, as the First Circuit recently held, the FTC's action, or inaction, with regard to descriptors does not preempt actions under state deceptive trade practices statutes. *Good v. Altria*, 501 F.3d at 49; *but see Brown v. Brown & Williamson Tobacco Corp.*, 479 F.3d 383 (5th Cir. 2007). The same is true with regard to actions under federal statutes, such as the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Arguing to the contrary, defendants (at 73-75) cite cases in which one federal agency or statute required or approved the precise conduct challenged under a different statute. Those cases are inapposite because the FTC has not required or approved use of descriptors; it has simply tolerated them. Indeed, in 1997, the FTC requested public comment on whether it should offer some "official guidance" with respect to use of these terms in marketing cigarettes. The agency stated:

> Cigarette manufacturers use a number of descriptive terms (such as "low tar," "light," "medium," "extra light," "ultra light," "ultra low," and "ultima") in advertising and labeling information about their cigarettes. The Ad Hoc Committee of the President's Cancer Panel concluded that "[b]rand names and brand classifications such as 'light' and 'ultra light' represent health claims and should be regulated and accompanied, in fair balance, with an appropriate disclaimer."
>
> There are no official definitions for these terms but they appear to be used by the industry to reflect ranges of FTC tar ratings. Generally, the term "low tar" is used to mean tar ratings of 7 to 15 milligrams, and the term "ultra low tar" is used to mean tar ratings of 6 milligrams or less. The Commission is beginning the process of examining these questions by seeking comment on the following issues:

> 1. Is there a need for official guidance with respect to the terms used in marketing lower rated cigarettes? . . . .

62 Fed. Reg. 48163. This request for public comment shows that, in the FTC's view, the use and meaning of the descriptors has been left to the cigarette companies. The FTC reiterated this view earlier this month, stating in testimony before a Senate committee that the cigarette companies "have adopted descriptors, such as 'light' and 'low,'" and that the descriptors "are not defined by the FTC or any other government agency." Prepared Statement of the FTC Before the Senate Comm. on Commerce, Science, and Transp. at 6 & n.16 (Nov. 13, 2007) (testimony and news release available at www.ftc.gov/os/testimony/110hearings.shtm). Although the FTC's 1997 request for public comment also shows that the FTC believes that it *could* adopt a regulation addressing the use of descriptors, the agency's authority to take action is insufficient to create a conflict when the FTC has never taken that action.

CONCLUSION

For the foregoing reasons, the decision below and the remedy ordered should be affirmed with respect to defendants' use of "light" and "low tar" descriptors.

May 22, 2008

Respectfully submitted,

Allison M. Zieve
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Amici Curiae
Public Citizen, *et al.*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), undersigned counsel states that this brief complies with the type-volume limitation set forth in this Court's Order of August 3, 2007. The brief is set in 14-point Times New Roman type and contains 3,547 words, not including the matter excluded by Rule 32(a)(7)(B)(iii), according to the word processing system used to prepare the brief.

May 22, 2008

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Allison M. Zieve

CERTIFICATE OF SERVICE

I hereby certify that on this 22th day of May, 2008, I caused two copies of the foregoing Amicus Curiae Brief of Public Citizen, Inc., *et al.*, to be served by first-class mail on all parties required to be served, as follows:

Mark B. Stern
Alisa B. Klein
United States Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue NW, Room 7531
Washington, DC 20530-0001

Counsel for Appellee United States of America

David S. Eggert
ARNOLD & PORTER LLP
555 Twelfth Street NW
Washington, DC 20004

Counsel for Defendant-Appellants Philip Morris USA Inc. and Altria Group, Inc.

Robert F. McDermott, Jr.
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001-2113

Counsel for Defendant-Appellant R. J. Reynolds Tobacco Company

John K. Crisham
KIRKLAND & ELLIS LLP
655 15th Street NW, Suite 1200
Washington, DC 20005

Counsel for Defendant-Appellant Brown & Williamson Holdings, Inc.

Joseph Kresse
COVINGTON AND BURLING LLP
1201 Pennsylvania Avenue NW
Washington, DC 20004

Counsel for Defendant-Appellant The Tobacco Institute, Inc.

Deborah Israel
WOMBLE CARLYLE SANDRIDGE & RICE PLLC
401 I Street NW, Suite 700
Washington, DC 20005

Counsel for Defendant-Appellant Council for Tobacco Research-USA, Inc.

Guy Miller Struve
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017

Counsel for Defendant-Appellant Altria Group, Inc.

Michael B. Minton
THOMPSON COBURN LLP
One US Bank Plaza, Suite 3500
St. Louis, Missouri 63101-1693

Counsel for Defendant-Appellant Lorillard Tobacco Company

Bruce G. Sheffler
CHADBOURNE & PARKE LLP
30 Rockefeller Plaza, 34th Floor
New York, New York 10112-0219

Counsel for Defendant-Appellant British American Tobacco (Investments) Limited

Katherine A. Meyer
Howard M. Crystal
MEYER GLITZENSTEIN & CRYSTAL
1601 Connecticut Avenue NW, Suite 700
Washington, DC 20009-1075

Counsel for Intervenors-Appellees

Leonard A. Feiwus
KASOWITZ, BENSON, TORRES & FRIEDMAN
1633 Broadway
New York, New York 10019

Counsel for Defendant Liggett Group, Inc.

_____
Allison M. Zieve