

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

COMPLEX CIVIL DIVISION
CASE NO.: 08-80000 (19)

IN RE: ENGLE PROGENY CASES
TOBACCO LITIGATION

CASE NO.: 07-036432 (19)

Pertains To:
BERTIE THOMAS as Personal Representative
of the Estate of MARVIN THOMAS

**PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT
TO ADD CLAIMS OF PUNITIVE DAMAGES**

COMES NOW the Plaintiff, BERTIE THOMAS, as Personal Representative of the Estate of MARVIN THOMAS, in the above-styled cause of action hereby files this Motion for Leave to File Second Amended Complaint to add counts for punitive damages, and moves for leave to file the Amended Complaint for the following reasons:

1. This is a products liability action for wrongful death or alternatively survival damages against Defendants as authorized by the Florida Supreme Court's rulings in *Engle v. Liggett Group, Inc.*, 945 So.2d 1246, 1267-1268 (Fla. 2006), for negligence, and intentional tortious conduct involving Defendants' distributing of an unreasonably dangerous and defective product (cigarettes), and conspiring to fraudulently conceal these actions over decades.

2. Plaintiff is seeking leave to file the Second Amended Complaint to add claims for punitive damages consistent with Florida law and the facts and circumstances of this case.

3. Pursuant to Fla. R. Civ. P. 1.190(a), leave to amend shall be given freely when justice so requires.

4. A copy of the Second Amended Complaint is attached hereto and incorporated herein as

Exhibit “A.”

5. This motion is filed not for the purpose of delay but so the ends of justice may be served.
6. The Plaintiff will be prejudiced should the court fail to grant the leave requested.
7. For the purposes stated herein, and in Plaintiff’s Memorandum of Law and Proffer in Support of Motion for Leave to File Second Amended Complaint to Add Claims of Punitive Damages, Plaintiff requests this Court grant the foregoing motion.

WHEREFORE, the Plaintiff respectfully moves this Honorable Court to grant Plaintiff’s Motion and permit Plaintiff to file the Second Amended Complaint attached hereto as **Exhibit “A”** and grant Plaintiff such other and further relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Electronic Mail this 19th day of May, 2016 to the attached service list:

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By: /s/ Eric Rosen, Esq.
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Pertains To:
BERTIE THOMAS as Personal Representative
of the Estate of MARVIN THOMAS

SECOND AMENDED COMPLAINT

Plaintiff, BERTIE THOMAS, as Personal Representative of the Estate of Marvin Thomas (“Thomas”) sues Defendants R.J. REYNOLDS TOBACCO COMPANY and PHILIP MORRIS USA INC. and alleges as follows:

1. This is an action for wrongful death pursuant to Florida’s Wrongful Death Act.
2. Alternatively, this is a survival action pursuant to Florida’s survival statute.
3. At all times material to this action, decedent Marvin Thomas, was a resident and citizen of Florida.
4. At all times material to this action: Bertie Thomas was the wife of Marvin Thomas; Henry Thomas was the son of Marvin Thomas.
5. Bertie Thomas is, or will be, the duly appointed Personal Representative of the Estate of Marvin Thomas, deceased, and brings this suit for and on behalf of the Estate of Marvin Thomas and Survivors.

6. Defendant Philip Morris USA, Inc. (“Philip Morris”) is a Virginia corporation that conducts business in every county within the State of Florida and did so during all times relevant to this action.

7. Defendant R.J. Reynolds Tobacco Company (“RJR”), individually and as successor by merger to Brown & Williamson Tobacco Corporation, individually and as successor by merger to The American Tobacco Company, is a North Carolina corporation that conducts business in every county within the State of Florida and did so during all times relevant to this action. Defendant R.J. Reynolds Tobacco Company is also the successor by merger to Lorillard Tobacco Company.

8. Liggett Group, LLC (f/k/a Liggett Group, Inc., f/k/a Brooke Group Ltd., Inc., f/k/a Liggett & Myers Tobacco Company) (“Liggett”) is a Delaware corporation that conducts business in every county within the State of Florida and did so during all times relevant to this action.

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

10. At all times relevant to this action, all Defendants manufactured and distributed tobacco products containing nicotine throughout Florida and the United States.

11. The Defendants, including Vector and Liggett, were and remain *Engle* defendants.

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

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

13. At all times relevant to this action, Plaintiffs' decedents were Florida residents and citizens (1) who were addicted to, purchased, and smoked cigarettes containing nicotine that were designed, manufactured, advertised and marketed by one or more of the Defendants and (2) who did so in sufficient quantities and for a sufficient time period to cause injury in the form of diseases and medical conditions, ultimately resulting in his death.

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

15. Less than one year has elapsed since the Florida Supreme Court's mandate issued. Therefore, this action is timely.

16. Because Plaintiff's decedent was an *Engle* class members, Plaintiff is entitled to the benefit of the Phase I findings and Plaintiff asserts and alleges those findings as conclusively established in this action as follows:

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

18. Nicotine in cigarettes is addictive.

19. Defendants placed cigarettes on the market that were defective and unreasonably dangerous.

20. Defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both.

21. Defendants agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment.

22. Defendants sold or supplied cigarettes that were defective.

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

24. All Defendants were negligent.

25. As a direct and proximate result of smoking cigarettes manufactured and sold by one or more Defendants, Plaintiff's decedent suffered from one or more of the diseases and medical conditions described, including laryngeal and mouth cancer, which was caused by his addiction to cigarettes that contain nicotine and each of which manifested during the class period.

COUNT I: STRICT LIABILITY

26. Plaintiff hereby realleges and incorporates the allegations contained in paragraphs 1- 25.

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

28. As a proximate result of smoking the defective cigarettes sold by one or more Defendants, Marvin Thomas suffered injuries and/or died.

COUNT II: FRAUD BY CONCEALMENT

29. Plaintiff hereby realleges and incorporates the allegations contained in paragraphs 1- 25.

30. The *Engle* Phase I findings conclusively establish that Defendants concealed or omitted material information not otherwise known or available, knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both.

31. Because the information already has been deemed material, the reliance element of fraud by concealment is satisfied as a matter of law.

32. Each Defendant's acts and omissions, and all of them, constitute fraud as a matter of law.

33. As a proximate result of the Defendants' fraud, Marvin Thomas, suffered injuries and/or died.

COUNT III: CONSPIRACY TO COMMIT FRAUD BY CONCEALMENT

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

35. The *Engle* Phase I findings conclusively establish that Defendants, the Council, and the Institute, agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment.

36. The concealed and omitted information described in the preceding paragraph was material information.

37. Decedent relied to his/her detriment upon the concealment and omission of such information.

38. Each Defendant's acts and omissions, and those of the Council and Institute, and all of them, constitute a successful conspiracy to commit fraud.

39. As a proximate result of the Defendants' conspiracy to commit fraud, Marvin Thomas suffered injuries and/or died.

COUNT IV: NEGLIGENCE

40. Plaintiff hereby realleges and incorporates the allegations contained in paragraphs 1- 25.

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

42. As a proximate result of the Defendants' negligence, Marvin Thomas suffered injuries and/or died.

COUNT V: BREACH OF EXPRESS WARRANTY

43. Plaintiff hereby realleges and incorporates the allegations contained in paragraphs 1- 25.

44. The *Engle* Phase I findings conclusively establish that all of the Defendants breached an express warranty; that is, Defendants sold or supplied cigarettes that, at the time of sale or supply, did not conform to representations of fact made by Defendants.

45. Defendants' products were not safe or reasonably suitable and fit for the uses advertised by Defendants to the public, including Plaintiffs.

46. As a proximate result of the Defendants' respective breaches, Marvin Thomas suffered injuries and/or died.

COUNT VI: BREACH OF IMPLIED WARRANTY

47. Plaintiff hereby realleges and incorporates the allegations contained in paragraphs 1- 25.

48. The *Engle* Phase I findings conclusively establish that all of the Defendants breached an implied warranty; that is, Plaintiffs were a foreseeable user of the Defendants' products; at all times Plaintiff used the products in their intended manner; and the products were defective when transferred from Defendants.

49. As a proximate result of the Defendants' respective breaches, breaches, Marvin Thomas suffered injuries and/or died.

COUNT VII – PUNITIVE DAMAGES FOR INTENTIONAL TORTS

50. All allegations above are re-alleged and incorporated by reference herein and Plaintiff further alleges:

51. At all times material hereto, Defendants had actual knowledge of the wrongfulness of their conduct and the high probability that injury or damage to the decedent would result, and despite that knowledge, intentionally pursued their course of conduct Defendants' conduct was so reckless or wanting in care that it constituted disregard or indifference to the life, safety, or rights of the decedent, and Defendants actively and knowingly participated in such conduct, and/or their officers, directors, or managers knowingly condoned, ratified, or consented to such conduct.

52. Furthermore, pursuant to the Florida Supreme Court's ruling in *Engle v. Liggett Group, Inc., et al.*, the following issues have been held to be *res judicata* in any class member's subsequent individual trial:

- a. That smoking cigarettes causes aortic aneurysm, bladder cancer, cerebrovascular disease, cervical cancer, chronic obstructive pulmonary disease, coronary heart disease, esophageal cancer, kidney cancer, laryngeal cancer, lung cancer (specifically, adenocarcinoma, large cell carcinoma, small cell carcinoma, and squamous cell carcinoma), complications of pregnancy, oral cavity/tongue cancer, pancreatic cancer, peripheral vascular disease, pharyngeal cancer, and stomach cancer),
- b. That nicotine in cigarettes is addictive,
- c. That the defendants placed cigarettes on the market that were defective and unreasonably dangerous
- d. That the Defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both,
- e. That the Defendants agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment.
- f. That all of the defendants sold or supplied cigarettes that were defective
- g. That all of the defendants sold or supplied cigarettes that, at the time of sale or supply, did not conform to representations of fact made by said defendants
- h. That all of the defendants were negligent.

53. Standing alone, these *res judicata* findings would be sufficient to support an award for punitive damages. However, in addition, Plaintiff has made a reasonable showing by evidence in the record or through a proffer or evidence to this Court that would provide a reasonable basis for recovery of punitive damages, and therefore is entitled to claim these damages pursuant to Fla. Stat. § 768.72.

54. As a proximate result of this conduct, decedent was severely injured and/or died.

**COUNT VIII – PUNITIVE DAMAGES FOR WILLFUL,
WANTON AND RECKLESS MISCONDUCT**

55. All allegations above are re-alleged and incorporated by reference herein and Plaintiff further alleges:

56. At all times material hereto, Defendants had actual knowledge of the wrongfulness of their conduct and the high probability that injury or damage to the decedent would result, and despite that knowledge, intentionally pursued their course of conduct. Defendants' conduct was so reckless or wanting in care that it constituted disregard or indifference to the life, safety, or rights of the decedent, and Defendants actively and knowingly participated in such conduct, and/or their officers, directors, or managers knowingly condoned, ratified, or consented to such conduct.

57. Furthermore, pursuant to the Florida Supreme Court's ruling in *Engle v. Liggett Group, Inc., et al.*, the following issues have been held to be *res judicata* in any class member's subsequent individual trial:

- a. That smoking cigarettes causes aortic aneurysm, bladder cancer, cerebrovascular disease, cervical cancer, chronic obstructive pulmonary disease, coronary heart disease, esophageal cancer, kidney cancer, laryngeal cancer, lung cancer (specifically, adenocarcinoma, large cell carcinoma, small cell carcinoma, and squamous cell carcinoma), complications of pregnancy, oral cavity/tongue cancer, pancreatic cancer, peripheral vascular disease, pharyngeal cancer, and stomach cancer),
- b. That nicotine in cigarettes is addictive,
- c. That the defendants placed cigarettes on the market that were defective and unreasonably dangerous
- d. That the Defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both,

- e. That the Defendants agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment.
- f. That all of the defendants sold or supplied cigarettes that were defective
- g. That all of the defendants sold or supplied cigarettes that, at the time of sale or supply, did not conform to representations of fact made by said defendants
- h. That all of the defendants were negligent.

58. Standing alone, these *res judicata* findings would be sufficient to support an award for punitive damages. However, in addition, Plaintiff has made a reasonable showing by evidence in the record or through a proffer or evidence to this Court that would provide a reasonable basis for recovery of punitive damages, and therefore is entitled to claim these damages pursuant to Fla. Stat. § 768.72.

59. As a proximate result of this conduct, decedent was severely injured and/or died.

60. WHEREFORE, for the above-listed counts Plaintiff, Bertie Thomas, as Personal Representative of the Estate of Marvin Thomas, demands (i) a jury trial on all issues so triable and (ii) judgment against each Defendant and every one of them for damages pursuant to Florida's Wrongful Death Act including, but not limited to: (a) funeral expenses of the decedent; (b) medical and hospital expenses of the decedent caused by smoking Defendants' products; (c) loss of the decedent's net accumulations, which would otherwise have been acquired; (d) survivors' losses, including (1) mental and emotional anguish, (2) medical, funeral and other expenses incurred, and (3) loss of the decedent's love, affection, support, services, protection, companionship, instruction; (e) punitive damages (f) all recoverable costs of this action; (g) all legally recoverable interest; and (h) any other relief to which Plaintiff may be legally or equitably entitled.

61. WHEREFORE, alternatively for the above-listed counts, should one or more Defendants contend that a decedent died of some cause unrelated to smoking cigarettes, said decedent's Personal Representative demands (i) a jury trial on all issues so triable and (ii) judgment against each Defendant and every one of them for all survival damages pursuant to Section 46.021, *Florida Statutes*, which damages include all that decedents could have recovered prior to their deaths, specifically including, but not limited to: (a) lost wages and earning capacity; (b) all medical and funeral expenses incurred; (c) loss of enjoyment of life, mental anguish, and pain and suffering; (d) damages for the aggravation of any previously existing condition; (e) punitive damages (f) damages for loss of consortium and companionship; (g) all recoverable costs of this action; (h) all legally recoverable interest; and (i) any other relief to which the Personal Representative may be legally or equitably entitled.

Dated this 19th day of May 2016.

/s Eric S. Rosen
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