LAW OFFICES OF
DOUGHERTY & HILDRE, L.L.P.
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
2550 FIFTH AVENUE, SUITE 617
SAN DIEGO, CALIFORNIA 92103-6624
(619) 232-9131
TELEFAX (619) 232-7317
WEBSITE: www.dhdhlaw.com

WILLIAM O. DOUGHERTY, A.P.C.
DONALD F. HILDRE, A.P.C.
THOMAS D. HAKLAR, A.P.C.

December 10, 2007

Honorable Chief Justice Ronald M George
and Honorable Associate Justices
of the California Supreme Court
Marathon Plaza-South Tower
350 McAllister Street, 8th Floor
San Francisco, CA 94102-1317

Re: Appellants Response to Respondents Letter Brief

Honorable Chief Justice George and Associate Justices,

Respondents argue that the decision in *Daniels* has no application to the issues before this Court, conceding that the previously entered decisions regarding preemption issues were correctly decided in the trial court. This would effectively coincide with the points raised by Plaintiffs in our original submission on this topic. Rather than addressing the issue raised by this Court, respondents have suggested that issues regarding preemption are not properly before the Court at this time. Presumably this Court was aware of the scope of its powers of supervisory review when it requested briefing with respect to its preemption holding in *Daniels*.

Apparently Respondents agree with Appellants that the preemption holding in *Daniels* bars only claims based solely on the assertion that cigarette companies unlawfully target youth in their advertising, and does not preclude claims based on fraudulent misrepresentations. As Appellants set forth in their first letter brief, the only claim asserted in this action which would be preempted under the rationale of *Daniels* was plaintiffs' claim 1 (a), asserting that respondents'' targeting of youth in advertising in and of itself constitutes an unfair trade practice under 17200. Following the rationale of *Lorillard v. Reilly*, 533 U.S. 25 (2001), the trial court found, as this Court subsequently found in *Daniels*, that such youth targeting claims are preempted. As Respondents correctly note, plaintiffs have never sought review of this aspect of the trial court's preemption ruling. Indeed, this aspect of the trial court's preemption finding, as well as the trial court's holding that claims based on false statements – including false pledges not to target youth – are not preempted, was entirely consistent with this Court's *Daniels* decision.

This is not too surprising in that the *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) case upon which this Court based its decision in *Daniels* did nothing to change the basic tenets of

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) which served as the basis for the preemption decisions previously issued in this case. "*Cipollone*, as we have noted, treats a state-law 'duty not to deceive' as broader than a 'duty "based on smoking and health"' and therefore beyond the reach of FCLAA preemption. We see nothing in *Reilly* suggesting any intent to disturb this aspect of the *Cipollone* plurality holding." *Good v. Altria Group*, (Slip Opinion 21-22). As an additional court stated, "We do not read *Reilly* to disturb *Cipollone's* core holding that a state-law 'duty not to deceive' is broader than a duty that is based on smoking and health and, therefore, beyond the reach of section 5(b) of the act. Both the holding and the result of *Cipollone* make clear that a claim is not preempted merely because it arises out of the adverse health consequences of cigarettes." *Dahl v. R.J. Reynolds*, WL 4234141, –N.W.2d– (Minn. App. 2007).

As this Court recognized in its *Daniels* decision, "[t]he fraud claim in *Cipollone* sought to regulate cigarette advertising on the basis that it contained false assertions of fact-a content-neutral basis-and the claim sought to impose a duty-the duty not to deceive-that was broader and more general than concerns about smoking and health." *Daniels*, slip opinion at 14 (citations omitted).

This action is the type of claims that the court in *Cipollone* found were not preempted. The *Brown* case seeks only to impose liability on the respondents for their violation of California consumer law resulting from their unfair, deceptive, untrue or misleading advertising and public statements about their products. In accord with a Stipulation and Order plaintiffs' claims were refined and focused to include the following , of which two, the ones dealing with the marketing of "light" cigarettes and "natural" or "no additive" cigarettes were found to be preempted by the lower courts:

- Respondents continue to market to minors despite their public statements to the contrary ;
- Respondents misrepresentations regarding the nature of the products they market as "light" cigarettes;
- Respondents market products as "natural" or as containing "no additives," despite knowing those labels to be false and or misleading;
- Respondents represent that they do not manipulate cigarette constituents when, in fact, they do;
- Respondents promulgate and agree to abide by the principles set forth in the Cigarette Advertising Code, which they regularly violate.

Each of these claims is predicated upon "a single, uniform standard: falsity. Thus, we conclude that the phrase 'based on smoking and health' fairly but narrowly construed does not

encompass the more general duty not to make fraudulent statements." *Cipollone*, at 529. Accordingly the claims that the plaintiffs in this case based upon fraudulent statements are not preempted. For example, it is not the fact that respondents have aimed their advertising at minors that serves as the basis for the claim, but rather that their marketing to minors is contrary to their representations to the public that they have not and do not market to minors. The remainder of the claims asserted by plaintiffs are similarly based upon the respondents unfair, deceptive, untrue or misleading advertising and public statements about their products.

As Appellants and Respondents are apparently in agreement that the *Daniels* preemption holding only applies to plaintiffs' claim 1 (a), and that the trial court was correct in finding plaintiffs' claims based on fraudulent misrepresentation not subject to preemption, it would seem that there is no need for this Court to review the trial court's preemption ruling at all. However, there are certain discreet aspects of the trial court's preemption holding aside from its holding with respect to youth marketing, which are inconsistent with the broader precepts of this Court's holding in *Daniels*, and this Court has the supervisory jurisdiction to correct those errors at this time.

While the trial court's holding on preemption as to what remains of plaintiffs' original case was on the whole consistent with this Court in *Daniels*, the trial court did err in finding plaintiffs' "light", "low tar" and "all natural" "no additive" claims preempted. The trial court found these claims were preempted because – or so the trial court reasoned – such terms are not inherently misleading. This reasoning has been rejected by a number of courts of late which have found that the use of such terms is misleading when it can be shown that these cigarettes deliver equivalent levels of harmful substances when smoked.[1] While the *Daniels* court did not address any issue which bears directly on the trial court's finding that these terms are not misleading as used, and constitute only "warning neutralization" or "implied health claims", this holding was nevertheless inconsistent with the broader holdings of *Daniels* to the effect that claims based on affirmative misrepresentation and voluntarily assumed duties are not preempted. Contrary to Respondents' assertion, this Court does have the supervisory authority to revisit this erroneous aspect of the trial court's holding.

---

[1] While several courts have found claims based on use of the terms "light" and "low tar" are not preempted, no court has yet addressed the preemption question with respect to the use of the terms "all natural" and "no additive". However, the rationale applied to "light" and "low tar" claims would apply with equal force to Appellants' "All Natural" and "No additive" claims. For a full discussion of the grounds for review of the trial court's holding on the "All Natural" and "No additive" claims, please see, *In re Tobacco II Cases,* 142 Cal.App.4th 891

Appellants properly sought review of certain discreet aspects of the trial court's preemption ruling when they applied for interlocutory appeal of the trial court's holding that the adoption of Proposition 64 required decertification. Since the decertification order was an appealable, interlocutory order, Appellants could also join appeal of previous interlocutory orders with that appeal. The appellate court declined to consider the appeal of these issues, having found that interlocutory review of the trial court's decertification order was not warranted. Should this Court find, as Appellants maintain it should, that interlocutory review of the certification order was warranted, reversing the Appellate Division, then it would necessarily have to reverse the Appellate Division's decision declining appeal of previous interlocutory orders. Thus, Appellants' appeal of the trial court's preemption decision is before this Court. Hence, this Court was correct in its apparent determination that the preemption issues raised in Appellate's appeal the lower court are at issue now before this Court.

Respondents' assertion that the issue of preemption is not properly before this Court, even though this Court expressly requested briefing on this issue, is telling. No doubt if Respondents could make a colorable argument that this Court's holding in *Daniels* required a broader application of preemption than that found by the trial court, Respondents would have availed themselves of this Court's invitation to present those arguments. Perhaps Respondents are loathe to have this Court consider preemption, because they fear that this Court will join the growing ranks of courts that have found that claims based on the misleading use of the terms "light" and "low tar" are not preempted. *See e.g. Good v. Altria, Inc.* 501 F.3d 29, 40 (1st Cir. 2007); *Price v. Philip Morris, Inc.*, 846 N.E. 2d 1, 33 (Ill. 2005); *Dahl v. R.J. Reynolds Tobacco Co.*, 2007 WL 4234141, – N.W. 2d – (Minn. App. 2007). Or perhaps Respondents simply want to be able to continue to mis-characterize this Court's holding in *Daniels* as requiring a broader application of preemption than this Court ever intended – as Philip Morris' successor company, Altria, attempted to do in the *Good* case.[2]

Whatever Respondents' motives for seeking to avoid consideration of the preemption issue, the fact remains that this Court can consider the trial court's preemption ruling, and with respect to the trial court's erroneous finding that "light" "low tar" and "all natural/no additive" claims are preempted, should do so. Indeed the interests of judicial economy weigh in favor of considering and determining the issue in this appeal. If this court does not consider this argument now, it will leave that issue out there to be the subject of a further appeal at a later point in this litigation. There is no need to send this case back for future consideration of this issue when the

---

[2] In *Good*, Altria attempted to cite the *Daniels* holding for the proposition that even claims based on *fraudulent* statements are preempted if the statements concern smoking and health. The First Circuit correctly rebuffed this blatant mis-characterization of *Daniels*. *See Good*, 501 F3d at 39, n. 13.

record is sufficient to allow this court to determine the issue as a matter of law. As for all other aspects of the trial court's holding that claims based on false statements are not preempted, supervisory review will confirm that the trial court was not only in keeping with the rationale of *Daniels*, but also correct.

Respectfully submitted,

Thomas D. Haklar, Esq.
Counsel for Plaintiffs/Appellants

PROOF OF SERVICE

I certify that I am over the age of 18 years and not a party to the within action; that my business address is:

DOUGHERTY & HILDRE
2550 Fifth Avenue, Suite 617
San Diego, California 92103
Telephone: (619) 232-9131
Facsimile: (619) 232-9131

and that on this date I placed a true copy of the foregoing document(s) entitled:

APPELLANTS RESPONSE TO RESPONDENTS LETTER BRIEF

on the parties in this action by placing a true copy thereof in a sealed envelope addressed as stated

(X) on the attached mailing list

( ) as follows:

____ I caused each envelope to be sent by Overnight Courier

____ (By Mail) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at San Diego, CA in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

_____ (By Personal Service) I caused to be delivered such envelope by hand to the offices of the addressee.

_____ (By FAX) I caused each document to be sent by FAX to the following numbers:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 10, 2007, at San Diego, California.

Alison Crawford

SERVICE LIST

Brown, et al. V. Philip Morris USA, Inc., et al.
Court of Appeal Case No. D046435

California Supreme Court
350 McAllister Street
San Francisco, CA 94102
14 copies via Messenger

Ronald A. Reiter
Supervising Deputy Attorney General
Office of the Attorney General
Consumer Law Section
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
1 copy via USPS

San Diego County District Attorney
Consumer Fraud Division
Hall of Justice
330 W. Broadway
San Diego, CA 92101
1 copy via USPS

Carlotta Tillman
Administrative Office of Court
455 Golden Gate Avenue, 6th Floor
San Francisco, CA 94102
1 copy via USPS

Jeffrey P. Lendrum
THE LENDRUM LAW FIRM
4275 Executive Square, Suite 910
La Jolla, CA 92037
Tel: (858) 334-0555
Fax: (858) 334-0554
1 copy via USPS

Defendant
LIGGETT GROUP, INC.
(LIGGETT &MYERS)

William S. Boggs
DLA PIPER RUDNICK GRAY CARY US LLP
401 B Street, Suite 2000
San Diego, CA 92101-4240
Tel: (619) 699-2758
Fax: (619) 699-2701
1 copy via USPS

Defendant LORILLARD TOBACCO COMPANY

Gregory P. Stone
MUNGER TOLLES &OLSON LLP
355 S. Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
Tel: (213) 683-9100
Fax: (213) 687-3702
1 copy via FedEx

Defense Liaison Counsel and Co-Counsel for Defendant PHILIP MORRIS USA INC.

Martin D. Bern
Patrick J. Cafferty, Jr.
MUNGER TOLLES & OLSON LLP
560 Mission Street
San Francisco, CA 94105
Tel: (415) 512-4000
Fax: (415) 512-4077
1 copy via FedEx

Defense Liaison Counsel and Co-Counsel for Defendant PHILIP MORRIS USA INC.

Gerald L. McMahon SELTZER CAPLAN McMAHON VITEK 2100 Symphony Towers 750 "B" Street San Diego, CA 92101 Tel: (619) 685-3003 Fax: (619) 685-3100 **1 copy via USPS**	Defense Co-Liaison Counsel and Co-Counsel for Defendant PHILIP MORRIS USA INC.
H. Joseph Escher III Bobbie J. Wilson HOWARD RICE NEMEROVSKY CANADY FALK &RABKIN Three Embarcadero Center, 7th Floor San Francisco, CA 94111-4065 Tel: (415) 434-1600 Fax: (415) 217-5910 **1 copy via USPS**	Co-Counsel for Defendants R.J. REYNOLDS TOBACCO COMPANY and BROWN & WILLIAMSON TOBACCO CORP.
Sharon Mequet LOEB &LOEB LLP 10100 Santa Monica Boulevard, Suite 2200 Los Angeles, CA 90067-4164 Tel: (310) 282-2000 Fax: (310) 282-2200 **1 copy via USPS**	Defendant THE COUNCIL FOR TOBACCO RESEARCH U.S.A. INC.
Mary C. Oppedahl CROSBY HEAFEY ROACH &MAY 1999 Harrison Street Oakland, CA 94612-3573 Tel: (510) 763-2000 Fax: (510) 273-8832 **1 copy via USPS**	Defendant THE TOBACCO INSTITUTE, INC.
Robert C. Wright Wright & L'Estrange 401 W. A Street, Suite 2250 San Diego, CA 92101 Tel: (619) 231-4844 Fax: (619) 231-6710 **1 copy via USPS**	Co-Counsel for Defendants R.J. REYNOLDS TOBACCO COMPANY and BROWN & WILLIAMSON TOBACCO CORP.
William T. Plesec Jones Day North Point, 901 Lakeside Avenue Cleveland, Ohio 44114 Tel: (216) 586-3939 Fax: (216) 579-0212 **1 copy via USPS**	Co-Counsel for Defendants R.J. REYNOLDS TOBACCO COMPANY and BROWN & WILLIAMSON TOBACCO CORP.