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November 26, 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: Letter Brief requested by The Supreme Court in support of Appellants, In Re Tobacco II Cases S147345

Honorable Chief Justice George and Associate Justices,

This Court has requested additional briefing from the parties with respect to the impact of this Court's recent federal preemption holding in *In re Tobacco Cases II* (*Daniels*), 41 Cal. 4th 1257, 163 P.3d 106 (2007) on the claims in the instant action. The short answer is that *Daniels* supports plaintiffs' position that the claims in this suit are not preempted. While this Court held in *Daniels* that certain claims based on unlawful marketing of cigarettes to minors are preempted under the Federal Cigarette Labeling and Advertising Act (FCLAA), this Court also reiterated the long-held rule that *fraudulent* advertising claims such as those raised herein are *not* subject to preemption. Plaintiffs' claims in this case arise from affirmative false statements and voluntary assumptions of duties, claims which this Court in *Daniels* and the United States Supreme Court in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) have unequivocally found *not* subject to FCLAA preemption.

In *Daniels*, this Court held that claims to the effect that intentional targeting of minors in cigarette advertising constitutes an unfair trade practice in violation of UCC 17200 and is violative of California's Penal Code Section 308 are preempted pursuant to the United States Supreme Court's holding in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed. 2d 532 (2001). Partially reversing its previous holding in *Mangini v. R.J. Reynolds Tobacco Co.*, 7 Cal. 4th 1057, 875 P.2d 73 (1994) as inconsistent with the High Court's ruling in *Lorillard*, this Court found that the claims asserted in *Daniels* amounted to nothing more than an attempt to mandate the content of cigarette advertising to prevent sales to minors. Following the logic of *Lorillard*, this Court found that a state law regulating the content of advertising to

prevent sales to minors was preempted under the express preemption provisions of the FCLAA.

This Court reasoned that regulation of youth marketing is inextricably tied to concerns about smoking and health, and as such any state law that seeks to regulate advertising content so as to curtail youth smoking would fall under the ambit of the FCLAA's express preemption of any state law regulating cigarette advertising content with respect to smoking and health. Hence this Court concluded that the *Daniels* plaintiffs' California state law claims that cigarette manufacturers unlawfully targeted youth in their cigarette advertising were nothing more than preempted efforts to impose state law restrictions on the contents of cigarette advertising with respect to smoking and health.

However, in reaching its holding in *Daniels* – which related solely to claims that youth targeting in cigarette advertising is an unlawful trade practice – this Court noted that the long-standing rule first articulated in *Cipollone*, that claims based on *fraudulent* statements in cigarette advertising are *not* preempted, still stands. *Daniels, 163 P.3d at 113, citing Cipollone*, 505 U.S. at 528-529. This Court also recognized that claims based on the tobacco companies' voluntary assumption of duties are not subject to FCLAA preemption. *Daniels, 163 P.3d at 112, citing Cipollone*, 505 U.S. at 526, 112. Unlike the youth marketing claims in *Daniels*, each and every one of plaintiffs' claims in this action falls into either or both of these well-recognized exceptions to FCLAA preemption.

In the trial court, plaintiffs stipulated that their claims were limited to six general areas of unlawful business practices: 1) youth targeting, a) generally, and b) as a violation of *voluntarily assumed duties* and *false* pledges not to target youth; 2) *misrepresentations* regarding so-called "Light" and "Low Tar" brands; 3) *misrepresentations* regarding so-called "All Natural" and "No Additive" brands; 4) *misrepresentations* regarding defendants' manipulation of nicotine; 5) *misrepresentations* of compliance with and violations of *duties voluntarily assumed* under the Cigarette Advertising Code (CAC); and 6) *conspiracy to deceive* the public about the health risks of smoking. With the exception of one *facet* of one of those six general claims (issue 1 (a)), which was dismissed by the trial court as preempted under the rationale of *Lorillard*, each and every claim in this suit hinges upon allegations of false and misleading statements and/or voluntary assumptions of a duty, none of which were at issue in this Court's holding in *Daniels*. The only aspect of *Daniels* which bears on these claims is this Court's reiteration of the long-held principle that claims of deception and breach of voluntarily assumed duties are *not* preempted by the FCLAA.

I. Claims based on misrepresentations and conspiracy are not preempted.

In *Daniels*, this Court reiterated the oft-cited rule of *Cipollone*, that claims based on fraudulent statements and conspiracy to deceive are not preempted by the FCLAA. *Id.*, 163 P.3d at 112-113. Here, each of plaintiffs' six issues is predicated upon material misrepresentations by defendants. In opposing the defendants' preemption summary judgment motion, plaintiffs provided the trial court with a lengthy Separate Statement, which for each of the six issues, set forth the fraudulent misrepresentations by defendants and the evidence demonstrating the falsity

of those statements.

With respect to four of the six issues (youth marketing, nicotine manipulation, the Cigarette Advertising Code, and conspiracy to deceive with respect to the hazards of smoking), the trial court found that plaintiffs had demonstrated a material issue of contested fact as to whether defendants had made false statements, and accordingly found the claims not subject to FCLAA preemption.[1] The trial court's ruling in this regard was entirely in keeping with this Court's holding in *Daniels* and the Supreme Court's *Cipollone* decision, as well as a host of preemption decisions handed down since *Lorillard* which have likewise found such claims are not preempted. *See e.g. Whiteley v. Philip Morris, Inc.*, 11 Cal. Rptr. 3rd 807, 842 (Cal. Ct. App. 2004); *Good*, 501 F.3d at 39; *Spain v. Brown & Williamson Tobacco Co.*, 363 F.3d 1182, 1202 (11th Cir. 2004); *Mulford v. Altria Group,* 504 F.Supp.2d 733, 750-751 (D.N.M. 2007); *Scott v. American Tobacco Co.*, 949 So.2d 1266, 1287 (La. 2007).

The trial court's holding with respect to issue six, conspiracy to deceive regarding the hazards of smoking, is illustrative of its rationale with respect to all of plaintiffs' fraudulent misrepresentation claims. The trial court reasoned:

> Through this Issue, Plaintiffs have asserted a decades-long conspiracy to deceive the public about the health risks associated with smoking.... It is unclear whether Defendants were under any duty to speak about the health consequences of their products, but they did in fact speak, and thus can be held accountable under State law if their representations to the public on such an issue of public concern were false or deceptive. As expressly held by the Supreme Court in *Cipollone* and now most recently by *Whiteley,* claims for intentional fraud are not preempted by the Act, especially where, as here, a company, under no duty to speak to the public, does so with the intent to deceive.
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> August 4, 2004 Order, at p. 30

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[1] With respect to issues 2 ("light" cigarettes) and 3 ("no additive/all natural"), the trial court found that use of those terms constituted only implied health claims or warning neutralization, not affirmative misrepresentations, and as such were subject to preemption. Plaintiffs sought review of this ruling in their appeal to the Appellate Division, which declined to consider the issue. While plaintiffs take issue with the trial court's finding that use of these terms is not an affirmative misrepresentation, the general preemption analysis employed (*i.e.* misrepresentation claims not preempted) was consistent with *Daniels*. It bears noting that courts have rejected the trial court's finding that use of the terms "light" and "low tar" does not constitute affirmative misrepresentations. *See Good v. Altria, Inc.*, 501 F.3d 29, 40 (1st Cir. 2007), *accord Price v. Philip Morris, Inc.*, 846 N.E.2d 1, 33 (Ill. 2005).

> health." [*Daniels*], then, ultimately does not support Philip Morris's position.
>
> *Good*, 593 F3d at 39, n. 13, *(citations to* Daniels *omitted)*.

Hence, the U.S. First Circuit considered the very issue raised by this Court's request for this Letter Brief, and concluded that *Daniels* supports a finding that plaintiffs' misrepresentation claims are not preempted.

II. Plaintiffs' claims based on voluntarily assumed duties are not preempted.

Plaintiffs' claims are predicated not only on a non-preempted duty not to deceive, but also on non-preempted voluntarily assumed duties. As the trial court noted, plaintiffs introduced ample evidence to the effect that defendants made myriad public pledges with respect to their business practices, including, *inter alia*, pledges to provide complete information about the hazards of smoking, not to target youth, and to conform to a voluntary industry Cigarette Advertising Code (CAC). Consistent with this Court in *Daniels* and the Supreme Court in *Cipollone*, the trial court found that claims based on violations of these voluntarily assumed duties are not preempted. Citing *Cipollone*, this Court affirmed that duties voluntarily assumed are not duties imposed by state law, and as such are not preempted. *Daniels, 163 P.3d at 112, citing Cipollone*, 505 U.S. at 526.

Consistent with this aspect of the *Daniels* holding, the trial court found that claims premised on defendants' pledges are not preempted. The trial court reasoned:

> The Labeling Act does not immunize [the cigarette industry] from obligations it has accepted on its own initiative regarding the disclosure of 'smoking and health' information, only those specifically imposed by state law.... Defendants made on their own initiative a promise to the American people by means of the CAC not to market to minors.... Such voluntary promises are actionable if broken, especially as an unfair business practice under California's UCL.
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> August 24, 2004 Order, p. 27, (citations to *Cipollone* and *Whiteley* omitted).

Thus, the trial court concluded, consistent with *Daniels* and *Cipollone*, that claims based on the breach of voluntarily assumed duties not to target youth do not fall within the Labeling Act's preemption provision. *Id.*

III. Insofar as they arise from misrepresentations about youth marketing and/or voluntarily assumed duties not to market to youth, plaintiffs' youth marketing claims are not preempted.

In reasoning that essentially tracks this Court in *Daniels*, the trial court found that unfair trade practice claims based on youth targeting alone are preempted under the rationale of *Lorillard*. However, the trial also found, in keeping with *Daniels*, that claims based on public misrepresentations about targeting youth, or breach of voluntarily assumed duties not to target youth, are not preempted. In opposing defendants' motion for summary judgment on preemption grounds, plaintiffs introduced evidence that defendants falsely touted their adherence to a Cigarette Advertising Code and that defendants published affirmative misrepresentations to the effect that they do not target minors in their advertising, assertions which were proven false by defendants' internal documents introduced in the trial court.

In *Daniels*, this Court held that as general proposition, the duties imposed by California's unfair trade practice act are not preempted by the FCLAA. *Daniels*, 163 P.3d at 115. This Court held:

> The state unfair trade competition law is a law of general application, and it is not based on concerns about smoking and health. Therefore, the FCLAA does not preempt that law *on its face*... To the extent we so concluded in *Mangini*, *supra*, we were correct, and we reaffirm those conclusions.
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> *Id.* (emphasis in original).

Hence, in *Daniels*, this Court specifically reaffirmed the long-standing rule that claims based on false statements, such as those asserted herein are not preempted.

What caused this Court to find the unfair trade practices claims in *Daniels* to be preempted even though 17200 is not preempted on its face, was the *Daniels* plaintiffs' predication of their unfair trade practices claim, not on false statements, but on violations of Penal Code Section 308, a regulation specifically concerning smoking and health. Here, plaintiffs have expressly disavowed any claims under Section 308. Rather, plaintiffs' unfair trade practices with respect to youth marketing arise from the defendants' violations of the general duty not to make false statements. In finding the claims in *Daniels* preempted, this Court expressly noted that the plaintiffs there had *not* alleged that defendants made misleading statements.

This Court found the *Daniels* plaintiffs' claims preempted because, "Plaintiffs' unfair competition claim here seeks to impose on defendant tobacco companies a duty not to advertise in a way that could encourage minors to smoke." *Id.*, 163 P.3d at 116. In this case, plaintiffs

claims do not seek to impose any such duty.[2] Rather, plaintiffs' claims are based on the generalized duty that defendants not lie to the public when they make public statements about whether they target minors with their advertising. As this Court in *Daniels*, the Supreme Court in *Cipolone*, and numerous other courts have recognized, the preemption provision of the FCLAA is not a license for cigarette manufacturers to make false statements.

CONCLUSION

The claims in the instant lawsuit are very different from the purely youth marketing claims that this Court found preempted in *Daniels*. At its core, the instant lawsuit seeks redress for defendants' misrepresentations and conspiracy to deceive, claims which this Court, the United State Supreme Court, and innumerable courts throughout the land have found not to be preempted. While, like *Daniels*, this suit involves charges that defendants target youth, the similarity ends there. Here, it is not youth marketing that forms the basis of plaintiffs' claims, but defendants' false and misleading statements *about* youth marketing, and defendants' repeated violation of their public pledge not to engage in youth marketing, that give rise to claims under 17200. Additionally, plaintiffs have asserted multiple other deception-based claims that are entirely removed from any issues of youth marketing. As this Court noted in *Daniels*, claims of that nature have never been subject to preemption under the FCLAA. To quote the United States Supreme Court in *Cipollone*, "Congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud." 505 U.S at 529.

Respectfully submitted,

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[2] To the extent plaintiffs' claims in this action were premised on any such duty, the trial court has ruled, consistent with this Court's interpretation of *Lorillard*, that those claims are preempted.