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December 10, 2007

VIA HAND DELIVERY
TO THE CLERK OF THE COURT

Honorable Ronald M. George, Chief Justice
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

Re: *In re Tobacco II Cases* (*Brown, et al. v. Philip Morris USA, Inc., et al.*), Case No. S147345

To The Honorable Chief Justice and Associate Justices of the California Supreme Court:

In accordance with this Court's October 10, 2007 Order, Defendants-Respondents (Defendants) respectfully submit this additional letter brief in response to the November 26, 2007 letter brief submitted by Plaintiffs-Appellants (Plaintiffs) regarding the effect of *In re Tobacco Cases II* (*Daniels v. Philip Morris USA Inc.*) (2007) 41 Cal.4th 1257 (*Daniels*), *petition for certiorari pending* (2007) 2007 WL 4231074. As set forth below, Plaintiffs' letter brief confirms that *Daniels* has no effect on the disposition of this interlocutory appeal.

Plaintiffs' letter brief is devoted almost entirely to making the legally irrelevant argument that the trial court correctly *denied* Defendants' motions for summary

adjudication with respect to four different issues raised by Plaintiffs' UCL claims.[1] (Plaintiffs' Nov. 26, 2007 Supp. Letter Br. (Plaintiffs' Supp. Br.) 3-7.) Plaintiffs' letter brief completely overlooks the fact that no issue concerning these rulings is properly before this Court. The trial court's rulings denying summary adjudication and allowing those claims to proceed have never been raised in this interlocutory appeal, and could not properly have been included in it. Indeed, Plaintiffs have never contended otherwise.

As Defendants have explained (Defendants' Supp. Br. 6-8), the limited appellate jurisdiction that is available in the current interlocutory posture of the case extends *only* to the trial court's order decertifying the class. Under the "death-knell" doctrine, such orders are immediately appealable because they are considered to be "tantamount *to a dismissal of the action* as to all members of the class other than plaintiff." (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 699, italics added.) By contrast, the trial court's partial summary adjudication order here does not dispose of all of the claims of anybody, and is therefore *not* immediately appealable. (*Jennings v. Maralle* (1994) 8 Cal.4th 121, 128; *Jacobs-Zorne v. Superior Court* (1996) 46 Cal.App.4th 1064, 1070.) While Defendants contended in their summary adjudication papers below that all of Plaintiffs' claims were preempted by FCLAA (see 2 A.A. 398-419); barred by the First Amendment (2 A.A. 419-438); and/or lacking in factual support (2 A.A. 393-398), any appeal on those points must await a final judgment (or some further development in the case that would place the issues in a posture allowing the appellate courts immediately to intervene). The mere fact that Plaintiffs chose to pursue a "death-knell" appeal of the class decertification provided no authorization in these circumstances for Defendants to pursue an interlocutory appeal of the trial court's summary adjudication rulings, and Defendants for that reason did not do so. (*Fontani v. Wells Fargo Investments, LLC* (2005) 129 Cal.App.4th 719, 736, disapproved on other grounds, *Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192, 203, fn. 5.)

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[1] As previously explained, Plaintiffs' UCL claims were distilled into six separate "Issues" (one of which was further divided into two sub-Issues). (See Defendants' Nov. 26, 2007 Supp. Letter Br. (Defendants' Supp. Br.) 4; Respondents' Brief on the Merits (R.B.) 5-6.) The trial court denied Defendants' motions for summary adjudication with respect to Issue No. 1(b) (alleged false denials of youth-targeting), Issue No. 4 (alleged false statements with respect to the use of additives and nicotine manipulation), Issue No. 5 (alleged false statements asserting compliance with a "Cigarette Advertising Code"), and Issue No. 6 (alleged false and misleading statements concerning the health hazards and addictiveness of smoking). (R.B. 6; 34 Appellants' Appendix (A.A.) 8474-8541.)

With respect to the remaining Issues as to which the trial court *granted* summary adjudication—Plaintiffs' claim of youth-targeting (Issue No. 1(a)) and Plaintiffs' claims concerning Lights and Natural/No-Additive cigarettes (Issues No. 2 and 3)—Plaintiffs' letter brief further confirms that no challenge to those rulings is before the Court in the pending appeal. Plaintiffs expressly concede that the youth-targeting claim (Issue No. 1(a)) was properly dismissed by the trial court and that they did not pursue that Issue in the Court of Appeal. (Plaintiffs' Supp. Br. 2; *id.* at p. 7, fn. 2.) Instead, they limited their challenge below to Issues No. 2 and 3. (*Id.* at p. 3, fn. 1.) As to the latter Issues, Plaintiffs acknowledge that the Court of Appeal held that it lacked jurisdiction to reach them (*ibid.*; see also Typed opn. p. 19), but once again Plaintiffs fail even to challenge that ruling (much less to demonstrate that it was wrong).

As Defendants have explained, the Court of Appeal's jurisdictional ruling was correct, and in any event Plaintiffs' multiple failures to challenge that holding in this Court establish that no question concerning the trial court's summary adjudication rulings is before the Court. (Defendants' Supp. Br. 6-8.) Moreover, although Plaintiffs state in passing (in a footnote) that they "take issue" with the trial court's ultimate conclusion that Issues No. 2 and 3 were preempted, Plaintiffs failed to raise any question on that score in their petition or briefs in this Court, and their letter brief affirmatively concedes that the trial court's general preemption analysis on these Issues "was consistent with *Daniels*." (Plaintiffs' Supp. Br. 3, fn. 1.) Any interlocutory review of these Issues is thus improper for those additional reasons as well. (Defendants' Supp. Br. 6.)[2]

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[2] Although the merits of those claims are thus not before the Court, Defendants also note parenthetically that Plaintiffs' citation of case law is highly selective. Thus, while Plaintiffs cite the First Circuit's opinion in *Good v. Altria Group Inc.* (1st Cir. 2007) 501 F.3d 29, *petition for certiorari pending* (2007) 76 U.S.L.W. 3240, they fail to mention that the Fifth Circuit explicitly endorsed (and quoted at length from) the trial court's summary adjudication ruling in this case with respect to Issue No. 2. (*Brown v. Brown & Williamson Tobacco Corp.* (5th Cir. 2007) 479 F.3d 383, 393.) And with respect to Issue No. 3, Plaintiffs failed below to challenge all of the trial court's *three* alternative grounds for summary adjudication, thereby demonstrating a further waiver of interlocutory review of that Issue. (Respondents' Brief in the Court of Appeal at pp. 45-46.)

Plaintiffs' letter brief thus provides further confirmation that the Court's ruling in *Daniels* does not affect the disposition of this interlocutory appeal.

Sincerely,

Daniel P. Collins /TAR

Daniel P. Collins

cc: All Counsel (*Proof of Service Attached*)

PROOF OF SERVICE VIA OVERNIGHT MAIL

I am employed in the City and County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 560 Mission Street, 27th Floor, San Francisco, California 94105.

On December 10, 2007, I served the foregoing document described as

RESPONDENTS' REPLY LETTER BRIEF TO THE COURT DATED DECEMBER 10, 2007

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

**** SEE ATTACHED SERVICE LIST ****

I am "readily familiar" with the firm's practice of collection and processing correspondence for delivery to an employee of Federal Express. Under that practice it would be delivered to an employee of Federal Express on that same day at San Francisco, California with charges to be billed to Munger, Tolles & Olson LLP's account to be delivered to the offices of the addressee(s) on the next business day.

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

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

_____

Julie Lunsford

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