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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 letter brief addressing the impact of the Court's recent opinion in *In re Tobacco Cases II* (*Daniels v. Philip Morris USA Inc.*) (2007) 41 Cal.4th 1257 (*Daniels*) on the issues in the instant appeal.

As set forth below, the substantive preemption and First Amendment rulings in *Daniels* have no effect on the limited issues raised in this interlocutory appeal, which addresses *only* the question whether the lower courts correctly concluded that Plaintiffs' claims under the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq. (UCL)) and the False Advertising Law (Bus. & Prof. Code, § 17500 et seq. (FAL)) were not

suitable for class treatment.[1] Plaintiffs in this case *did* raise in the trial court a youth-targeting claim that was virtually indistinguishable from that rejected by this Court in *Daniels*. The trial judge—the same coordination trial judge who entered the ruling affirmed in *Daniels*—similarly granted summary adjudication to Defendants on that claim here. But while this Court's *Daniels* decision certainly confirms the correctness of that summary adjudication ruling, no issue concerning that ruling (or indeed, any of the trial court's summary adjudication rulings) is properly before this Court in the present posture of this case.

Plaintiffs have not raised in this Court—either in their petition for review or in their merits briefs—*any* issue concerning the trial court's summary adjudication rulings, including the youth-targeting ruling. Although Plaintiffs did attempt to raise below a challenge to two of the trial court's other summary adjudication rulings, the Court of Appeal correctly held that it lacked interlocutory jurisdiction to address those rulings. (Typed opn. p. 19.) In their papers in this Court, Plaintiffs have not challenged the Court of Appeal's holding that it lacked jurisdiction to reach these issues. Moreover, at no point in these appellate proceedings have Plaintiffs *ever* sought to challenge the trial court's summary adjudication rulings concerning the UCL youth-targeting claim in this case that is analogous to the one rejected in *Daniels*. Indeed, Plaintiffs' papers in this Court did not even renew the substantive challenges that were raised below to the trial court's summary adjudication rulings. For these reasons, Plaintiffs have waived any interlocutory review of those issues at this time. Because no substantive preemption or First Amendment issue is properly before the Court, *Daniels* has no effect on the disposition of this interlocutory appeal.

I. Relevant Procedural History of the *Daniels* and *Brown* Cases

In order to assess whether this Court's substantive rulings concerning the preemption and First Amendment issues in *Daniels* have any direct effect on the specific issues presented in the current interlocutory appeal in *Brown*, it is useful first to summarize the relevant procedural histories of the two distinct cases.

A. This Court Affirmed the Trial Court's Grant of Summary Judgment on the UCL Youth-Targeting Claims Asserted in *Daniels*

The *Daniels* lawsuit involved a separate class action that was part of the same coordination proceeding, before the same coordination trial judge (Prager, J.), as the

[1] Because, for purposes of the issues before the Court, there is no material difference between the UCL and the FAL, Defendants will refer only to the "UCL" in the discussion below.

Brown case presently before this Court. In *Daniels*, the plaintiffs' central allegation was that the "defendant tobacco companies' advertising and promotional activities intentionally targeted minors," and that this alleged conduct violated the UCL by "encourag[ing] or induc[ing] violation[s] of Penal Code section 308, which prohibits the sale of tobacco to minors and the purchase and possession of tobacco by minors." (*Daniels*, *supra*, 41 Cal.4th at pp. 1263-1264.) After certifying a plaintiff class consisting of "all persons who as California resident minors (under 18 years of age) smoked one or more cigarettes in California between April 2, 1994 and December 31, 1999," the trial court ultimately granted summary judgment to the defendants, concluding that the plaintiffs' UCL youth-targeting claim was both preempted by the Federal Cigarette Labeling and Advertising Act (15 U.S.C. § 1331 et seq. (FCLAA)) and barred by the First Amendment. (*Daniels*, at pp. 1263-1264.) The Court of Appeal affirmed based upon FCLAA preemption, without reaching the First Amendment issue. (*Id.* at p. 1264.)

This Court unanimously affirmed. Noting that it had previously upheld a similar UCL claim in *Mangini v. R.J. Reynolds Tobacco Co.* (1997) 7 Cal.4th 1057 (*Mangini*), the Court nonetheless explained that the *Mangini* decision had "been superseded" by the U.S. Supreme Court's subsequent decision in *Lorillard Tobacco v. Reilly* (2001) 533 U.S. 525 (*Lorillard*). (*Daniels*, *supra*, 41 Cal.4th at p. 1276.) In *Lorillard*, the high court had held that FCLAA's express preemption of requirements or prohibitions that were "based on smoking and health" extended to state-law claims that "*were based on concerns about youth smoking*, because the court concluded that those concerns were indistinguishable from the concern about cigarette smoking and health." (*Daniels*, at p. 1272, citing *Lorillard*, *supra*, 533 U.S. at p. 548, italics added.) Because the plaintiffs' youth-targeting claim in *Daniels* was based on "precisely" the sort of state-law duty that *Lorillard* held "is necessarily and inherently based on concerns about smoking and health," this Court held that the plaintiffs' unfair competition claim was "preempted, unless it falls within an exception to FCLAA preemption." (*Daniels*, at p. 1273.)

Although the *Daniels* plaintiffs sought to fit their UCL youth-targeting claim within *Lorillard*'s "exception allowing states to prohibit conduct that constitutes an inchoate crime," this Court rejected that argument, holding that "at least when, as here, there is no allegation that the advertisements directly and expressly incited criminal violations," the purposes of FCLAA "would be severely undermined if states could invoke the inchoate crime exception on the ground that cigarette advertising, because of its content or location, was intentionally designed to encourage youth smoking." (*Daniels*, *supra*, 41 Cal.4th at pp. 1273-1274.) Moreover, the Court held that the plaintiffs' theory that the defendants' advertising constituted criminal aiding and abetting of illegal sales was inconsistent with the First Amendment under the four-part test of

Central Hudson Gas & Electric Corp. v. Public Service Com. (1980) 447 U.S. 557. (*Daniels*, at pp. 1274-1275.) In particular, "treating defendants' conduct in advertising their cigarettes as aiding and abetting a violation of Penal Code section 308" was "not a 'reasonable fit' with the state's purpose of discouraging smoking by minors." (*Id.* at p. 1275.)

B. In Appealing the Decertification Ruling in *Brown*, the Plaintiffs Have Failed to Challenge in This Court the Court of Appeal's Holding That It Lacked Interlocutory Appellate Jurisdiction Over the Trial Court's *Separate* Order Granting Partial Summary Adjudication

In contrast to the *Daniels* lawsuit, which centered on claims of youth-targeting, the *Brown* litigation involves a broader and even more diverse range of allegations. As explained in Respondents' Answering Brief on the Merits (R.B.), the *Brown* Plaintiffs' multi-faceted (and frequently amended) UCL claim was ultimately distilled into six overlapping "Issues," *one* of which included (as a sub-issue) the assertion that Defendants had "violated the UCL by *targeting minors* in their cigarette marketing and advertising activities." (15 Appellants' Appendix (A.A.) 3708, italics added; see also R.B. 5-6.) All of these claims were asserted on behalf of a certified class consisting of "[a]ll people who at the time they were residents of California, smoked in California one or more cigarettes between June 10, 1993 through April 23, 2001, and who were exposed to defendants' marketing and advertising activities in California." (2 A.A. 340.)

Consistent with its prior ruling in *Daniels*, the trial court in *Brown* subsequently granted Defendants' motion for summary adjudication on FCLAA-preemption grounds with respect to the youth-targeting sub-issue (denominated below as "Issue 1(a)"). (34 A.A. 8495-8501.) Although in *Daniels* the trial court had also held that the First Amendment provided an alternative and independent basis for granting summary adjudication on the youth-targeting claim presented there (*Daniels*, *supra*, 41 Cal.4th at p. 1264), the same court in *Brown* relied *only* on FCLAA preemption, concluding that, as a result of perceived technical deficiencies in the Defendants' separate statement of material facts, "no burden shifted to Plaintiffs" to demonstrate the presence of a triable issue of fact concerning the First Amendment defense to that claim (or to most of the other claims asserted by Plaintiffs). (34 A.A. 8531-8532.)

With respect to the remaining "Issues" in the *Brown* UCL action, the trial court granted Defendants summary adjudication with respect to two other Issues on FCLAA-preemption and other grounds (34 A.A. 8482-8491, 8501-8508, 8527-8528, 8533-8535), but denied summary adjudication as to the rest. (34 A.A. 8492, 8508, 8521-8529, 8531-8533, 8539-8540.) Specifically, the trial court granted summary adjudication with

respect to Plaintiffs' claims concerning the marketing of Lights (Issue No. 2) and Plaintiffs' claims concerning the marketing of "No Additives" and "Natural" cigarettes (Issue No. 3). (34 A.A. 8476.) The trial court, however, allowed the Plaintiffs to proceed with their claims that Defendants allegedly made false statements denying that they targeted minors (Issue 1(b)); that Defendants allegedly made a variety of false statements regarding the use of additives and purported nicotine manipulation (Issue No. 4); that Defendants allegedly made false statements asserting compliance with their self-imposed "Cigarette Advertising Code" (Issue No. 5); and that Defendants purportedly made numerous false and misleading statements concerning the health hazards and addictiveness of smoking (Issue No. 6). (34 A.A. 8476.)

After the enactment of Proposition 64, the trial court concluded that, in light of the adoption of that initiative, the class should be decertified on the ground that "individual issues predominate, making class treatment unmanageable and inefficient." (40 A.A. 9892-9893.) Plaintiffs appealed this ruling under the "death knell" doctrine of *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, which held that an order completely denying a class action is immediately appealable because it is "tantamount to a dismissal of the action as to all members of the class other than plaintiff." (*Id.* at p. 699.) In the Court of Appeal, Plaintiffs attempted to piggy-back onto this limited interlocutory appeal a challenge to the trial court's summary adjudication ruling with respect to their Lights and No-Additives/Natural cigarette marketing claims. (Appellant's Opening Brief in the Court of Appeal pp. 47-69.) Notably, however, Plaintiffs did *not* challenge the trial court's dismissal of their UCL youth-targeting claim. (See, e.g., Respondents' Brief in the Court of Appeal, p. 5, fn. 3.) Defendants' answering brief in the Court of Appeal asserted that Plaintiffs' attempt to bring an interlocutory appeal of the summary adjudication rulings was procedurally improper on multiple grounds. (*Id.* at pp. 30-32.)

The Court of Appeal held that review of the challenged summary adjudication rulings was beyond its limited interlocutory appellate jurisdiction because those issues would not "resurrect" the class action. (Typed opn. p. 19.) Thereafter, Plaintiffs' petition for review, as well as their briefs on the merits in this Court, did not raise *any* issue concerning any of the trial court's summary adjudication rulings, including the youth-targeting ruling (the latter of which, as noted above, Plaintiffs had not even attempted to appeal). Moreover, Plaintiffs' petition and merits briefs also did *not* address the Court of Appeal's threshold holding that it lacked jurisdiction to review the summary adjudication rulings.

II. No Question Concerning the Propriety of the Trial Court's Summary Adjudication Rulings Is Properly Before This Court

While this Court's ruling in *Daniels* confirms the obvious conclusion that the same trial court's identical preemption ruling on the same youth-targeting issue in *Brown* was likewise correct, this observation is ultimately of no moment to this particular interlocutory appeal. Because no issue concerning any of the trial court's summary adjudication rulings is properly before this Court, the substantive preemption and First Amendment issues decided in *Daniels* do not affect the scope or the disposition of the limited issues raised in the instant appeal.

This Court's *Daniels* decision arose in the context of an appeal from a final judgment disposing of all of the claims presented in the case. By contrast, the instant appeal is a limited *interlocutory* appeal from an order decertifying a previously certified class. There is no final judgment disposing of the entire action because, as noted above, the trial court in the *Brown* case *denied* summary adjudication with respect to most of the claims raised. (*Ante*, pp. 4-5.) Moreover, the scope of the questions properly presented in this case is further limited by the Plaintiffs' failure to raise certain issues either in the Court of Appeal or in this Court (or both). As a direct consequence of these case-specific procedural features in *Brown*, there are at least four separate reasons why (in contrast to *Daniels*) no substantive issue concerning federal preemption or the First Amendment is properly presented in this interlocutory appeal.

First, Plaintiffs' petition for review, as well as their briefs on the merits in this Court, did not raise *any* issue concerning any of the trial court's summary adjudication rulings, including the youth-targeting ruling. More specifically, Plaintiffs' petition and merits briefs did *not* challenge the Court of Appeal's holding that it *lacked jurisdiction* to review the summary adjudication rulings in the context of a limited "death knell" interlocutory appeal of a class decertification ruling. Because Plaintiffs' petition and briefs in this Court (1) failed to renew the challenge they made in the Court of Appeal to the trial court's summary adjudication rulings; and (2) failed to challenge the Court of Appeal's ruling that these issues were outside its limited interlocutory jurisdiction (much less explain why that jurisdictional ruling was wrong), any such issue concerning the trial court's summary adjudication rulings has been doubly waived. (See *PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1094, fn. 3; *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11.)

Second, even if Plaintiffs' papers in this Court *had* sought to raise the issue of the Court of Appeal's jurisdiction over the trial court's summary adjudication rulings, the Court of Appeal correctly held that it lacked interlocutory jurisdiction to review those

rulings. (Typed opn. p. 19.) An order completely denying *class certification* (such as the trial court's March 7, 2005 decertification order under review here) is immediately appealable on the theory that such an "order is tantamount to a dismissal of the action as to all members of the class other than plaintiff." (*Daar v. Yellow Cab Co., supra*, 67 Cal.2d at p. 699.) But the appealability of such an order does not "give[] rise to the right to appeal an entirely unrelated order," such as the trial court's earlier ruling granting summary adjudication with respect to certain issues. (*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.) It is settled that summary adjudication rulings are *not* appealable orders and may be appealed only after a final judgment is rendered. (*Jennings v. Maralle* (1994) 8 Cal.4th 121, 128; *Jacobs-Zorne v. Superior Court* (1996) 46 Cal.App.4th 1064, 1070.)

This conclusion is especially true here in light of the unique procedural history of this case. The challenged class decertification order was in fact that *fourth* class certification ruling rendered in this case:

- The trial court denied Plaintiffs' first *two* motions for class certification, which both had sought certification of Plaintiffs' claims under the Consumer Legal Remedies Act (Civ. Code, § 1750 et seq. (CLRA));

- The trial court granted the Plaintiffs' third class certification motion, which sought certification of only the UCL claims, on the ground that the UCL did not require proof of exposure to, or causation of injury by, the challenged advertising; and

- The trial court then decertified the UCL class after the passage of Proposition 64.

(R.B. 6-8 [summarizing this procedural history].) In the earlier CLRA orders, which were issued *before* the summary adjudication rulings (at a time when all substantive issues were still in the case[2]), the trial court found a predominance of individualized issues concerning, inter alia, Plaintiffs' exposure to advertising and the causal effect of

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[2] For example, the broadly framed CLRA claim that was the subject of the second CLRA class certification ruling raised essentially the same substantive issues that were later addressed in the trial court's summary adjudication rulings concerning the UCL claims. (8 Respondents' Supplemental Appendix (R.S.A.) 2098-2100, 2116-2117, 2126-2135 [CLRA allegations in Sixth Amended Complaint]; 9 R.S.A. 2482-2499 [Second Class Certification Motion, addressed to CLRA claim in Sixth Amended Complaint].)

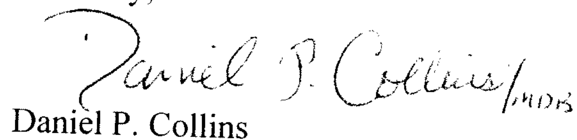
that advertising. (8 R.S.A. 2070-2072, 2086-2087; 1 A.A. 229-230.) The rationale of the trial court's subsequent decertification order was that, in light of Proposition 64's new standing requirements, the comparable reasoning of these earlier CLRA orders now applied to the class certification determination for the UCL claims. (40 A.A. 9892-9893.) Because the trial court found a predominance of individualized issues both before and after its summary adjudication rulings dismissing a handful of issues from the case, the record leaves no doubt that the presence or absence of those issues had no bearing on the correctness of the decertification ruling. As the Court of Appeal aptly stated, the summary-adjudication issues raised by Plaintiffs were not within its appellate jurisdiction because they would not "resurrect the UCL or CLRA class actions." (Typed opn. p. 19.)

Third, at no point in the proceedings on this interlocutory appeal have Plaintiffs *ever* challenged the trial court's ruling granting summary adjudication to Defendants on Plaintiffs' youth-targeting claim. (See, e.g., Respondents' Brief in the Court of Appeal, p. 5, fn. 3.) Because the issue was never even raised in the Court of Appeal, it is not properly before this Court. (See, e.g., *Galvadon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1265.)

Fourth, whether the trial court properly permitted certain claims to *survive* summary adjudication is also not before this Court. No such contention was raised in the Court of Appeal, because (as explained above) no such issue could properly have been raised in that court in this limited interlocutory appeal. And, *a fortiori*, no such issue has been raised in the answer to Plaintiffs' petition for review or in the merits briefs in this Court.

Because no substantive issue concerning the trial court's summary adjudication rulings is properly before this Court, the decision in *Daniels* concerning the scope of FCLAA preemption and the First Amendment has no effect on the limited issues presented in this interlocutory appeal.

Sincerely,



Daniel P. Collins

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

PROOF OF SERVICE VIA OVERNIGHT MAIL

I am employed in the City 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 November 26, 2007, I served the foregoing document described as

RESPONDENTS' LETTER BRIEF TO THE COURT
DATED NOVEMBER 26, 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 ****

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

Executed on November 26, 2007, at San Francisco, California.

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