STATEMENT OF INTEREST OF AMICI CURIAE

The Tobacco Control Legal Consortium ("TCLC") is a national network of legal centers providing legal technical assistance to public officials, health professionals and advocates in addressing legal issues related to tobacco and health, and supporting public policies that will reduce the harm caused by tobacco use in the United States. TCLC grew out of collaboration among specialized legal resource centers serving six states, and is supported by national advocacy organizations, voluntary health organizations and others.[1] In addition, TCLC prepares legal briefs as amicus curiae in cases where its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance. TCLC has submitted amicus briefs in recent cases before the Supreme Courts of Kentucky, Montana and New Hampshire.

The interest of amicus Tobacco Control Resource Center ("TCRC") in this case arises from its mission to improve public health by reducing the use of and exposure to tobacco products in the United States. Begun in 1979 and a 501(c)(3)

---

[1] TCLC's coordinating office is located at the Tobacco Law Center of the William Mitchell College of Law in St. Paul, Minnesota. Other affiliated legal centers include the Technical Assistance Legal Center (TALC) at the Public Health Institute of California, in Oakland, California; the Legal Resource Center for Tobacco Regulation, Litigation & Advocacy (TRC) at the University of Maryland School of Law in Baltimore, Maryland; the Tobacco Control Resource Center (TCRC) at Northeastern University School of Law in Boston, Massachusetts; the Smoke-Free Environments Law Project (SFELP) at the Center for Social Gerontology in Ann Arbor, Michigan; and the Tobacco Control Policy and Legal Resource Center at New Jersey GASP in Summit, New Jersey.

nonprofit since 1984, TCRC has experience in tobacco control issues generally, as well as longstanding and specific expertise in tobacco litigation and public health.

SUMMARY OF ARGUMENT

Formerly secret tobacco industry documents and empirical research demonstrate that the Defendants in the instant case have used their enormous financial resources to impede and frustrate individual claims of injury for tobacco-related disease and death. Industry documents show that Defendants' strategy is not to gain legal advantage, but rather to make the case so time consuming and expensive as to bankrupt individual plaintiffs and their attorneys and thwart the ability of the court system to provide an opportunity to be heard. As a result of this strategy, almost all individual plaintiffs cannot find attorneys to represent them, therefore the only chance for a fair hearing of plaintiffs' complaint is through a class action lawsuit.

In 1996, the Third District Court of Appeals determined that a class action lawsuit was the appropriate vehicle for resolution of the plaintiffs' claims in this case. Though the size of the class is larger than anticipated, the Third District has not explained adequately why it has reversed itself after the plaintiffs relied on its earlier ruling, and plaintiffs, defendants and the judicial system expended enormous resources trying a two-year-long lawsuit. Decertifying the class now will require each individual plaintiff to prove liability that took the class action jury

over a year to resolve. It would be a waste of judicial resources to retry these settled issues on an individual basis. In fact, decertification would result in a *de facto* denial of access to the courthouse because of the tobacco industry's cynical scorched earth litigation tactics.

The Third District Court of Appeals was incorrect in relying on the Florida Settlement Agreement (FSA) between the State of Florida and the Defendants, or the Master Settlement Agreement (MSA) between 46 states and the Defendants, in reversing the trial court's award of punitive damages. By the unambiguous terms of the FSA and the MSA, the settlement agreements shall not "be offered or received in evidence in this Action, or any other action or proceeding, for any purpose other than in an action or proceeding arising under this Settlement Agreement." FSA Other courts that have examined this issue have found the settlement agreements on which the court relies specifically preclude the introduction of those agreements in other actions. The FSA and the MSA are settlements of various state claims and do not address individual or class tort injury claims, and therefore cannot be said to be the same action and were properly not relied upon by the trial court. Because the FSA and the MSA do not address the same issues or involve the same plaintiffs as the instant case, the doctrine of *res judicata* cannot be relied on to eliminate punitive damages.

ARGUMENT

I. DECERTIFYING THE CLASS WILL CREATE A *DE FACTO* DENIAL OF REMEDIES FOR ALMOST ALL CLASS MEMBERS.

A. The Tobacco Industry's Litigation Tactics Purposely and Needlessly Increase the Costs of Litigation with the Goal of Bankrupting and Discouraging Plaintiffs.

Despite over 400,000 tobacco-related deaths a year in the United States, *The Health Consequences of Smoking, A Report of the Surgeon General*, (2004), and the availability of formerly secret, incriminating tobacco industry documents, there are just a handful of individual lawsuits pending against the cigarette industry. *See* Altria Group, Inc., Form 10-Q Quarterly Report, filed May 10, 2004. The reason for this anomaly is the tobacco industry's stated policy to make litigation as expensive as possible so as to discourage and prevent individual lawsuits. The tobacco industry uses a scorched earth strategy that unnecessarily prolongs pre-trial activity by purposely misunderstanding discovery requests, forcing plaintiffs to hire experts to prove well-settled scientific facts, and filing motions that border on the frivolous. This strategy delays trial and increases the cost for the plaintiff. Even if these actions could be characterized as aggressive defense of the tobacco industry's interests, the motivation is not to gain legal advantage, but rather to punish plaintiffs financially. In a formerly secret tobacco industry document, counsel for R.J. Reynolds explained:

> [T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiff's lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of Reynold's money, but by making that other son of a bitch spend all his.

Haines v. Liggett Group, 814 F.Supp. 414, 421 (D. N.J. 1993). (Quoting "Memorandum from RJR outside Litigation Counsel to RJR outside litigation counsel, forward to Philip Morris in-house counsel, discussing legal issues and strategy in California Litigation Involving the Tobacco Industry." Mike Jordan. 29 April 1988.

The cigarette companies had decided from the beginning of personal injury litigation against them that they would "spare no cost in exhausting their adversaries' resources short of the court house door." Rabin, Robert L., *A Sociological History of the Tobacco Tort Litigation*, 44 Stan. L. Rev. 853, 857 (1992). An R.J. Reynolds attorney stated:

> [t]he industry's success in the litigation is primarily because at the outset a decision was made to fight the lawsuits all out, never considering settlement in even the smallest sum. The industry felt then, and still does, that if any case were lost or settled, there would be thousands of potential claimants to whom payment – no matter how small – would be prohibitive.

Jacob, E.J.; Jacob Medinger. "Report Prepared by RJR Outside Legal Counsel Transmitted to RJR Executives for the Purpose of Rendering Legal Advice

Concerning Smoking and Health Issues and Litigation." 27 Jun 1980. Bates: 504681987-504682023. http://tobaccodocuments.org/bliley_rjr/504681987-2023.html In just one case the industry spent an estimated $75 million in legal costs, and it is estimated that it spends $600 million per year defending the cases pending against it. Daynard, Richard A., *Catastrophe Theory and Tobacco Litigation*, Tobacco Control 1994; 3: 59-64.

A 1991 empirical study of California civil litigation, fee shifting, and settlement behavior indicated that some defendants may attempt to force plaintiffs to drop cases by driving up litigation costs and using hard bargaining tactics in an attempt to discourage future litigation or to set a precedent that would discourage repeat litigation. *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, Vargo, John F., 42 Am. U.L. Rev. 1567, 1619-20 (1993). Judge Posner argues that a defendant's wealth must be considered where that wealth enables "the defendant to mount an extremely aggressive defense against suits," and "by doing so to make litigating against it very costly, which in turn may make it difficult for the plaintiffs to find a lawyer willing to handle their case." *Matthias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003).

In the tobacco arena, it is well known that the industry members use their wealth to take detailed depositions, engage in seemingly endless pretrial interrogation, file as many motions as possible, and appeal any adverse decision, in

hopes that plaintiffs will drop their lawsuits. Rabin, *A Sociological History of the Tobacco Tort Litigation*, 44 Stan. L. Rev. at 859. A memorandum by Jones, Day, Reavis, and Pogue, a law firm representing R.J. Reynolds, stated, "[t]he taking of extensive admission-oriented depositions will also impress upon the plaintiffs, their lawyers, and their experts the seriousness of the commitment they must make in bringing these cases," and that "it is critical to file a series of motions before each trial" because there may be a "tactical advantage in forcing the plaintiff's counsel, on the eve of trial, to respond to such motions." "Memorandum To File Smoking And Health Litigation," Bates: 680712261-680712337. http://tobaccodocuments.org/tplp/680712261-2337.html

Even though the industry settled state government smoking-related Medicaid expenses suits, they still refused to settle any individual smoking cases. "In short, by making the cost of litigation so high, the cigarette manufacturers have closed the courthouse to most people who have gotten sick or died from using their products." Townsley, William E. & Hanks, Dale K., *The Trial Courts Responsibility to Make Cigarette Disease Litigation Affordable and Fair*, 4.5 TPLP 4.12, 1989.

Plaintiffs in Florida have difficulty finding attorneys for individual cases against the tobacco industry. Attorneys who might otherwise represent plaintiffs must take into account that it will likely cost them more in time and expenses to

win the case than any possible reward. As a matter of business entrepreneurship, tobacco litigation strikes attorneys as a bad business risk. This is not because cases cannot be won, but rather because the tobacco industry makes plaintiff verdicts Pyrhhic victories. Decertifying this class therefore will result in a denial of remedies for almost all plaintiffs.

B. In the Event Class Members Could Find Counsel to Represent Them, Decertifying the Class Will Lead to a Flood of Cases Retrying the Same Liability Issues and Undermining Judicial Efficiency.

In *Broin v. Philip Morris*, 641 So. 2d 888, 891-92 (1994), the Third District Court of Appeals held that a class of flight attendants was properly certified despite the fact that the plaintiffs had different diseases and might pose choice of law issues because they resided in different states. The court stated, "if we were to construe the rule to require each person to file a separate lawsuit, the result would be *overwhelming and financially prohibitive*. Although defendants would not lack the financial resources to defend each separate lawsuit, the vast majority of class members, in less advantageous financial positions, would be deprived of a remedy." (emphasis added).

"The very purpose of a class suit is to save a multiplicity of suits, to reduce the expense of litigation, to make legal processes more effective and expeditious, and to make available a remedy that would not otherwise exist." *Tenney v. City of Miami Beach*, 152 Fla. 126, 11 So. 2d 188, 189 (Fla. 1942). The inability to secure

legal representation because of the poor risk-reward ratio for attorneys' compensation creates a *de facto* denial of a remedy for the vast majority of the class members.

As the Third District Court of Appeals pointed out, "Rule 1.220 also requires that class representation be superior to other available methods of fairly and efficiently adjudicating the claims presented." *Liggett Group, Inc. v. Engle*, 853 So. 2d 434, 445 (Fl 3rd District 2003). Under this logic, the Court of Appeals would require each individual plaintiff to retry the liability issue, including all the scientific expert testimony as to the health consequences of cigarette use. The liability phase of the class action suit took over one year to try. Surely it is more efficient and equitable to try this expensive and time consuming portion of the trial just once in a class action setting, rather than repeat it hundreds of thousands of times for each individual smoker in Florida. The Florida judicial system will be overwhelmed with individual lawsuits if the Third District Court of Appeals is taken at its word. It is the tobacco industry's intent to make litigation so time consuming as to make the system inefficient and thus cynically deny justice by closing the courthouse doors by sheer volume. The judiciary should not aid the tobacco industry in this approach to litigation.

A class inevitably will have some differences among its members, and the class management plan anticipated the resolution of the differences by providing

for a third phase of the trial where individualized hearings would be held. Other class action cases have used special masters, arbitrators, or other neutrals to resolve the amount of the award for individual class members as an adjunct to the judicial system. In those cases, the court efficiently resolved the common issues in the class setting, and the individual differences were resolved in a judicially sanctioned forum that preserved the court system's resources.

Individual proceedings in the final phase of *Engle* do not need to resemble the drawn out adjudications in Phase 2A. Contemporary experience with mass torts has produced a variety of abbreviated but fair and efficient proceedings for resolving individual damages issues after common liability issues are resolved. Several of these may well comport with due process requirements. See e.g. several articles by Professor Francis McGovern, who has helped devise such processes, including *The Alabama DDT Settlement Fund*, 53 Law & Contemp. Probs. 61 (1990); *Resolving Mature Mass Tort Litigation,* 69 B.U. L. Rev. 659 (1989); *Toward a Functional Approach for Managing Complex Litigation,* 53 U. Chi. L. Rev. 440 (1986).

In an earlier ruling in this same case, the Third District Court of Appeals already held that a class action lawsuit was the appropriate vehicle for the resolution of the plaintiffs' claims in this case. *R.J. Reynolds Tobacco. Co. v. Engle*, 672 So. 2d 39 (Fla. 3d DCA 1996). At that time, the Third District was

asked by Defendant on interlocutory appeal to decertify a nationwide class of injured plaintiffs injured by tobacco-related diseases. The Third District stated, "Although certain individual issues will have to be tried as to each class member, principally the issues of damages, the basic issues of liability common to all members of the class will clearly predominate over the individual issues." *Id.* at 41. The Third District also stated that its decision in *Broin* compelled the result. *Id.* This Court chose not to hear the defendant's appeal. After years of pre-trial activity, a two year long trial, and the expense of enormous resources by the plaintiffs, defendants and the judicial system of Florida, the Third District now has determined that it would be inefficient to have the case proceed as a class action. In the current appeal, the Third District does not cite the *Broin* case, much less explain why it is no longer controlling precedent. Although the court cites as a changed circumstance the increase of class members from what was originally predicted, it was clear to the Third District at the time that the class would be enormous and "certain individual issues will have to be tried as to each class member." *R.J. Reynolds Tobacco Co.*, 672 So. 2d at 41. The Third District did modify the class to reduce it from a nationwide class to a class of Florida residents only. Those class members relied on the Third District's decision and proceeded in a lengthy, difficult and emotionally fraught lawsuit, which resulted in a victory

for the class. Yet now, eight years later, the Third District has changed its mind and has denied those plaintiffs their victory, their forum, and their rights.

The issues and remedies in the instant case are like those in *Broin*, where the Third District found class certification to be the appropriate vehicle for resolving a deadly tort against an enormous number of victims. The same analysis and result should apply here so that injured consumers can have a meaningful remedy.

II. THE JURY'S PUNITIVE DAMAGE AWARD SHOULD BE UPHELD

The punitive damages award in this lawsuit should be upheld. The Third District Court of Appeals incorrectly relied on the 1997 Florida Settlement Agreement ("FSA") and the 1998 Master Settlement Agreement ("MSA") in reversing the jury's award. The very terms of the agreements explicitly bar the use or consideration of those settlements in any private lawsuit, including the present lawsuit where punitive damages are sought. The Court should uphold the punitive damage award.

A. The Terms of the 1997 Florida Settlement Agreement Preclude Any Consideration of It in this Lawsuit.

The FSA precludes the Defendants from relying on it in this lawsuit, thus it should not be used to bar punitive damages. In negotiating the FSA, the State of Florida and the cigarette manufacturers agreed on language crafted to ensure that the FSA would have absolutely no effect on private lawsuits. In relevant part, section VI(C) of the FSA states:

> [N]either this Settlement Agreement nor any evidence of negotiations here under, *shall be offered or received in evidence in this Action, or any other action or proceeding,* for any purpose other than in an action or proceeding arising under this Settlement Agreement.

(emphasis added).

The FSA ended the lawsuit *State of Florida v. American Tobacco Co.*, No. 95-1446 AH (Fla. 15th Jud. Cir. 1995), which the State of Florida filed to recoup its healthcare expenditures caused by the cigarette manufacturers' wrongdoing. The State of Florida determined that smoking rates, and consequently the Medicaid expenditures it incurred in treating sick and dying smokers, would have been much lower had cigarette manufacturers been honest with the public about the dangers caused by smoking and not committed numerous other wrongful acts orchestrated to create the highest possible number of smokers. *Id.* (Third Amended Complaint) at ¶ ¶ 1-12. The State of Florida decided that cigarette manufacturers should shoulder at least some of the fiscal responsibility of paying these Medicaid expenditures. Through the FSA payments, the cigarette manufacturers are now forced to do so.

Individual victims, however, receive no benefits under the FSA. The rights and interests of individual victims were not represented or at issue in *State of Florida v. American Tobacco Co.* or in the FSA. The settlement released the claims of the State of Florida, but did not release or affect any claims or rights of

individual smokers. Individual victims may continue to press their claims against cigarette manufacturers in private lawsuits, as intended by the State of Florida.

Section VI(C) of the FSA provides the simple instruction that the FSA is non-admissible in private lawsuits. Indeed, that the FSA is not admissible in private lawsuits is the only instruction relative to private lawsuits in the entirety of the FSA. Accordingly, the FSA cannot bar punitive damages and should, by its very terms, have no role in the present lawsuit.

B. The Terms of the 1998 Master Settlement Agreement Preclude Any Consideration of It in this Lawsuit.

For the same reason the State of Florida included section VI (C) in the FSA, the group of states attorneys general negotiating the MSA included a non-admissibility instruction in the MSA. *See* MSA, §XVIII(f). Thus, the MSA should not be used to bar the punitive damage award in this lawsuit. Section XVIII (f) states:

> Neither this Agreement nor any public discussions, public statements, or public comments with respect to this Agreement shall be by any Settling State or Participating Manufacturer or its agents *shall be offered or received in evidence in any action or proceeding for any purpose* other than in an action or proceeding arising under or relating to this Agreement.

(emphasis added).

The MSA's history demonstrates exactly why states included the non-admissibility guarantee in the MSA. That history shows that, in 1997 and 1998, the tobacco industry sought congressional legislation to "settle" the lawsuits

brought by state governments on terms that would have granted tobacco companies the immunity from private punitive damage claims that they now seek from this Court. Their legislative efforts were rejected by Congress, and they were forced to accept settlements with the states on terms that left the claims of private citizens--including private claims for punitive damages--unaffected. Having failed to persuade Congress to strip smokers of their claims, and having then settled with Florida and other states on terms that necessarily left unaffected the claims of private litigants who were not parties to the case, the Defendants now seek to bootstrap these very settlements into evidence of a de facto immunity of precisely the type that Congress and the settlement agreements rejected. The settlement agreements contain non-admissibility guarantees to bar this sort of duplicity.

The state lawsuits underlying the MSA, as with the FSA, sought to recover smoking-related Medicaid expenses from leading cigarette manufacturers under a variety of theories. Cigarette manufacturers and the states entered into settlement negotiations, and by 1997 they agreed to seek proposed legislation, the so-called "Global Settlement," which would have exchanged monetary and public health concessions for Congressional legislation imposing cap on punitive damages in private lawsuits and settlement of the state lawsuits. *See* Daynard R, Bloch M, Roemer R, *A Year of Living Dangerously: the Tobacco Control Community Meets the Global Settlement*, 113 Pub. Health Rep. 488-97 (1998).

In Congress, Senate debate focused particularly on the punitive damage cap, as Senator McCain's Global Settlement bill emerged from the Senate Commerce Committee in early 1998. See S. 1415, 105th Cong. First Sess. (1998) (*substitution for S.1414*); 144 Cong. Rec. S4035-02 (May 1, 1998) (*introduction of S.1415*).

Senators Gregg and Leahy's amendment striking the punitive damage cap from the Global Settlement bill succeeded. 144 Cong. Rec. S5238-01 (May 20, 1998) (*recording introduction of amendment number 2433*); *see* 144 Cong. Rec. S5248-69, S5280-91 (May 21, 1998) (*recording failure to table amendment and indicating inevitable majority support of amendment in Senate*.) Ultimately the Global Settlement bill failed, *see e.g.* 144 Cong. Rec. S5737-54, S5756-62, S5764-60, S5775 (June 9, 1998). Subsequent negotiations between a group of state attorneys general and cigarette manufacturers led to the MSA. *See* MSA II (aa).

Although the MSA extracted fewer public health concessions and money from the tobacco industry than the Global Settlement would have, individual victims' rights were protected. MSA Section XVIII(f) was included to reflect the parties understanding that the MSA would not be admissible in other lawsuits; the individual victims' claims were to be protected from being blocked in any way by the MSA. The Third District Court ruling is precisely the sort of immunity in private lawsuits that MSA Section XVIII(f) was intended to prevent and was the basis for the rejection of the Global Settlement in 1998. The MSA should not

serve as *de facto* immunity to punitive damages in the present case. It would be the height of irony, and a perverse distortion of the parties' intent, if this Court were to make the settlements that were deliberately written to preserve private litigants' claims into instruments for granting defendants *de facto* immunity from those very claims.

C. Courts Have Precluded Defendants from Relying on the MSA in other Lawsuits Based on the Non-Admissibility Guarantee in the MSA and for Other Reasons.

The Defendants' portrayal of the MSA as a bar to litigation has been correctly rejected by other courts based on the non-admissibility guarantee in MSA XVIII (f). For example, in 2002, the Oregon Appeals Court rejected Philip Morris' argument that a punitive damage award should be reduced based on Philip Morris' participating in the MSA. The trial court reduced the $79.5 million punitive damages award based on MSA provisions, but the appeals court stated:

> By its own terms, which reflect the defendant's agreement with the state and the other parties to the litigation that led to the judgment, the settlement was not admissible for the purposes for which the defendants seeks to use it in this case.

Williams v. Philip Morris, Inc., Docket Nos. 9705-03957 (Oregon App. Ct. 2002). Based on this reasoning, the Court reinstated the jury's full punitive damage award.

Most recently, United States District Court Judge Gladys Kessler rejected cigarette manufacturers attempt to use the MSA in the federal government's RICO lawsuit against the same defendants in the instant lawsuit. *United States v. Philip*

Morris USA, Civil Docket No. 99-2496 (U.S. Dist. Ct., Dist. of Columbia 1999) (Memorandum Opinion May 6, 2004), <http://www.dcd.uscourts.gov/99-2496ab.pdf>. Judge Kessler rejected defendants' motion for summary judgment, holding the MSA, by its terms, is inadmissible. Judge Kessler stated:

> As the Government points out, the MSA itself precludes Defendants from relying upon it in this lawsuit. Specifically, the MSA provides that it shall not be "offered or received in evidence in any action … for any purpose other than in an action … arising under or relating to this Agreement.

Id. at 6.

There is only one narrow exception to the non-admissibility guarantees of the settlements. FSA VI(C) clearly states that the FSA shall not "be offered or received in evidence in this action, or any other proceeding, for any purpose other than in an action or proceeding arising under this Settlement Agreement." The present lawsuit is clearly not an action relating to the FSA. As noted by other Courts addressing this question, the sole exception to the non-admissibility instruction of the MSA and the similarly worded exception to the non-admissibility instruction in the FSA, *see* FSA §VI (C), reflect only the need to admit the Agreements into evidence in enforcement actions. Because the limited exception does not apply to the present lawsuit, neither the MSA nor the FSA should be considered for any purpose in the instant lawsuit.

D. The FSA Does Not Bar Punitive Damages Under *Res Judicata*

The FSA does not bar punitive damages under res judicata principles. Res judicata applies only when there is an identity between the parties to the current action and a previous action. *See Topps v. State*, 865 So.2d 1253, 1255 (Fla. 2004). The class members in the present lawsuit were *not* parties to *State of Florida v. American Tobacco Co.*, nor were they privy to that action. The settlement that resulted from that action (i.e., the FSA) thus has no res judicata effect on the present litigation.

The Third District Court of Appeal, nevertheless, relied heavily on *Young v. Miami Beach Improvement Co.*, 46 So. 2d 26 (Fla. 1950), for the premise that a final judgment in a suit involving a governmental body is binding on future lawsuits. This holds true, however, *only* if the final judgment clearly defines the issue in question and that issue's exact resolution. Thus, in *Young*, this court barred a community association from suing to obtain a public right of way on a parcel of land, basing it decision on an earlier judgment regarding the same issue in a suit brought by the plaintiffs' city. The earlier judgment had defined the issue to be public access to a parcel of land, and resolved it by a complete bar on all future public access to the parcel of land. The second court, accordingly, applied res judicata, even though the public was not a party to or privy to the earlier judgment.

However, none of the elements present in *Young* exist in this case. Neither the FSA nor any judgments in *State of Florida v. American Tobacco Co.* mention that punitive damages against the Defendants are barred, or that the FSA's requirements provide the public with sufficient deterrence against the Defendants' future wrongdoing. The FSA, in fact, is limited explicitly to the parties in the Medicaid reimbursement lawsuit. The FSA's first sentence states, "[t]his Settlement Agreement … is intended to settle and resolve with finality all present and future civil claims against *all parties to this litigation* relating to the subject matter of this litigation, which have been or could have been asserted by *any of the parties hereto*." See FSA, §I(D) (emphasis added). These entities are defined specifically in the FSA as the State of Florida and certain cigarette manufacturers. The punitive damages in the present lawsuit, accordingly, should be upheld.

CONCLUSION

The amici curiae respectfully requests that this Court reverse the decision of the Third District Court of Appeals and reinstate the class certification, the jury verdicts, and the final judgment.

Respectfully Submitted,

P. Timothy Howard, Esq.
Howard & Associates, P.A.
Florida Bar Number 0655325
1471 Timberlane Road, Suite 115

Certificate of Service

I hereby certify that a true and correct copy of the Amicus Curiae Brief was delivered to counsel on the attached service list this _____ day of June, 2004.

_____
P. Timothy Howard

Certificate of Compliance

I hereby certify that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____
P. Timothy Howard

IN THE SUPREME COURT OF FLORIDA
CASE NO.: SCO3-1856

HOWARD A. ENGLE, M.D., et. al.,

Petitioners,

vs.

LIGGETT GROUP, INC., et. al.,

Respondents.

_____/

MOTION OF AMICI CURIAE TOBACCO CONTROL LEGAL CONSORTIUM AND TOBACCO CONTROL RESOURCE CENTER TO FILE AN AMICUS CURIAE BRIEF

In accord with Florida Rule of Appellate Procedure 9.370 (2004), the Tobacco Control Legal Consortium and the Tobacco Control Resource Center respectfully move that the Supreme Court of Florida grant them leave to file an *amicus curiae* brief in the above captioned case of *Engle v. Liggett Group, Inc.*

The Tobacco Control Legal Consortium ("TCLC") is a national network of legal centers providing legal technical assistance to public officials, health professionals and advocates in addressing legal issues related to tobacco and health, and supporting public policies that will reduce the harm caused by tobacco use in the United States. TCLC grew out of collaboration among specialized legal resource centers serving six states, and is supported by national advocacy

organizations, voluntary health organizations and others.[2] In addition, TCLC prepares legal briefs as *amicus curiae* in cases where its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance. TCLC has submitted *amicus* briefs in recent cases before the Supreme Courts of Kentucky, Montana and New Hampshire.

The interest of *amicus* Tobacco Control Resource Center ("TCRC") in this case arises from its mission to improve public health by reducing the use of and exposure to tobacco products in the United States. Begun in 1979 and a 501(c)(3) nonprofit since 1984, TCRC has experience in tobacco control issues generally, as well as longstanding and specific expertise in tobacco litigation and public health.

The *amici* can assist the court in the disposition of the case because of their lengthy experience in tobacco control legal issues generally and tobacco litigation specifically. The issues addressed in the brief include the *de facto* denial of remedies to almost all class members if the class is decertified, the incorrect reliance by the appeals court on the settlement agreements between the State of Florida and the Defendants and 46 other states and the Defendants because those

---

[2] TCLC's coordinating office is located at the Tobacco Law Center of the William Mitchell College of Law in St. Paul, Minnesota. Other affiliated legal centers include the Technical Assistance Legal Center (TALC) at the Public Health Institute of California, in Oakland, California; the Legal Resource Center for Tobacco Regulation, Litigation & Advocacy (TRC) at the University of Maryland School of Law in Baltimore, Maryland; the Tobacco Control Resource Center (TCRC) at Northeastern University School of Law in Boston, Massachusetts; the Smoke-Free Environments Law Project (SFELP) at the Center for Social Gerontology in Ann Arbor, Michigan; and the Tobacco Control Policy and Legal Resource Center at New Jersey GASP in Summit, New Jersey.

agreements are inadmissible by their terms, and the lack of *res judicata* effect of those settlement agreements on the instant case.

Respectfully Submitted,

P. Timothy Howard, Esq.
Howard & Associates, P.A.
Florida Bar Number 0655325
1471 Timberlane Road, Suite 115
850-298-4455

Tobacco Control Legal Consortium
Doug Blanke, Executive Director
William Mitchell College of Law
875 Summit Avenue
Saint Paul, Minnesota, USA 55105 Tel: 651-290-7520

Tobacco Control Resource Center
Richard A. Daynard, President
Northeastern University School of Law
360 Huntington Avenue
117 Cushing Hall
Boston, MA 02115 Tel: 617 373 2026

Certificate of Service

I hereby certify that a true and correct copy of the *Amicus Curiae* Brief was delivered to counsel on the attached service list this _____ day of June, 2004.

_____
P. Timothy Howard

IN THE SUPREME COURT OF FLORIDA
CASE NO.: SCO3-1856

HOWARD A. ENGLE, M.D., et. al.,

Petitioners,

vs.

LIGGETT GROUP, INC., et. al.,

Respondents.

_____/

BRIEF OF AMICI CURIAE TOBACCO CONTROL LEGAL CONSORTIUM AND TOBACCO CONTROL RESOURCE CENTER

P. TIMOTHY HOWARD, Esq.
HOWARD & ASSOCIATES, P.A.
FLORIDA BAR NO.: 0655325
1471 Timberlane Road, Suite 115
Tallahassee, Florida 32312
(850) 298-4455

Tobacco Control Legal Consortium
Doug Blanke, Esq., Executive Dir.
William Mitchell College of Law
875 Summit Avenue
Saint Paul, Minnesota, USA 55105
(651) 290-7520

Tobacco Control Resource Center
Richard A. Daynard, Esq., Ph.D.
Northeastern Univ. School of Law
Robert L. Kline, Esq.
Christopher Banthin, Esq
360 Huntington Avenue
117 Cushing Hall
Boston, MA 02115
(617) 373-2026

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Legislative History

Law Reviews and Other Journals

Tobacco Industry Documents

ENGLE FLORIDA CLASS SUPREME COURT SERVICE LIST
LOWER TRIBUNAL CASE NO.: 3D00-3400

Stanley M. Rosenblatt, Esquire
Susan Rosenblatt, Esquire
Stanley M. Rosenblatt, P.A.
66 West Flagler Street
12th Floor, Concord Building
Miami, Florida 33130
Tel: (305) 374-6131
Fax: (305) 381-8818
Class Counsel for the Engle Class

Robert C. Heim, Esquire
Joseph P. Archie, Esquire
Dechert Price & Rhoads
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793
Tel: (215) 994-4000
Fax (215) 994-3143
(Co-counsel for Philip Morris, Inc.)

Dan K. Webb, Esquire
Stuart Altschuler, Esquire
Winston & Strawn
35 West Wacker Drive
Chicago, Illinois 60601
Tel: (312) 558-5600
Fax (312) 558-5700
(Co-Counsel for Philip Morris, Inc.)

Melvin S. Spaeth, Esquire
David Eggert, Esquire
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004
Tel: (202) 942-5000
Fax (202) 942-5999
(Co-counsel for Philip Morris, Inc.)

Norman A. Coll, Esquire
Kenneth J. Reilly, Esquire
Shook Hardy & Bacon, LLP
Miami Center, Suite 2400
201 South Biscayne Boulevard
Miami, FL 33131-2312
Tel: (305) 358-5171
Fax (305) 358-7470
(Co-Counsel for Philip Morris Inc.)
(Co-Counsel for Lorillard, Inc., Lorillard Tobacco Company)

Stephen N. Zack, Esquire
Zack Kosnitzky
100 S.E. Second Street, Suite 2800
Miami, Florida 33131-2144
Tel: (305) 539-8400
Fax (305) 539-0499
(Co-Counsel for Philip Morris, Inc.)

James T. Newsom, Esquire
Shook, Hardy & Bacon, LLP
One Kansas City Place
1200 Main Street
Kansas City, MO 64105
Tel: (816) 474-6550
Fax: (816) 421-2708/421-5547
(Co-Counsel for Lorillard, Inc.
Lorillard Tobacco Company)

Arthur J. England, Jr., Esquire

David L. Ross, Esquire

ENGLE FLORIDA CLASS SUPREME COURT SERVICE LIST
LOWER TRIBUNAL CASE NO.: 3D00-3400

Elliot H. Scherker, Esquire
Greenberg, Traurig
1221 Brickell Avenue
Miami, FL 33131
Tel: (305) 579-0500
Fax (305) 789-5373
(Co-Counsel for Lorillard, Inc. and Lorillard Tobacco Company)

James R. Johnson, Esquire
Diane G. Pulley, Esquire
Jones Day Reavis & Pogue
3500 One Peachtree Center
303 Peachtree Street, N.E.
Atlanta, GA 30308-3242
Tel: (404) 521-3939
Fax: (404) 581-8330
(Co-Counsel for RJ Reynolds Tob. Co.)

R. Benjamine Reid, Esquire
Wendy F. Lumish, Esquire
Carlton Fields
100 S.E. 2nd Street, Suite 4100
Miami, Florida 33131-9101
Tel: (305) 530-0050
Fax (305) 530-0055
(Co-Counsel for RJ Reynolds Tob. Co.)

Robert H. Klonoff, Esquire
Jones Day Reavis & Pogue
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Tel: (202) 879-3939
Fax (202) 626-1700
(Co-Counsel for RJ Reynolds Tob. Co.)

Gordon Smith, Esquire
Richard A. Schneider, Esquire
Barry Goheen, Esquire
King & Spalding
191 Peachtree Street
Atlanta, GA 30303-1763
Tel: (404) 572-4600
Fax: (404) 572-5125
(Co-Counsel for Brown & Williamson Tobacco Corporation/The American Tobacco Company)

Anthony J. Upshaw, Esquire
Adorno & Yoss
2601 South Bayshore Drive, Ste. 1600
Miami, FL 33133
Tel: (305) 860-7052
Fax (305) 250-7110
(Co-Counsel for Brown & Williamson Tobacco Corporation/The American Tobacco Company)

James A. Goold, Esquire
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
Tel: (202) 662-6000
Fax: (202) 778-5507/662-6291
(Co-Counsel for Tobacco Institute)

Gutierrez & Associates
Suite 510, Courvoisier Centre II
601 Brickell Key Drive
Miami, FL 33131-2651
Tel: (305) 577-4500
Fax (305) 577-8690
(Co-Counsel for Tobacco Institute and Council for Tobacco Research)

ENGLE FLORIDA CLASS SUPREME COURT SERVICE LIST
LOWER TRIBUNAL CASE NO.: 3D00-3400

Joseph P. Moodhe, Esquire
Debevoise & Plimpton
919 Third Avenue
New York, N.Y. 10022
Tel: (212) 909-6000
Fax: (212) 909-6836
(Co-Counsel for Council for Tobacco Research)

Michael Fay, Esquire
Aaron Marks, Esquire
Kassowitz Benson Torres & Friedman
1633 Broadway, 22nd Floor
New York, N.Y. 10019-6799
Tel: (212) 506-1700
Fax (212) 506-1800
(Co-Counsel for Liggett Group, Inc., Brooke Group Holding, Inc.)

Kelly A. Luther, Esquire
Clarke, Siverglate, Campbell, Williams & Montgomery
799 Brickell Plaza, 9th Floor
Miami, FL 33131
Tel: (305) 377-0700
Fax (305) 377-3001
(Co-Counsel for Liggett Group, Inc. Brooke Group Holding, Inc.)

Alvin B. Davis, P.A.
Steel Hector & Davis, LLP
200 South Biscayne Boulevard
Miami, FL 33131-2398
Tel: (305) 577-2835
Fax (305) 577-7001
(Co-Counsel for Liggett Group, Inc. Brooke Group Holding, Inc.)

ENGLE FLORIDA CLASS SUPREME COURT SERVICE LIST
LOWER TRIBUNAL CASE NO.: 3D00-3400