IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC03-1856

Lower Tribunal Nos.: 3D00-3400, 3D00-3206, 3D-00-3207, 3D00-3208, 3D00-3210, 3D00-3212, 3D00-3215

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

Petitioners,

vs.

LIGGETT GROUP, INC., et al.,

Respondents.
_____/

REPLY BRIEF OF PETITIONERS,
FLORIDA ENGLE CLASS, ON THE MERITS

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INTRODUCTION

This is a case of great significance. The public relied on class certification in 1994 and the district court's affirmance of a state-wide class in 1996, "compelled" by *Broin. Engle I* at 41.[1] *Engle II* erased all traces of the historic two-year trial and the unprecedented service of a patient and thorough jury, a jury that the district court called "lemmings" (rodents) that "ran amuck." *Engle II* at 466-67. The district court usurped the function of both the jury and trial judge, failing to defer to the judge's discretionary fact finding (*Engle FJ*) and instead applied an erroneous *de novo* standard of review as to all issues in violation of established Florida law.

Disregarding Florida's long-held maxim that a defendant may not profit from its own wrongdoing, *Carter v. Carter*, 88 So.2d 153, 157 (Fla. 1956), the district court rewarded defendants by decertifying the Class because Tobacco's dangerous and fraudulent conduct harmed too many people. Because the number of Tobacco's victims is so enormous, the decades-long conspiracy and fraud so intricate and egregious, and the network of tobacco companies, parents and affiliates so complex,

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[1]Final Judgment and Amended Omnibus Order: November 6, 2000 shall be referred to as *Engle F.J.* (*Engle v. R.J. Reynolds Tobacco*, 2000 WL 33534572 (Fla. Cir. Ct.)) A.3-4; *Liggett Group, Inc. v. Engle*, 853 So.2d 434 (Fla. 3d DCA 2003): *Engle II* A.1; *R.J. Reynolds Tobacco Co. v. Engle*, 672 So.2d 39 (Fla. 3d DCA 1996): *Engle I* A.2; Appendix: (A) Appendix filed with Class Brief on Merits (CB).

the district court subscribed to Tobacco's claim that a Florida Class is unmanageable and that "close to a million" individual trials is preferable. *Engle II* teaches that the more people you harm, the more likely you will escape judicial review.

ARGUMENT

I. The Verdicts and Judgments Should Be Reinstated on All Grounds Because the District Court Utilized an Erroneous *De Novo* Standard of Review as to All Issues, Failing to Give the Requisite Deference to the Findings of the Jury and Trial Court.

The Third District's application of the wrong standard of review infects every issue in the case. The "application of the wrong standard of review may tilt the playing field and irreparably prejudice a party's rights." *North Florida Women's Health & Counseling Services, Inc. v. State*, 866 So.2d 612, 626 (Fla. 2003). The district court sat as a seventh juror with veto power, effectively directing a verdict for defendants, thereby depriving the Engle Class of due process and their right to a trial by jury. *See Keene v. Chicago Bridge and Iron Co.*, 596 So.2d 700, 704 (Fla. 1st DCA 1992); *Dudley v. Harrison, McCready & Co.*, 173 So. 820, 825 (Fla. 1937). *Art. I, Section 22, Fla. Const.* The prejudice caused by the district court's use of a *de novo* standard is compounded by the court's almost verbatim replication of Tobacco's partisan briefs as the opinion of the court, rather than rendering a reasoned and principled opinion. This Court recently condemned a similar practice. *Perlow v. Berg-Perlow*,

875 So.2d 383 (Fla. 2004). *In accord, DiLeo v. Ernst & Young*, 901 F.2d 624, 626 (7th Cir. 1990); A.7, 5, pp.7-21. In *Perlow* the judgment affected only the parties. *Engle II* seals the fate of "close to a million Floridians" by denying them a remedy and any hope of obtaining justice.

II. The Trial Court's Denial of Defendants' Eleventh Hour Motion for Decertification Was Not an Abuse of Discretion.

It is a fiction to suggest that "close to a million" Floridians can individually sue tobacco companies without aggregating their claims for class treatment. Indeed, in *Broin v. Philip Morris*, 641 So.2d 888, 891 (Fla. 3d DCA 1994), the same court recognized the absurdity of such a suggestion, relying on *Tenney v. City of Miami Beach*, 11 So.2d 188, 189 (Fla. 1942):

> "The very purpose of a class suit is. . . to make available a remedy that would not otherwise exist." . . . . Here, as in *Tenney*, if we were to construe the rule to require each person to file a separate lawsuit. . . . the vast majority of class members. . . would be deprived of a remedy. We decline to promote such a result. (emphasis supplied)

Defendants argue that 700,000 Floridians are too many for class treatment, but ignore the *Engle II* court's narrowing of the Class by over 60%, to 280,000 Floridians, by redefining the class to include only Floridians whose diseases were diagnosed between 10/31/90 and 10/31/94. This narrowing invalidates a key basis for decertification -- that "plaintiffs have now more than doubled their original estimate of

class size from 300,000 to at least 700,000." *Engle II* at 443. Tobacco also argues that the Class' "negative value assertion is patently untrue", suggesting that eight non-final compensatory damage verdicts (out of many millions of Tobacco' victims) demonstrate the feasibility of individual lawsuits. Ironically, Tobacco boasted in *Engle II*: "Although dozens of smoker cases have gone to trial, so far only *one* has resulted in a final pro-plaintiff judgment after the resolution of all appeals." (A.46). Absent class treatment, there is no remedy for 99.9% of these "negative value" lawsuits. Any contrary view is a fiction.[2]

Tobacco defends the Third District's *de novo* review of the 1994 class certification, a class certification order that was never challenged in *Engle II* and is not preserved for appellate review. *Cochran v. State*, 476 So.2d 207, 208 (Fla. 1985). The issue before the district court was *Decertification* -- Whether Tobacco met its heavy burden of demonstrating "exceptional circumstances" to establish that adhering to class certification and the *Engle I* opinion would result in "manifest injustice." *Fla.*

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[2]*See In re: Simon II Litig.*,211 F.R.D. 86 (E.D. N.Y. 2002); *Thayer v. Liggett & Meyers Tobacco Co.*, 1970 U.S. Dist. Lexis 12796 *60 n.33 (W.D. Mich.) A.47; *Smith v. R.J. Reynolds Tobacco Co.*, 630 A.2d 820 (N.J. Super. Ct. 1993); *Haines v. Liggett Group, Inc.*, 814 F.Supp. 414 (D. N.J. 1993). *See also*, briefs of *Amicus Curiae*, Tobacco Trial Lawyers Association, Tobacco Control Legal Consortium, et al., and American Public Health Association, et al., describing the critical importance of class treatment and the need for justice and closure for many sick Floridians who have patiently litigated for over one decade.

Dept. of Transp. v. Juliano, 801 So.2d 101, 105-06 (Fla. 2001). Decertification -- after an interlocutory opinion affirming certification, nine years of litigation, dissemination of legal notice, reliance by class members, twelve appellate proceedings, a two-year trial and entry of a final judgment -- is unprecedented. Late decertification is an extraordinary remedy to be avoided, absent the most compelling and exceptional circumstances, because it creates a great injustice to class members. *Birmingham Steel Corp. v. Tennessee Valley Auth.*, 353 F.3d 1331, 1337 (7th Cir. 2003); CB 16-19.

The trial court found that class treatment avoided having the common issues "litigated many thousands of times" where in future trials "common issues of defendants' conduct would become a predominant aspect of each trial." *Engle F.J. 22-23*. There has been no showing of any abuse of the trial court's broad discretion. *W.S. Badcock Corp. v. Myers*, 696 So.2d 776 (Fla. 1st DCA 1997). *Engle F.J.* 21-28.

III. There Is No Basis in Fact or Law for the District Court's Extinguishment of all Floridians' Punitive Damages.

Although the applicability of *res judicata* is reviewed *de novo*, the district court failed to give deference to the underlying factual findings that support the trial court's determination that the FSA and MSA were separate and distinct lawsuits and

settlements, involving different parties and claims. *Artigas v. Winn-Dixie Stores, Inc.*, 622 So.2d 1346, 1348 (Fla. 1st DCA 1993); *Viteritti v. Peakload, Inc. of America*, 859 S.2d 521, 523 (Fla. 1st DCA 2003); A.8, 9, 13; T.52050-52, 52110-11, 53114; CB 24-28. The trial court did not abuse its discretion in giving a limiting instruction as to the admissibility of evidence of the MSA/FSA which had become the focal point of Tobacco's "We've been punished enough" defense. T.56690, 56902; *see Weisterheide v. State*, 767 So.2d 656 (Fla. 5th DCA 2000). Tobacco asserts *"res judicata* hinges on the final judgment in the State's case," but the *res judicata* effect "must be determined from the entire record, not just the judgment." *deCancino v. Eastern Airlines, Inc.*, 283 So.2d 97, 99 (Fla. 1973); *Weit v. Rhodes*, 691 So.2d 1108, 1109 (Fla. 4th DCA 1997). Defendants' "private attorneys general metaphor. . . is just that, a metaphor," and does not bar punitive damages. *In re: Exxon Valdez*, 270 F.3d 1215, 1228 (9th Cir. 2001). *See amicus*, Trial Lawyers for Public Justice.

IV. The Trial Court Did Not Abuse its Broad Discretion in Implementing a Trifurcated Trial Plan.

The trial court did not abuse its discretion in devising a multi-phase trial plan. *Microclimate Sales v. Doherty*, 731 So.2d 856, 858 (Fla. 5th DCA 1999). Tobacco argues that no trial plan can be devised that would comport with due process if punitive damages are awarded in the aggregate. But defendants fail to cite any Florida

law prohibiting the recovery of punitive damages on a class-wide basis. Indeed, the principles announced in *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *Cooper Industries v. Leatherman Tool Corp.*, 532 U.S. 424 (2001), are particularly suited to a class; distribution of a punitive damage award among a class of victims is far preferable to a few windfalls. Punitive damages have been determined on a class-wide basis before compensatory damages, with stream-lined procedures for determining the remaining issues (as can be done here by joinder and aggregation of claims in state and federal forums), in *In re: New Orleans Train Car Leakage Fire Litigation*, 795 So.2d 364 (La. Ct. App. 2001); *Hilao v. Estate of Marcus*, 103 F.3d 767 (9th Cir. 1996); *In re: Simon II*; *See* CB 24, 30; A.6, pp.92-93, 100.[3] "Due process is flexible and calls for such procedural protections as the particular situation demands. . . . Novelty is not a constitutional objection." *Agency for Health Care Admin. v. Assoc. Industries of Florida, Inc.*, 678 So.2d 1239, 1251 (Fla 1996).

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[3]The verdict form was not a basis for reversal and is not reviewable here. *Provident Mgmt. Corp. v. City of Treasure Island*, 718 So.2d 738, 740 (Fla. 1998). Defendants challenge the "generalized" question on entitlement to punitive damages but fail to reveal that Tobacco authored and defended that question: "That's not a meaningless question. . . [I]f the answer is no, not a single Florida. . . injured smoker in this Class can ever recover punitive damages from any of the defendants in this courtroom." T.36004-05; 36012-13. Defendants agreed to the verdict form with 242 subparts as a preferred "middle ground" over the Class' interrogatory questions on fraud and conspiracy T.35950-51; 35967-69; A.6 pp. 110-120.

Defendants and the district court twist the language in *Gore* and *Campbell*, stating that "harm" can only be measured by compensatory damages. But compensatory damages are not the *sine qua non* of punitive damages. *Ault v. Lohr*, 538 So.2d at 454, 456 (Fla. 1989); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 465 (1993). The jury was instructed to consider the harm and potential harm to the Class, pursuant to *Gore* and *Owens Corning Fiberglas Corp. v. Ballard*, 749 So.2d 483 (Fla. 1999); T.56000, 57786-87. Defendants urged the jury to consider each company's historical market share when determining the harm caused to the Class T.57211-13, 57390-94, 57476-77, 55873, 56734-35, 53904-09, and also asked the jury to consider that the Class will recover trillions of dollars in compensatory damages, thereby admitting the evidentiary predicate for a punitive damage award (with a ratio of less than 1:1 between punitive and compensatory damages). T.54149-50, 54212-14, 57192, 57213, 57340, 53116-17, 53123, 53867, 53901.

V. The District Court Misapplied Florida and Federal Law Governing the Review of a Punitive Damage Award Challenged as Excessive.

The Third District improperly determined the credibility of witnesses, re-weighed the evidence, accepted Tobacco's self-interested CEOs' disputed net worth as dispositive, rejected the Class' experts' testimony and ignored valuable trademarks, such as *Marlboro*. *See Castillo v. E.I. DuPont de Nemours & Co., Inc.*, 854 So.2d

1264, 1277 (Fla. 2003). Defendants withdrew all experts as to Tobacco's financial worth/ability to pay and class size (T.56732, 56034-35, 56475-76), urging the jury to award "zero" punitive damages (T.51069, 57185), because defendants "got the message" from the Phase I verdict T.55823, 57198-02, 57477, 57255-57, 51253-54. The jury disagreed. "Exemplary damages imposed on a defendant should reflect the enormity of his offense." *Gore* at 575. The jury had the right to disbelieve defendants' flimsy evidence, consisting of unauthenticated financial statements challenged by the Class, as misleading, inaccurate and as to RJR, unaudited. T.56234-44, 56792, 56797, 56855, 56879-85, 56414-17, 56879-82, 55818-19, 53016, 53288. *See Atlas Properties, Inc. v. Didich*, 226 So.2d 684, 690 (Fla. 1969); *Tennant v. Charlton*, 377 So.2d 1169, 1170 (Fla. 1979). The remedy for an excessive award is a remittitur, not reversal. If a remittitur is needed, the Class' experts presented alternative methodologies and determined the financial worth/ability to pay of each defendant, in lower amounts. *Engle F.J.* 36-64; T.53017-18, 53031-33, 53102, 53167, 53175-80, 53192-95, 53220-21, 53847, 53066-67, 53726.

Defendants also challenged the award as excessive under the U.S. Constitution but the district court failed to conduct the required *de novo* review of the *Gore* three prong test. *St. John v. Coisman*, 799 So.2d 1110, 1114 (Fla. 5th DCA 2001). The trial court did consider the evidence of misconduct and reprehensibility and the

relationship between the punitive award and the harm and potential harm to the Florida Class. This Court should conduct the *Gore* review, deferring to the fact findings of the trial court. *Cooper Industries* at 440, n. 14.

VI. The Verdicts and Judgment Against Liggett/Brooke Should Be Affirmed Where There Is Competent Substantial Evidence.

According to defendants, there was no evidence to support verdicts against the Liggett defendants. But Liggett/Brooke failed to address why the jury could not rely on testimony, tobacco documents and its own CEO's admissions in open court of fraud, conspiracy and liability. *See* CB 37-39; T.55348, 55357, 55802; A.25. Liggett/Brooke relies on its recent "good behavior," ignoring its sordid past. But recent cooperation is only a mitigating factor and does not absolve Liggett of liability for past misconduct. *See Johns-Mansville Sales Corp. v. Janssens*, 463 So.2d 242, 252 (Fla. 1st DCA 1984); *Celotex Corp. v. Pickett*, 490 So.2d 35, 38 (Fla. 1986).

VII. The Trial Court Did Not Abuse its Discretion in Denying Defendants' Untimely Challenge to Class Representatives' Standing -- Post-judgment Narrowing of the Class Was Error and Erroneously Resulted in Defense Judgments Against Class Representatives.

Although defendants assert Farnan and Della Vecchia will have their day in

court,[4] the Third District ordered otherwise: "[J]udgment should have been entered in favor of the defendants as to individual plaintiffs Farnan and Della Vecchia because their claims did not accrue until years after the cut-off date for class membership." *Engle II* at 455 n.23. Defendants' position at trial was that the Class was open and included Floridians diagnosed with disease after 1994. *See* CB 40-44; T.13755-77; 31885-93, 33172-81, 35242-46, 36004-05; R.51437-58; A.11a, 43, 48-51, 56-57. Defendants sought to narrow the class more than fifteen months after Farnan and Della Vecchia were appointed class representatives and only after suffering defeat in Phase I. R.51437-58. The trial court did not abuse its discretion in declining Tobacco's eleventh hour "wait-and-see" request to redefine the Class. *Aetna Life Ins. Co. v. De Angelis*, 317 So.2d 106, 107 (Fla. 3d DCA 1975).

It is critical to Floridians that this Court announce that all statutes of limitation are tolled, to ensure that victims of tobacco who relied on the Engle class certification are not time-barred from pursuing individual claims. To require individuals to battle the statute of limitations against the tobacco industry, as Tobacco suggests, would add yet another hurdle for Floridians who wish to file individual claims.

VIII. Comments of Counsel Did Not Interfere with Jury's Deliberations

[4]Defendants' similar disingenuous argument before the jury was that every Floridian would have his day in court pursuant to the Phase I verdict, even if the three representatives lost their trials T.33878; 33896; 49685; 49688; 49914; 50017.

and Decisions -- The District Court Failed to Give the Deference Due the Trial Court in Determining the Propriety and Potential Impact of Allegedly Improper Argument of Counsel.

This Court recognized that "[T]he trial judge is in the best position to determine the propriety and potential impact of allegedly improper closing argument." *Murphy v. Int'l. Robotic Systems, Inc.*, 766 So.2d 1010, 1031 (Fla. 2000). That is because, as Judge Posner wrote: "A trial judge of long experience. . . develops a feel for the impact. . . on the jury. . . that an appellate court, confined to reading the transcript, cannot duplicate." *U.S. v. Boyd*, 55 F.3d 239, 242 (7th Cir. 1995). Here, the trial court emphatically found and held that the jury was not influenced by counsel's argument. Yet the district court ignored these findings, concluding that it was not the "mountain of evidence" of reprehensible misconduct, the "decades of abuses" and "concerted behavior" "affecting so many people," and "shock[ing] the conscience of the court," which caused the jury to reach their verdicts. *Engle F.J.* at *7, 31. According to the district court, the jury was so mesmerized by a handful of misquoted comments of counsel, during 23 days of opening and closing statements, that it caused the jurors to act like "lemmings" that "ran amuck." *Engle II* at 466-67. How could this so-called "emotionally charged" jury then find Frank Amodeo barred under statutes of limitation, comparative fault on the part of all three class representatives, and that BAC, a type of lung cancer, asthmatic bronchitis, and infertility were not caused from

smoking cigarettes?

Tobacco pieced together a fictitious version of Class Counsel's arguments, juxtaposed words, and created a "straw man," -- i.e. that *the Class sought to nullify Tobacco's legal right to sell cigarettes*. T.57224-28, 57415-17, 57499, 57571-72, 57635, 54427, 54430, 55348-49. Counsel responded to Tobacco's distortions:

> Did I ever. . . say that cigarettes should be banned? You do not decide that issue. They are right about that. It is a legal product ... But a legal product does not mean that the tobacco companies are not responsible... Go on sell your product, but tell the truth. T.37451-52; 37509-10.

Defendants' fabricated script is regularly used in other tobacco litigation. *See Williams v. Philip Morris*, 92 P.3d 126, 143 (Or. App. 2004). Another fiction: "Plaintiffs' counsel proceeded to tell the jury that, like slavery and the Holocaust, there was just one side to whether the defendants should continue to sell cigarettes." *Engle II* at 459. But the record reveals counsel argued that <u>there was just one side to whether smoking causes lung cancer and addiction</u>:

> When they tell you that there is a debate, a debate on the issues of cause and addiction, or there is a controversy, that is not being truthful with you. . . .You want to be fair, and say. . . there's two sides to every question. What's the other side to the Holocaust? . . . What is the other side to slavery?. . . [That] causation has not been proven, that is untrue. To say that nicotine is not addictive, is untrue T.36348-51.

Comments about getting out of the business were directed at Bennett Lebow, who had been portrayed as a hero for cooperating with the States. "Bennett Lebow is not my

hero. If you admit my product causes cancer, get out of the business" T.36369-70.

Tobacco and the district court even distorted the makeup of the jury: "Four of the six venire members were African Americans." *Engle II* at 459. The record reflects two African Americans, one Hispanic, one Anglo and two Jamaican Americans.[5] Another fiction: "Plaintiffs' counsel began making racially-charged arguments on the first day of trial that the defendants study races." *Engle II* at 459. The record reflects that the complained of comments, fully supported by the evidence,[6] were made twenty-one months before the punitive damage verdict on July 14, 2000.

Another fabrication: "Counsel [told] the jury to stand up to the defendants' lawful conduct in marketing and selling cigarettes" *Engle II* at 461. All nullification arguments came from the defendants who argued from opening statements forward that tobacco companies cannot be held liable for manufacturing a legal product with mandated Congressional warnings. T.10966-67; 10970-71; 10974; 11126; 37253-54;

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[5]The book about the murder/euthanasia trial in the 1980s in St. Petersburg, Florida involved a twelve member jury with one African American -- so much for Tobacco's theory that counsel uses historical Civil Rights analogies as a "race-card."

[6]The evidentiary record, including the 1998 Surgeon General's Report, *Report on Tobacco Use Among Racial Ethnic Minority Groups*, revealed that African Americans have a much higher incidence of cancer, heart disease, stroke and death from smoking, are more susceptible to nicotine and addiction from menthol cigarettes, and that defendants have carefully studied and used that information in marketing menthol cigarettes to African Americans. T.11571-75; 30763-64; 30786-87; T.11973-74; 30764, 28715, 20818, 34299-34300, 16843-46; PX 16, 72, 3026.

37390; 37451-52. Tobacco also falsely asserted that defendants must pay any Engle punitive award "immediately" in "one lump sum," in contrast to the MSA where the States permitted a payout. T.51101-03, 53062-67, 53629, 53817-18, 54627, 57509, 57511, 57661. This misrepresentation invited the Class response. *Lewis v. State*, 2004 WL 1749516 *2 (Fla. 5th DCA) Contrary to the trial and district courts' rulings, payouts of punitive damages have been permitted where there are "future financial prospects." *See Ruffo v. Simpson*, 103 Cal. Rptr.2d 492, 525-29 (Cal. Ct. App. 2001); *In re: Paragon Falls, Inc. v. Riffle*, 1992 WL 167172 (Bankr. W.D. Penn.); A.6 pp.191-93. Finally, "I represent to you" was nothing more than a permissible figure of speech, not a "voucher." T.57754-55. *Murphy* at 1029.

CONCLUSION

The decision of the district court should be quashed and the Florida Class reinstated, together with the three jury verdicts and the final judgment. If this Court finds that one or more of the punitive damage verdicts are excessive, it should enter a remittitur, pursuant to the criteria in *Ballard*, *Gore* and *State Farm*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Reply Brief of Petitioners' Florida Engle Class, on the Merits was hand delivered to Norman Coll, Esquire, Shook Hardy & Bacon, LLP, Miami Center, Suite 2400, 201 South Biscayne Boulevard, Miami, FL 33131-2312 this 16th day of August, 2004 and served by U.S. Mail the 16th day of August, 2004 to all other counsel on the attached Service List.

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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.

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