

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

FILED

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CLERK OF CIRCUIT COURT #9
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

SHARON PRICE and MICHAEL FRUTH,)
individually and on behalf of all others)
similarly situated,)

Plaintiffs,)

vs.)

PHILIP MORRIS INCORPORATED,)

Defendant.)

Cause No. 00-L-112

JUDGMENT

I. Plaintiffs, SHARON PRICE and MICHAEL FRUTH, on behalf of themselves and all others similarly situated, have brought this action as a Class Action against Defendant PHILIP MORRIS INCORPORATED (“Philip Morris”) pursuant to §5/2-801 *et seq.* of the Illinois Code of Civil Procedure, individually and on behalf of a Class consisting of persons who purchased Defendant’s Marlboro Lights and Cambridge Lights cigarettes in the State of Illinois for personal consumption. Specifically, the Court finds that the Class is defined as follows:

All persons who purchased Defendant’s Cambridge Lights and Marlboro Lights cigarettes in Illinois for personal consumption, between the first date the Defendant placed its Cambridge Lights and Marlboro Lights cigarettes into the stream of commerce through - February 8, 2001.

Excluded from the Class is Defendant, any parent, subsidiary, affiliate, or controlled person of Defendant, as well as the officers, directors, agents, servants, or employees of Defendant, and the immediate family members of such persons. Also excluded is any trial judge who may preside over this case.

2. This Class Action is brought pursuant to the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.* ("Illinois Consumer Fraud Act"). Based upon the findings and conclusions herein, the Court finds that Defendant Philip Morris has violated the Illinois Consumer Fraud Act (815 ILCS §505/2) and the Uniform Deceptive Trade Practices Act (815 ILCS §510/2). As a direct and proximate result of Defendant's violation of these statutes, Plaintiffs and the Class have suffered compensatory damages in the amount of \$7.1005 Billion.

3. The trial in this case commenced on January 21, 2003 and continued through March 6, 2003. The findings contained within this Order are based upon the trial testimony in this action and evidence admitted during trial.

4. This Court has presided over this action since its inception and is familiar with the issues of fact and law it presents. The Court has heard, read and considered all of the admitted evidence and testimony pertinent to the Consumer Fraud Act Claims at issue in this case. The Court has had the opportunity to consider the documents and materials admitted into evidence and to observe the demeanor, evaluate the credibility and weigh the testimony of the parties' fact and opinion witnesses and the arguments of counsel.

5. The Court, after considering all of the evidence, the demeanor and the credibility of the witnesses, makes the overall observation that the expert and fact witnesses who testified for the Plaintiffs in this case were credible and reputable. Specifically, many of the experts who offered opinions on behalf of the Plaintiffs in this case are leaders in their scientific fields, and national leaders of the public health community. The Court did not find the expert and fact testimony of Philip Morris' witnesses to be as credible as the testimony of witnesses for the Plaintiffs in this case.

6. During the course of this trial, the Court allowed both parties latitude with respect to

their offer of expert testimony based upon their disclosures of opinion testimony under Illinois Supreme Court Rule 213. Both parties were permitted to offer opinion testimony over opposing counsel's objection in this regard. Although the Court allowed this evidence into the record, the Court finds (as a matter of fact) that my rulings in this case would be unchanged in any respect in the event the Court had disallowed the opinion testimony that was objected to by either party on the basis of alleged inadequate Rule 213 disclosure.

7. The Court finds that it has jurisdiction over the subject matter of this action and the parties hereto pursuant to 735 ILCS 5/2-209 and that venue is proper in this Court pursuant to 735 ILCS 5/2-101.

8. The Court finds that Defendant engaged in the business of manufacturing, promoting, marketing, distributing and selling Marlboro Lights and Cambridge Lights cigarettes in Illinois and in Madison County specifically.

9. The Court finds that Defendant promoted, marketed, distributed and sold Marlboro Lights cigarettes in Illinois from 1971 through the end of the Class Period in this case - February 8, 2001 - and promoted, marketed, distributed and sold Cambridge Lights cigarettes in Illinois from 1986 through the end of the Class Period in this case.

10. Based upon the facts, testimony and evidence presented at trial, the Court first revisits its prior Certification Order entered on February 8, 2001.

Under 735 ILCS 5/2-801, a Class may be certified under Illinois Law if:

1. the Class is so numerous that joinder of all members is impracticable;
2. there are questions of fact or law common to the Class, which common question predominate over any questions affecting only individual members;

3. the representative parties will fairly and adequately protect the interests of the Class; and,
4. the Class Action is an appropriate method for the fair and efficient adjudication of the controversy.

The Court finds that each of the prerequisites for the maintenance of a Class Action has been met.

11. With respect to numerosity, the Court finds Plaintiff have met their burden that the Class in this case includes over one million members and finds, based on the evidence introduced, that this Class is so numerous that joinder of all members is not only impracticable but virtually impossible. In addition, individual actions by each Class member would be impracticable.

12. Based upon the evidence introduced at trial, commonality has been demonstrated, because the claims of all Class members are based upon both common questions of law and fact which predominate over any questions affecting individual Class members. Miner v. Gillette Co., 87 Ill.2d 7 (1981). Philip Morris has engaged in a course of conduct that affects this Class in such a way that all members share various elements of this cause of action.

13. The common issues of law predominate because the Illinois Consumer Fraud Act applies to the claims of all Class members.

14. In addition, the Court finds, based upon the evidence introduced at trial, that the following common issues applicable to the entire Class:

- a. whether Class members understood the descriptor “lights” and “lowered tar and nicotine” to mean less harmful, safer and/or delivering less tar;
- b. whether these representations were false and/or misleading to Class members;
- c. whether Defendant Philip Morris intended for the Class to rely upon these

representations;

- c. whether Philip Morris' conduct violated the Illinois Commerce Fraud Act and whether this violation was willful and wanton; and
- d. whether Class members sustained damages as a result of Philip Morris' deceptive conduct.

15. Based upon the testimony of the representative parties – SHARON PRICE and MICHAEL FRUTH – offered during the trial of this action as well as these Class Representatives' attendance and participation in the trial of this matter, the Court finds that these representative parties have claims which are typical of claims of the Class members, that there is a substantial alignment between their interests and the interests of the Class in prosecuting this action, and that they have indeed fairly and adequately protected the interest of the Class.

16. Based upon the trial in this matter, the Court finds that the law firm of CARR KOREIN TILLERY was and is competent Class Counsel and adequately represents the interests of the Class in this action.

17. Based upon the evidence introduced at trial, a Class Action is not only the appropriate method for the fair and efficient adjudication of this controversy but is the only practicable method for such adjudication.

18. The claims certified in this Class Action do not include claims for personal injury but only encompass claims under the Illinois Consumer Fraud Act for economic losses based upon the purchase of Marlboro Lights and Cambridge Lights cigarettes in Illinois during the Class Period. In rendering this Order and the Judgment thereon, this Court expressly reserves the right of all Class members to bring personal injury claims.

19. Based upon these findings, the Court hereby reaffirms its Order dated February 1, 2001 (entered February 8, 2001) granting Plaintiffs' Motion for Class Certification.

20. The elements of Plaintiffs' claim under the Illinois Consumer Fraud Act are as follows:

- a. a deceptive act or practice by Philip Morris;
- b. Philip Morris' intent that the Plaintiffs rely on the deception;
- c. the occurrence of the deception in the course of conduct involving trade or commerce; and,
- d. actual damage to the Plaintiffs;
- e. proximately caused by the deception.

See Oliveira v. Amoco Oil Co., 201 Ill.2d 134 (2002).

21. With respect to Marlboro Lights, two specific representations are at issue: (1) the descriptor "Lights" in the name and (2) the "Lowered Tar and Nicotine" representation. Both of these representations appeared on every pack of Marlboro Lights sold in Illinois from 1971 through the end of the Class Period.

22. With respect to Cambridge Lights, the representation at issue is the descriptor "Lights" in the brand name. This descriptor appeared on every package of Cambridge Lights from 1986 through the end of this Class Period.

23. The representations at issue in this case are alleged by Plaintiffs to have violated the Illinois Consumer Fraud Act in two distinct ways. First, Plaintiffs allege that the representations of "Lights" and "Lowered Tar and Nicotine" are material and false. Second, Plaintiffs allege that the representation of lower tar explicitly contained within "Lowered Tar and Nicotine" representation

and implicitly communicated by the descriptor “Lights” is false and misleading because members of the Class did not receive lower tar and nicotine and, even if some few members of the Class did receive some small reduction in tar, this representation is still fraudulent and misleading because it does not state matters which materially qualify the statement as made.

24. The matters not stated are that the “tar” from Marlboro Lights and Cambridge Lights cigarettes is higher in toxic substances and more mutagenic than the tar from regular Marlboro and Cambridge cigarettes. Therefore, even if it were possible that for some Class members the representation of “lowered tar” were true, the representation (without the material qualification that the delivered tar is more harmful) is fraudulent.

25. The misrepresentations at issue in this case (and Philip Morris’ fraudulent conduct (related thereto) are alleged by Plaintiffs also to violate the Illinois Consumer Fraud Act and the Illinois Uniform Deceptive Trade Practices Act, because Philip Morris’ course of conduct related to these fraudulent misrepresentations is “unfair”. The elements of an unfairness claim under the Illinois Uniform Deceptive Trade Practices Act, are: (1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive or unscrupulous; and (3) whether it causes substantial injury to consumers.

26. There is no dispute that if the other elements of this cause are met, Philip Morris’ deception occurred in the course of conduct involving trade or commerce. Philip Morris admits that it manufactured, promoted, marketed, distributed and sold Marlboro Lights and Cambridge Lights cigarettes in Illinois and that this conduct involves trade or commerce.

The remaining disputed elements of Plaintiffs’ claims are discussed individually below.

27. With respect to the definition of a “deceptive act” under the Act, 815 ILCS 501/1 *et*

seq. provides in pertinent part:

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression, or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practices described in Section 2 of the 'Uniform Deceptive Trade Practices Act', approved August 6, 1965, in conduct of any trade or commerce are hereby declared unlawful, whether any person has in fact been mislead, deceived, or damaged thereby.

28. Plaintiffs offered credible testimonial and documentary evidence to establish that prior to the release of Marlboro Lights and Cambridge Lights, Philip Morris recognized that smokers had become increasingly concerned about the health issues related to smoking beginning in the 1950's. Specifically, Dr. Joel Cohen, a Professor at the University of Florida who has studied consumer behavior (specifically in the context of tobacco) for over twenty years, established as a factual matter that Philip Morris fully understood (prior to the launch of Marlboro Lights and Cambridge Lights) smokers' concerns regarding the negative health impact of smoking.

29. The testimony and documents offered at trial demonstrate that Philip Morris' initial response to this growing health concern was to create a disinformation environment wherein Philip Morris through its own public statements (and through its participation in the Tobacco Institute) knowingly and falsely disputed scientific conclusions that established a connection between smoking

and diseases. Philip Morris' strategy was to create doubt about the negative health implications of smoking without actually denying these allegations. The evidence offered at trial establishes that Philip Morris continued this disinformation campaign through the mid-1990's.

30. Dr. Cohen and several other witnesses who testified in this case also offered credible testimony (based in part upon internal Philip Morris documents) that Philip Morris intentionally marketed Marlboro Lights with the descriptor "Lights" and the representation "Lowered Tar and Nicotine" on every package of Marlboro Lights with the intention of communicating to consumers that the Marlboro Lights cigarette was less harmful or safer than a regular Marlboro cigarette.

31. The Court finds, based upon the evidence introduced at trial, that Marlboro Lights and Cambridge Lights were introduced into the market by Philip Morris with the intent to provide smokers who were concerned about their health with a product that could reduce the cognitive dissonance associated with smoking and thereby allow them to continue to smoke cigarettes.

32. The Court finds, based upon the evidence introduced at trial, that Philip Morris' implicit health representations embodied by the descriptor "Lights" – although clearly understood by all Class members in this case – were not explicit, because Philip Morris (while at the same time intentionally and falsely misrepresenting these cigarette products as less harmful or less hazardous than their regular counterparts) was engaged in a disinformation campaign whereby it disputed that any cigarette was harmful or hazardous. As a consequence, Philip Morris chose to make implicit health claims for these products rather than explicit claims so as not to contradict its separate and contemporaneous disinformation efforts directed to the smoking public.

33. The internal Philip Morris documents and testimony introduced as evidence at trial conclusively demonstrate that, as a factual matter, Philip Morris intended to deceive consumers into

believing that Marlboro Lights and Cambridge Lights cigarettes were less harmful or safer than their regular counterparts.

34. This Court finds that based upon the expert testimony and documentary evidence introduced at trial, the positive health attribute associated with Marlboro Lights and Cambridge Lights created by Philip Morris' misrepresentations constitutes a universally positive and desirable product attribute for the Class members in this case in the form of a health reassurance.

35. Marlboro Lights and Cambridge Lights were health reassurance cigarettes in that they expressly and impliedly conveyed the notion of a positive health attribute through the representations of "Lights" (with respect to Marlboro Lights and Cambridge Lights) and the representation of "Lowered Tar and Nicotine" (with respect to Marlboro Lights).

36. The Court finds that the term "Lights" not only conveyed a message of reduced harm and safety, but also conveyed to Class members that the "Lights" cigarette product was lower in tar and nicotine.

37. The Court finds that the representation of "Lowered Tar and Nicotine" on the package of Marlboro Lights not only conveyed the message to all consumers that Marlboro Lights possessed a positive health attribute as compared to a regular Marlboro, but also explicitly communicated that the Marlboro Lights cigarette would deliver less tar and nicotine to the consumer than a regular Marlboro.

38. Although Philip Morris' misrepresentations in this case were not in the form of an explicit statement that Marlboro Lights and Cambridge Lights were healthier or safer, the Court finds that Class members universally understood the message of reduced risk from these products.

39. Based upon the information environment existing at the time of the launch of

Marlboro Lights and existing throughout the Class Period, the phrase “Lowered Tar and Nicotine” inescapably communicates that the Marlboro Lights cigarette is safer. The evidence at trial demonstrates that all consumers who chose a Marlboro Lights cigarette understood that tar and nicotine were the “bad” components in cigarette smoke and, therefore, lower levels of these components would reduce negative health affects of the cigarette product.

40. Although Philip Morris introduced evidence at trial in an attempt to contradict the universal reliance by Class members on the health representations implicit and explicit in the descriptors “Lights” and “Lowered Tar and Nicotine”, this evidence does not persuade the Court. If anything, this evidence only demonstrates that Class members may have relied to different degrees or in different ways upon these health representations. In all events, however, the testimony at trial demonstrates that all Class members in this case understood the positive health attribute associated with “Lights” on both the Marlboro Lights and Cambridge Lights package and “Lowered Tar and Nicotine” on the Marlboro Lights package. The testimony and evidence also establishes that this understanding was relied upon as a causative or determining factor for all Class members even if the degree or extent may have varied between Class members.

41. Class members’ belief that Marlboro Lights and Cambridge Lights cigarettes were healthier than their regular counterparts was reinforced by the feel or impact of the smoke from these cigarettes in a person’s mouth, throat and lungs. Although Philip Morris contends that some smokers preferred the taste of Marlboro Lights and Cambridge Lights, the evidence indicates that this preference was actually an additional health reassurance enforcement.

42. Plaintiffs also offered the credible expert testimony of Robert Cialdini, a Professor of Psychology with special expertise in human behavior, social influence and persuasion focusing

specifically on persuasion and influence in the consumer context. Dr. Cialdini testified that the words "Lights" and "Lowered Tar and Nicotine" on the cigarette products at issue in this case meant "less hazardous" to all Class members. Dr. Cialdini also explained the various psychological principles influencing Class members' purchase decision in this case.

43. Dr. Cialdini credibly testified that the four Principles of Influence: association, consistency, authority and social proof, all reinforced and reaffirmed the association of these Light cigarettes with improved health. As a consequence of these Principles of Influence, Dr. Cialdini concluded that improved health was at least one of the determinative reasons for every Class Member to purchase either Marlboro Lights or Cambridge Lights during the Class Period (with the possible exception of individuals with an irrational death wish).

44. In addition to the internal Philip Morris documents that demonstrate Philip Morris' specific intent to market Marlboro Lights and Cambridge Lights as healthier and less harmful cigarette products, many of the current and former marketing executives at Philip Morris also testified that these products were, indeed, intentionally marketed to the health conscious consumer with the intent that consumers rely upon the implicit representation of safety. This testimony includes, but is not limited to, statements of intent from the decision-makers at Philip Morris at the time of the launch of Marlboro Lights and internal Philip Morris documents demonstrating such intent.

45. The Court finds the testimony and argument presented by Philip Morris that these Light cigarettes were at least in part marketed based upon taste characteristics as not credible and unconvincing. Evidence, including testimony from Philip Morris' own personnel, was introduced at trial that at the time of the launch of Marlboro Lights, Philip Morris and the advertising agency responsible for marketing Marlboro Lights understood the taste of Marlboro Lights to be a negative

product attribute that needed to be overcome by the implicit health representation.

46. As Defendant has correctly pointed out, the individual Class members who testified in this case started smoking at different ages, smoked different amounts, and varied in other respects in their smoking behavior. In my view, this would certainly be expected. However, some very important common facts came out in the testimony of all Class members: while acknowledging that all cigarettes are unsafe, they all believed that buying and smoking a Light cigarette would be a safer or healthier alternative to a regular cigarette. All Class members who were asked the question thought that the words “Lowered Tar and Nicotine” meant just that - that they were getting less tar and nicotine when they smoked Marlboro Lights than they would get from a regular Marlboro. Most importantly, they all testified that their belief that Marlboro Lights (or Cambridge Lights) were safer or healthier or contained less of the “bad stuff” than the regular cigarette counterparts resulted from their being denominated “lights” and contributed to their decision to buy Marlboro Lights and Cambridge Lights cigarettes.

47. The testimony of Defendant’s expert, Dr. Timothy Meyer, that people may smoke for a variety of reasons and may also choose Lights cigarettes for a variety of reasons misses the crux of Plaintiffs’ case and is, therefore, unpersuasive. As a threshold matter, the mere existence of potential other reasons for a consumer to prefer the products at issue in this case does not vitiate or eliminate the fraud associated with the health representation as a causative influence on all Class members’ purchase decisions. “A person is liable for his or her conduct whether it contributed wholly or partly to the plaintiffs’ injury as long as it was one of the proximate causes of the injury.” Leonardi v. Loyola of Chicago, 168 Ill.2d 83, 658 N.E.2d 450, 455 (1995).

48. Dr. Meyer testified that the belief that Marlboro Lights and Cambridge Lights are

safer was not a factor in the cigarette choice of all Class members because the health hazards of smoking are irrelevant to some smokers and some young smokers are actually attracted to the health hazard of smoking. The Court finds it altogether implausible that any smokers who have no concerns about the hazards of smoking or who actually want to defy death by smoking the most hazardous cigarettes available would choose specifically to smoke a low tar cigarette like Marlboro Lights and Cambridge Lights. Indeed, in making these assertions, Dr. Meyer had no empirical or other data specifically with respect to Marlboro Lights or Cambridge Lights and he had failed to avail himself of any of the relevant internal studies and documentation accumulated by the Defendant on whose behalf he was testifying.

49. The Court has listened to Plaintiffs and Class members testify about a broad range of issues concerning their smoking of Marlboro Lights and Cambridge Lights cigarettes. The Court notes that during several of the discovery depositions which were shown in Court by stipulation as evidence, a number of issues arose concerning privileged communications with medical doctors as well as medical conditions. However, at no time was the Court asked by Defendant to resolve those issues by ruling on such assertions in the discovery phase of the case or during the trial when such testimony was presented. Considering those depositions in totality, any such evidence as to Class members' medical conditions or communications with physicians would have no influence on my determination of the issues in this case - and did not have any influence in fact.

50. Based upon the testimony and evidence introduced at trial, the Court finds that the term "Lights" and the phrase "Lowered Tar and Nicotine" universally communicated a reduced harm message to all Class members in this case and that all Class members relied upon this representation as at least one of the determining factors for their purchase decision.

51. Philip Morris offered survey evidence in an attempt to establish that only a portion of the Class was deceived by the misrepresentations of “Lights” and “Lowered Tar and Nicotine”. On rebuttal, Plaintiffs offered the testimony of Dr. Stanley Presser to explain the significance and meaning of the survey data offered by Philip Morris.

52. The Court finds Dr. Stanley Presser to be one of the preeminent survey researchers and methodologists in this country and the court finds his testimony to be credible. Dr. Presser explained that none of the survey data presented by Philip Morris was informative of the question as to what percentage of Light smokers believed Light cigarettes were safer. In addition, none of the survey data offered by Philip Morris is informative of the question relating to what percentage of Light smokers purchased Light cigarettes for health or safety-related reasons. Dr. Presser explained that most of these surveys measured the wrong population. The surveys relied upon by Philip Morris included both non-smokers and smokers of cigarette products other than Lights cigarettes. Therefore, the survey data was not representative of any percentage of Light smokers specifically. Other survey data offered by Philip Morris asked questions not related in any way to the critical questions at issue in this case.

53. Based upon the comparative credibility and persuasiveness of the evidence and testimony presented by Philip Morris in opposition to Plaintiffs’ testimony that all Class members understood “Lights” and “Lowered Tar and Nicotine” to mean safer and all Class members purchased their cigarettes based at least in part upon this representation, the Court finds Philip Morris’ evidence and testimony to be neither credible nor persuasive on this issue.

54. Philip Morris argued at trial that these representations were not the only source of information regarding Marlboro Lights and Cambridge Lights being safer than their regular

counterparts. Philip Morris specifically argued that the public health community as a whole, and specific components of the public health community (including the authors of the Reports of the Surgeon General and statements issued by the American Cancer Society) were the reasons some consumers believed these products to be safer. The Court finds this testimony and evidence neither credible nor persuasive as a defense to liability in this Action. As a threshold matter, the fact that the public health community recommended to those smokers who could not quit that a lower delivery cigarette would reduce risk is not misleading. There is apparently no dispute that actual lower delivery of toxic substances may reduce harm. The fact that Marlboro Lights and Cambridge Lights did not reduce the actual delivery of harmful toxins does not convert the message from the public health community into a defense to Philip Morris' intentional fraudulent conduct.

55. Moreover, a significant body of credible evidence was introduced at trial demonstrating that Philip Morris had specific scientific and cigarette design knowledge that the public health community did not possess related to Lights cigarettes generally as well as Marlboro Lights and Cambridge Lights cigarettes specifically. This demonstrates that although Philip Morris knew their Lights cigarettes were not safer, the public health community did not know this fact. The Court finds that Philip Morris took advantage of the message of the public health community in selling their cigarettes which delivered neither lower tar and nicotine, nor less harm to the Class members in this case.

56. The testimony from Dr. William Farone (a high ranking scientist within Philip Morris from 1976 through 1984), demonstrates credibly that Philip Morris knew Light cigarettes (and specifically Marlboro Lights and Cambridge Lights) did not reduce the delivery of tar or nicotine to the consumer compared to their regular counterparts and that these cigarettes were not designed

to reduce actual delivery to smokers.

57. Philip Morris internal documents and the testimony offered at trial demonstrate that Philip Morris, prior to the launch of Marlboro Lights and Cambridge Lights, knew that smokers adjusted their smoking behavior through largely unconscious means so as to receive the same dose of nicotine and tar from a Light cigarette as from a regular cigarette. In fact, the testimony and evidence clearly establish that Marlboro Lights and Cambridge Lights were specifically designed in such a way as to reduce the machine-measured tar and nicotine delivery while at the same time allowing consumers to extract the same levels of tar and nicotine from these products as they would extract from their regular Marlboro and Cambridge counterparts.

58. The evidence establishes that the primary design distinction between Marlboro Lights and Cambridge Lights as compared to their regular counterparts is increased ventilation. Ventilation is measured by Philip Morris as the percent of air that is drawn in through the filter to dilute the smoke of the cigarette when smoked. This design distinction of ventilation provides for a lower machine measurement of tar and nicotine for “Lights” cigarettes, while still allowing the consumer to receive the same delivery of tar and nicotine from the “Lights” and regular cigarettes.

59. Although Philip Morris offered factual testimony through Willie Houck as to Philip Morris’ intent and purpose in designing Marlboro Lights, the Court finds this testimony to not be credible. At the time of the design of Marlboro Lights, Willie Houck was a sophomore in college attending night school. He was an extremely junior member of the filter design group and did not have responsibility or authority to design and create Marlboro Lights (which is the way his testimony was offered by Philip Morris). Furthermore, he admittedly had absolutely no involvement in marketing these cigarettes in any fashion, particularly as “Lights,” or representing them to deliver

“lowered tar and nicotine” on the packaging.

60. Plaintiffs offered testimony and documentary evidence credibly demonstrating that the representations of “Lights” and “Lowered Tar and Nicotine” were false for all Class members in this case. For example, Dr. Neal Benowitz testified that Class members who smoked Marlboro Lights and Cambridge Lights would receive the same amount of tar and nicotine from these products as they would receive from a regular Marlboro or a regular Cambridge respectively. Dr. Benowitz specifically concluded, based upon his extensive scientific research, that smokers of these Marlboro Lights and Cambridge Lights cigarettes engage in what is called compensatory smoking behavior so as to receive 100% of the tar and nicotine that would be received by this smoker from the regular counterpart cigarette.

61. Compensatory smoking behavior consists of unconscious acts - including but not limited to inhaling deeper, more frequent puffs, larger puffs and holding the smoke in the lungs for a longer period of time - that enable the smoker to regulate the amount of nicotine, and hence tar, received by the smoker. Dr. Benowitz credibly testified that these unconscious acts result in there being no difference for an individual smoker between the tar and nicotine delivery from a Marlboro Lights cigarettes as compared to a regular Marlboro cigarette (the same being true of Cambridge Lights cigarettes and regular Cambridge cigarettes).

62. Dr. Benowitz and other expert witnesses explained that the reason compensation occurs is that smokers regulate their intake of nicotine, a pharmacologically active drug. Smokers change their smoking behavior in largely unconscious ways, particularly with respect to the products at issue in this case, to obtain the dose of nicotine required by each individual smoker. Although the nicotine level required by each smoker may vary among smokers, the fact that each smoker will

obtain the same amount of nicotine and tar from these Lights cigarettes as from their regular counterparts does not vary.

63. Dr. Benowitz is the leading researcher in the fields of nicotine, addiction and compensatory smoking behavior. He analyzed several different kinds of scientific studies measuring compensatory smoking behavior, including: forced switching studies, cross-sectional studies and spontaneous brand switching studies. Based upon all of his research, experience and his expertise in these scientific areas, Dr. Benowitz offered the scientific conclusion that compensation for this Class is 100%. Significantly, this conclusion was never rebutted by the Defendant.

64. In fact, Philip Morris has publicly taken the position as of November 2002 that people who switch to Light cigarettes are likely to inhale the same levels of cancer-causing toxins. In addition, Philip Morris' own scientific expert, Dr. Richard Carchman, agreed that Philip Morris' public position regarding compensatory smoking behavior means that consumers are compensating 100% when they switch from a regular cigarette like Marlboro to a Light cigarette like Marlboro Lights.

65. Philip Morris' own internal research regarding compensatory smoking behavior demonstrates that Philip Morris knew since before the launch of Marlboro Lights and Cambridge Lights that smokers will adjust their behavior to receive the same level of tar and nicotine from these Light cigarettes as they would receive from their regular cigarette counterparts. Although Philip Morris attempted to contradict its own internal studies through the factual testimony of Barbro Goodman, this Court finds this testimony to be not credible and unpersuasive.

66. Based in part upon the fact that smokers of Marlboro Lights and Cambridge Lights engage in complete compensatory smoking behaviors, the Court finds that Marlboro Lights and

Cambridge Lights are just as harmful as regular Marlboro and regular Cambridge for all Class members in this case.

67. Plaintiffs also demonstrated that Light cigarettes are just as harmful as regular cigarettes through the un rebutted testimony of Dr. Michael Thun. Dr. Thun is a medical doctor, an expert in epidemiology, and also a co-author of Chapter 4, Monograph 13 (discussed below). Dr. Thun has specifically studied epidemiology for the past twenty-five years while working at the Centers for Disease Control and the American Cancer Society.

68. Dr. Thun testified, based upon all of his epidemiological experience and all of the studies that he has reviewed, that the machine-measured tar difference between Marlboro Lights and Marlboro (as well as Cambridge Lights and Cambridge) does not lead to any disease reduction whatsoever among these comparative smoking populations. The evidence also establishes that the same is true for the population of Class members in this case. The Court finds this testimony to be both credible and persuasive, as well as un-rebutted on this record.

69. Dr. Thun (along with other witnesses) also credibly testified that Light cigarettes have had other negative impacts on disease risk. Specifically, the false perception that a smoker is reducing risk may cause smokers to delay cessation and cessation has been proven to reduce risk from all forms of disease caused by cigarette smoke. In addition, Dr. Thun testified that Light cigarettes may have impacted initiation rates in a way that has led to negative health consequences for the Class.

70. The evidence at trial demonstrates not only that Marlboro Lights and Cambridge Lights are just as harmful as their regular counterparts, but that these products are actually more harmful and more hazardous than their regular counterparts. The Court finds that Philip Morris was aware of the increased harm from these Light cigarettes based upon their own scientific testing.

Philip Morris' knowledge and understanding of increased harm from Lights cigarettes is also demonstrated by Philip Morris' refusal to conduct any additional testing to reconfirm this scientific conclusion of increased harm.

71. Philip Morris' documents, as well as the testimony of Dr. William Farone and Dr. Peter Shields, establish as a factual matter that Philip Morris has known for over twenty-five years that Lights cigarettes like Marlboro Lights and Cambridge Lights – with increased ventilation – are more mutagenic than cigarettes with less ventilation.

72. Philip Morris conducted mutagenesis studies as part of its toxicological evaluation in order to predict the carcinogenic potential of their products and product design changes. The testimony at trial established that Philip Morris believed its biological test results (in the form of Ames mutagenicity testing) to be both meaningful and predictive of carcinogenesis. In fact, several of Philip Morris' scientists testified that the Ames test was the primary biological test relied upon by Philip Morris. This testing was and is used by Philip Morris to demonstrate reduced harm from cigarettes. It is therefore quite significant that their test results have consistently demonstrated for the past twenty five years that increased ventilation (the primary design distinction between Light cigarettes and their regular counterparts) increases the specific mutagenicity of cigarette smoke.

73. Although Philip Morris attempted to reduce the evidentiary significance of its own testing through the testimony of Dr. Richard Carchman, the Court does not find this testimony to be credible. The biological testing over the past twenty five years has consistently demonstrated an increase in specific mutagenicity associated with an increase in ventilation.

74. The fact that Philip Morris intentionally prevented its scientists in the United States from performing additional testing does not undermine the credibility and reliability of the testing that

Philip Morris did perform. In fact, this intentional failure to conduct additional testing further demonstrates Philip Morris' belief that Light cigarettes were and are more harmful than their regular counterparts.

75. Plaintiffs also introduced credible testimony regarding the specific toxicity levels of cigarette smoke comparing Marlboro Lights cigarettes to regular Marlboro. Based upon the constituent toxicity testing results performed by Philip Morris itself and other tobacco manufacturers in the context of the Massachusetts Benchmark Study ("MBS"), Plaintiffs demonstrated through Dr. Jeffrey Harris that Marlboro Lights has higher specific toxicity levels for almost all of the toxic substances measured in cigarette smoke in the MBS.

76. This testimony and evidence is particularly persuasive and disturbing. These toxicity levels measured in the MBS study demonstrate that even if a smoker does not compensate completely (a fact itself which is contrary to the evidence presented), a smoker of Marlboro Lights will receive higher levels of most of the toxic substances found in cigarette smoke from a Marlboro Lights than they will receive from a regular Marlboro. The Court notes that the constituent toxicity testimony was completely un rebutted.

77. Specifically with respect to the two toxic substances Philip Morris itself has targeted for reduction as a means of demonstrating harm reduction (Acrolein and 1,3-Butadiene), a smoker of Marlboro Lights need only compensate 14% to receive higher levels of these two specific toxic substances. Therefore, the Court finds that Marlboro Lights and Cambridge Lights, based upon the similar design distinction of increased ventilation, are more harmful for every Class Member than a regular Marlboro or a regular Cambridge cigarette.

78. Plaintiffs introduced credible scientific and epidemiological evidence that connected

the dramatic increase in adenocarcinomas (lung cancer of the peripheral lung cells) to the increased prevalence of Light cigarettes like Marlboro Lights and Cambridge Lights. The un rebutted expert testimony of Dr. Peter Shields and Dr. Michael Thun establish that Marlboro Lights and Cambridge Lights have contributed to the dramatic rise in adenocarcinoma cancer rates, thereby demonstrating another line of evidence that establishes increased harm from these “Light” cigarette products.

79. Plaintiffs offered extensive evidence, both documentary and through expert witnesses, relating to the October 2001 consensus public health publication entitled *Monograph 13 – Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine* – published by the United States Department of Public Health and Human Services - ‘Public Health Service - National Institutes of Health - National Cancer Institute. Monograph 13 represents the first public health community consensus that cigarettes with lower machine-measured yields of tar and nicotine (including Light cigarettes like Marlboro Lights and Cambridge Lights) do not lower the risk of disease as compared to higher yield cigarettes (like regular Marlboro and regular Cambridge)....

80. Philip Morris made no attempt to rebut the testimony that Monograph 13 represented the first scientific consensus regarding the lack of any harm reduction associated with Light cigarettes. In fact, Philip Morris made no attempt to contradict any of the conclusions within Monograph 13. Based upon the fact that Monograph 13 represents the first consensus’ within the public health community as to the lack of any harm reduction from Light cigarettes, the Court finds that Class in this case could not have known of the fraud associated with Marlboro Lights and Cambridge Lights prior to the publication of Monograph 13 in October 2001. Further, the conclusions of Monograph 13 itself establish that Philip Morris recognized the inherent deception of offering cigarettes as “Light” and “Lowered Tar and Nicotine”.

81. Although Philip Morris offered isolated references in scientific publications prior to the issuance of Monograph 13 of the potential for the benefit of low tar cigarettes to have been overestimated, the first public community consensus on the lack of any benefit from Light cigarettes as compared to regular cigarettes occurred after the Class Period in this case. As discussed previously, Philip Morris' contention that the public health community should somehow be blamed for the fraud associated with Lights cigarettes is both morally abhorrent and factually incorrect. At all times since the inception of their Lights products, Philip Morris was aware of their deception and was aware that the public health community was among those deceived by the fact that their products did not deliver the promised lower tar and nicotine and were not "light" as represented. Yet, it was not until the fall of 2002 that they disseminated this knowledge. As such, they cannot assert that the Class should have known information which they chose not to publicly reveal until November 2002. The fact that Philip Morris found it necessary to reveal this information so prominently on their website, in newspaper inserts, and by placing inserts in their cigarette packs demonstrates that Philip Morris understood that consumers of their product were not aware of the information contained in these materials.

82. The proper measure of damages under the Illinois Consumer Fraud Act is to measure the difference between the value the product would have had at the time of the sale if the representations had been true and the actual value to the consumer of the property sold. See Gerill Corp. v. Jack L. Hargrove Builders, Inc., 538 N.E.2d 530, 537-38 (Ill. 1989). See also Manjal v. Baird & Worner, In/c., 92 Ill. Dec. 809, 820 (2nd Dist. 1985).

83. Both Plaintiffs and Defendant offered testimony from economists regarding the proper economic method to measure the damages to the Class. Plaintiffs offered the testimony of Dr. Jeffrey

Harris, an expert economist from MIT who is not only a Professor of Economics but also a full time practicing physician. Defendant offered Dr. Kip Viscussi, a Professor of Law and Economics at Harvard Law School. Both of these economic experts were qualified to render opinions regarding economic theory. However, the Court finds the testimony of Dr. Jeffrey Harris more credible and more persuasive than the testimony of Dr. Kip Viscussi.

84. Dr. Harris and Dr. Viscussi essentially agree that the correct economic model for measuring damages in this case should be the difference between the price paid by the consumers in the Class and the value to the consumer of the “misrepresented” cigarette they actually received. The critical distinction between the two models proposed by the two economists in this case is whether the promised product with the promised attributes is made available when determining the value to the consumer (or willingness to pay) for the “misrepresented” Lights.

85. Dr. Harris testified that the only way to accurately measure the damages at the time of the sale or transaction caused by the fraud is to provide as an alternative in the comparative valuation of the product that was promised by Philip Morris.

86. There is no dispute that the promised product in this case is a “genuine” harm reducing “Light” cigarette. Dr. Harris credibly testified that if you do not include the product that was promised in the comparative valuation, you cannot measure the value of the promise, i.e. the harm reduction promise of Marlboro Lights and Cambridge Lights.

87. Dr. Viscussi testified that because the promised product does not exist in the “real world,” it should not exist in the valuation measure for this case. This Court rejects the testimony of Dr. Viscussi in this regard. The reason the promised product (i.e. a “real” light cigarette that actually reduces the harm from cigarettes and delivers lowered tar and nicotine) does not exist in the

“real world” is that Philip Morris never offered a “real” Marlboro Light or Cambridge Light cigarette to the Class. Philip Morris cannot escape liability in this case from its fraud because of the fact that it never created the product that it promised in Marlboro Lights and Cambridge Lights.

88. Philip Morris acknowledges as of November 2002 that it has never and does not now sell or market any “safer” cigarettes. The newspaper insert distributed throughout the United States through major newspapers and the “onsert” placed on packages of Marlboro Lights for a very brief time in November 2002 both state unequivocally that there is no such thing as a safer cigarette and a consumer should not believe that Lights cigarettes are safer. This Court finds that this disclosure does not minimize but rather dramatizes the deception which took place throughout the Class period. This disclosure certainly cannot serve to avoid liability made, as it was, long after this case was filed. However, these disclosures do establish that even Philip Morris agrees that Marlboro Lights and Cambridge Lights are not any safer than their regular counterparts.

89. In order to measure the damages proximately caused by Philip Morris’ misrepresentation, Plaintiffs offered into evidence a valuation study conducted by Dr. Dennis of Knowledge Networks. Knowledge Networks has created a web-enabled probability sample of nationally representative survey respondents in the United States population. Within that population, Dr. Dennis conducted a survey for purposes of this case of Marlboro Lights smokers to measure the value of the health attribute aspect of Marlboro Lights to consumers in order to determine the damage caused by Philip Morris’ fraud.)

90. The Court finds that the measured value of this health attribute is the damage proximately caused by Philip Morris’ fraud in this case Philip Morris implicitly represented Marlboro Lights and Cambridge Lights as less harmful or safer. The Knowledge Networks survey

provided an accurate measure of damages to the Class members in this case by measuring the difference between the price paid for the cigarettes purchased during the Class Period and the value to the Class members of the product actually received – a product that not only was just as harmful as a regular cigarette but in fact could be more harmful. The aggregate diminution in value measured by the Knowledge Networks survey caused by Philip Morris' fraud was calculated to be 92.3%.

91. Although the Knowledge Networks survey measured damages as an aggregate average for a representative sample of Marlboro Lights smokers and not for Cambridge Lights smokers, the Court finds, based upon all of the testimony offered in this case, that there is no reason to believe that Cambridge Lights smokers would have a different aggregate average valuation of the health attribute of their Light cigarette than Marlboro Lights smokers. In fact, this Court finds as a factual matter that the damages from the fraud relating to the "Lights" descriptor for Class members who purchased Marlboro Lights is, in the aggregate average, the same as the aggregate average damages to Class members who purchased Cambridge Lights.

92. The Court finds, based in part upon the testimony of Dr. Dennis who designed and implemented the Knowledge Networks valuation survey, that the survey conducted by Knowledge Networks did provide an accurate measure of the damage suffered by the Class members in this case.

93. Philip Morris attempted to challenge the accuracy of the survey measurement through the testimony of Dr. Nancy Mathiowetz. However, the Court finds that the survey criticisms offered by Dr. Nancy Mathiowetz were neither credible nor persuasive. In fact, Dr. Mathiowetz admitted that she had no opinion whatsoever as to the directional impact of any of the criticisms she identified with respect to this data. Moreover, the criticisms identified by Dr. Mathiowetz were specifically

refuted by Dr. Stanley Presser. The Court finds the testimony of Dr. Presser on the issues relating to survey data to be credible and persuasive.

94. Philip Morris offered the testimony of Dr. Viscussi to also criticize the survey data and to try to establish that a report conducted for the National Oceanic and Atmospheric Administration (“NOAA”) contained relevant survey guidelines for this case. However, Dr. Presser credibly testified that these NOAA criteria have no applicability to the Knowledge Networks survey conducted to measure damages in this case.

95. Based upon the diminution in value measured by Dr. Dennis’ survey, Dr. Jeffrey Harris, a qualified medical doctor and economist with over 25 years experience in health economics, calculated the total damages to Class members in this case.

96. First, Dr. Harris calculated the total consumer expenditure for Class members on both Marlboro Lights and Cambridge Lights for the relevant portion of the Class period. Because the private cause of action under Section 2 of the Illinois Consumer Fraud Act was not effective until October 1973, the Court finds the appropriate period for damages calculation in this case to be from October 1973 through February 8, 2001. Dr. Harris calculated the relevant total consumer expenditure to be \$7.6298 Billion. None of this consumer expenditure testimony was rebutted in any way by Philip Morris.

97. The next step in Dr. Harris’ damages calculation was to compute the aggregate damages by multiplying the appropriate diminution in value (92.3%) times the relevant total consumer expenditure of Class members in this case. Based upon this time period for determining the relevant total consumer expenditure, Dr. Harris calculated the compensatory damages to Class members to be \$7.1005 billion.

98. This compensatory damage calculation includes a 5% non-compounded prejudgment interest component – in the amount of \$2.1137 Billion. The Court finds under the circumstances of this case (and under the Illinois Consumer Fraud Act) that prejudgment interest is appropriate generally to this case and for this amount to be appropriate specifically.

99. The Court finds that Plaintiff Sharon Price has proven on an individual claim basis that Philip Morris has violated the Illinois Consumer Fraud Act by misrepresenting Cambridge Lights as “Lights,” meaning safer and lower in tar than regular Cambridge. Philip Morris intended for Plaintiff to rely upon the deception of this misrepresentation. This misrepresentation occurred in the course of conduct involving trade or commerce and caused actual damage to Ms. Price in an amount calculated by multiplying her total consumer expenditure (which was established during trial to be \$12,334.53) by the aggregate average diminution in value of 92.3% resulting in \$11,384.77 of actual damages proximately caused by the misrepresentation of Philip Morris. The Court finds that Plaintiff has also established Philip Morris has violated the Uniform Deceptive Trade Practices Act by demonstrating that Philip Morris’ fraudulent conduct offends public policy in an immoral and unethical way that caused substantial injury to Plaintiff as a consumer.

100. The Court finds that Plaintiff Michael Fruth has proven on an individual claim basis that Philip Morris has violated the Illinois Consumer Fraud Act by misrepresenting Marlboro Lights as “Lights” and “Lowered Tar and Nicotine” - meaning safer and lower in tar than regular Marlboro cigarettes. Philip Morris intended for Plaintiff to rely upon the deception of this misrepresentation. This misrepresentation occurred in the course of conduct involving trade or commerce and caused actual damage to Mr. Fruth in an amount calculated by multiplying his total consumer expenditure (which was established during trial to be \$19,297.55) by the aggregate average diminution in value

of 92.3% resulting in \$17,811.64 of actual damages proximately caused by the misrepresentations of Philip Morris. The Court finds that Plaintiff has also established that Philip Morris has violated the Uniform Deceptive Trade Practices Act by demonstrating that Philip Morris' fraudulent conduct offends public policy in an immoral and unethical way that caused substantial injury to plaintiff as a consumer.

101. Philip Morris' demand for a trial by jury is denied. There is no right to a jury trial under the Illinois Consumer Fraud Act. Plaintiffs' Second Amended Complaint is a one count Complaint containing only claims under the Illinois Consumer Fraud Act. Therefore, Philip Morris has no right to a jury trial in this case.

102. Philip Morris filed twenty-seven Affirmative Defenses in response to Plaintiffs' Second Amended Complaint. During the course of the trial, Philip Morris made an oral motion for mistrial based upon its alleged inability to pursue and develop its Affirmative Defenses. That Motion for Mistrial is denied. At no point during discovery in this litigation did the Court limit in any way Philip Morris' ability to pursue its Affirmative Defenses or to disclose and present expert testimony related thereto. The record demonstrates that during discovery, Philip Morris disclosed several experts with opinions related to its Affirmative Defenses. During the course of the trial, Philip Morris presented evidence (albeit not persuasive) on many of its Affirmative Defenses. Philip Morris specifically pled all its Affirmative Defenses in response to Plaintiffs' Second Amended Complaint and was at no time denied the opportunity to develop these defenses.

103. Although Plaintiffs failed to answer Philip Morris' Affirmative Defenses in a timely manner, Plaintiffs did ultimately respond to Philip Morris' Affirmative Defenses and the Court finds no prejudice from this late response.

104. All of Philip Morris' Affirmative Defenses are denied for the reasons identified herein.

105. Philip Morris' First Affirmative Defense - Statute of Limitations – is denied as legally insufficient because none of the allegations relate to knowledge that would trigger a Statute of Limitations for the claims in this case. Philip Morris has the burden of establishing that Class members knew of the fraud and failed to act on that knowledge. However, even if Class members knew all of the facts alleged here, they did not have knowledge of the fraud. With respect to subparagraphs (a) through (e), these allegations are legally insufficient because they relate to alleged knowledge of the general dangers of smoking as opposed to the fraud allegations related to Marlboro Lights and Cambridge Lights. Sub-paragraph (f) is legally insufficient because whether Class members knew the intention of the FTC machine measurements is not relevant to the claims at issue in this case. As to sub-paragraph (g), even if these factual allegations were known to some Class members, this knowledge is legally insufficient for the Statute of Limitations Affirmative Defense, because it does not establish knowledge of the increased harm relating to Marlboro Lights and Cambridge Lights cigarettes.

106. Philip Morris' Statute of Limitations Affirmative Defense also fails based upon the discovery rule. The discovery rule, which “delays the commencement of the relevant statute of limitations until the plaintiff knows or reasonably should know that he has been injured and that his injury has been wrongfully caused[,]” applies to consumer fraud cases. *Hermitage Corp. v. Contractors Adjustment Co.*, 651 N.E.2d 1132, 1135-36 (Ill. 1995).

107. “When a plaintiff uses the discovery rule to delay commencement of the statute of limitations, the plaintiff has the burden of proving the date of discovery.” *Id.* at 1138. Both Plaintiffs allege that they were “without knowledge of the conduct by Defendant alleged in this Complaint, or

of any facts from which it might reasonably be concluded that Defendant was so acting, or which would have lead to the discovery of such action, until after the filing of this action.” Second Amended Complaint ¶¶ 13,14. The Court finds that neither Plaintiffs nor Class members had either actual or constructive knowledge prior to the filing of this case of the essential injury which is the subject of Plaintiffs’ Complaint: economic loss caused by Philip Morris’ descriptors representing that Marlboro Lights and Cambridge Lights are safer than their regular counterparts when, in fact, these Lights cigarettes are more harmful than regular cigarettes.

108. Philip Morris’ Second Affirmative Defense of Laches is an equitable defense and does not apply to Plaintiffs’ claims under the Illinois Consumer Fraud Act. Even if such a defense would apply, the factual basis for laches is insufficient as a matter of law for the reasons identified in the discussion regarding their proposed Statute of Limitations defense.

109. Philip Morris’ Third Affirmative Defense – Waiver – is denied because it is not an affirmative defense but instead is a denial of proximate cause.

110. Philip Morris’ Fourth Affirmative Defense – Impermissible Claims Splitting – is denied for the reasons identified in this Court’s Certification Order entered on February 8, 2001.

111. Philip Morris’ Fifth Affirmative Defense – Federal Preemption – is denied. Philip Morris has argued in its summary judgment briefs and throughout this trial that Plaintiffs claims in this case are preempted by the Federal Cigarette Advertising and Labeling Act, 15 U.S.C. §1331, *et seq.* (“FCLAA”). §1334(b) of the FCLAA which provides that “no requirement or prohibition based on smoking and health shall be imposed under state law with respect to the advertising or promotion of any cigarettes, the packages of which are labeled in conformity with the provisions of this Act.” 15 U.S.C. §1334(b). Philip Morris contends that this provision expressly preempts the claims

brought by Plaintiffs in this case. The Court finds that none of Plaintiffs' claims in this case are expressly preempted by the FCLAA.

112. The United States Supreme Court in Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992), in interpreting the FCLAA, held that claims relating to Philip Morris' failure "to provide adequate warnings of the health consequences of cigarette smoking" and claims that Philip Morris attempted to "neutralize the warning labels" would both be preempted. 505 U.S. at 510, 524 & 528. However, Plaintiffs claims in this case are neither based upon a failure of Philip Morris to provide adequate warnings nor based upon a neutralization claim. Instead, Plaintiffs claims in this case "are predicated not on a duty, based on smoking and health, but rather on a more general obligation – the duty not to deceive." Id. at 528-29.

113. The Illinois Consumer Fraud Act makes unlawful "unfair or deceptive acts or practices including but not limited to the use or employment of any deception, fraud, pretense, false promise, misrepresentation or concealment, suppression or omission of any material fact . . . in the conduct of any trade or commerce [.]" 815 ILCS §505/2. The Court finds that Plaintiffs' claims in this case are based upon the independent duty not to deceive under state law. "[T]he predicate of this claim is a state-law duty not to make false statements of material fact or to conceal such facts." Cipollone, 505 U.S. at 528.

114. Plaintiffs have alleged essentially two types of misrepresentation claims under the Illinois Consumer Fraud Act. First, Plaintiffs have asserted that Philip Morris' representations that their Marlboro Lights and Cambridge Lights cigarettes are "Light" and that Marlboro Lights are "Lowered Tar and Nicotine" are false. The Court finds this claim to be wholly unrelated to any failure to warn claim and, therefore, not preempted.

115. Plaintiffs second type of misrepresentation claim relates to Philip Morris' representations of lower tar (both explicitly and implicitly through the use of the descriptor "Lights" which communicates lower tar) . Here, even if for some consumers the statements relating to lower tar could be technically true as far as that statement goes (which is contrary to the evidence presented), these statements are nevertheless fraudulent and misleading, because the tar from these "light" cigarettes is more harmful and higher in toxic substances. Therefore, this claim, whether characterized as an omission or simply as a false and misleading statement, does not implicate a failure to warn claim as Philip Morris contends and is not preempted.

116. Philip Morris is not under any obligation to warn or provide any additional information regarding the tar content in its cigarettes based upon Plaintiffs' misrepresentation / omission claims. Philip Morris' representations regarding the lower tar level of Light cigarettes (while knowing that the tar from these cigarettes is actually more harmful and of a different constituency) is false and misleading and violates Philip Morris' independent state law duty not to deceive. In Cipollone, the Supreme Court noted that "Congress offered no sign that it wished to insulate cigarette manufacturers from long standing rules governing fraud." 505 U.S. at 529.

117. Therefore, the Court holds that Plaintiffs' claims regarding the fraudulent misrepresentations of lower tar – without materially qualifying that statement – are not preempted. It is irrelevant for this analysis whether this claim is characterized as an omission or not. In either event, no failure to warn is being claimed in this context. Instead, all of Plaintiffs' claims are "intentional fraud and misrepresentation both by false representation of a material fact and by concealment of a material fact"[.] See Cipollone, 508 U.S. at 528.

118. Philip Morris also contends that Plaintiffs' claims in this case somehow conflict with

the regulations and policies of the Federal Trade Commission (“FTC”). In support of this position, Philip Morris offered testimony of John Peterman, an economist formerly with the FTC Bureau of Economics. The Court finds this testimony to be unpersuasive on the issue of conflict preemption. Further, the Court finds the testimony of Mr. Peterman to be unrelated to any potential areas of his expertise. Instead, he offered a narrative summary of historical facts. The Court finds that he has no expertise in assessing FTC involvement in regulation of the issues surrounding the allegations of Plaintiffs’ Complaint. Based upon the evidence presented in this case, both in the form of testimony and documents, the Court finds that Plaintiffs’ claims in this case do not conflict with the FCLAA or with any regulations or policies of the Federal Trade Commission.

119. Neither the FCLAA nor any regulation of the FTC governs the conduct at issue in this case – Philip Morris’ voluntary use of “Lights” and “Lowered Tar and Nicotine” descriptors on its cigarette packages. Under the facts and circumstances in this case, the fact that the FTC has not adopted regulations regarding the use of the “Lights” and “Lowered Tar and Nicotine” descriptors (even if the FTC has at certain points in time considered such regulations) does not create conflict preemption. See Sprietsma v. Mercury Marine, 123 S.Ct. 518, 527-29 (2002).

120. Philip Morris’ Sixth Affirmative Defense – Primary Jurisdiction – is denied. Philip Morris contends that the matters related to these claims are within the special expertise of the FTC and that there is a need for a uniform application of these administrative standards. Mr. Peterman offered no convincing evidence regarding the FTC “special expertise” on the issues relevant to this case and the Court finds him unqualified to render such an opinion in any event. Philip Morris claims that “plaintiffs have acknowledged these materials adequately allege primary jurisdiction”. Regardless of the adequacy of any allegations, the Court finds that the evidence introduced at trial does not

establish either that the FTC has specialized or technical expertise regarding the claims at issue in this case or that there is a need for uniform administrative standards in this context. See Employers Mutual Co. v. Skilling, 162 Ill.2d 284, 288-89 (1994).

121. Philip Morris has failed to demonstrate through evidence offered at trial that the FTC has some specific specialized or technical expertise such that this Court should defer to the FTC rather than adjudicating this matter. In fact, the Court finds that the evidence and testimony at trial demonstrates that the FTC lacks such expertise and has publicly acknowledged this lack of expertise on numerous occasions. The claims in this case concern fraud and deception under the Illinois Consumer Fraud Act and the Uniform Deceptive Trade Practices Act. This Court is well equipped to determine these issues. See Crain v. Lucent Technologies, 317 Ill. App. 3d 486, 495 (5th Dist. 2000).

122. The Court notes that Philip Morris has attempted to mis-characterize Plaintiffs' claims in an attempt to succeed on its affirmative defenses. Plaintiffs' claims in this case are not based upon any challenge to the FTC machine measuring procedures or the tar and nicotine ratings published based upon those testing procedure. Plaintiffs' claims in this case are related to Philip Morris' specific intentional misrepresentations on the packages of Marlboro Lights and Cambridge Lights.

123. The fact that Philip Morris intentionally designed these "Lights" products to register lower on the FTC machine measurements than actually delivered to the consumer is only relevant to the extent Philip Morris has used these lower FTC machine measurements as an attempted justification for the use of its fraudulent descriptors. Based upon the evidence introduced at trial, the lower machine measurements of tar and nicotine on the FTC machine do not justify Philip Morris'

use of these descriptors. In any event, the fact that Philip Morris attempted to defend its fraudulent misrepresentations based upon FTC measurements does not convert Plaintiffs' claims into claims based upon those measurements.

124. Philip Morris' Seventh Affirmative Defense – Compliance with Government Regulations – is denied. The false and misleading use of the descriptors “Lights” and “Lowered Tar and Nicotine” has never been specifically authorized by law. Philip Morris voluntarily chose to use these terms on its packages of Marlboro Lights and Cambridge Lights. No regulatory body has ever required (or even specifically approved) the use of these terms by Philip Morris. The Court finds that Philip Morris has not established that its conduct is “specifically authorized” by law. See Aurora Fire Fighters Credit Union v. Harvey, 516 N.E.2d 1028, 1036 (Ill. Ct. App. 1987).

125. Philip Morris' Eighth Affirmative Defense – First Amendment to the United States Constitution – is denied. Philip Morris' claims that the descriptors “Lights” and “Lowered Tar and Nicotine” provide accurate information regarding the FTC machine-measured tar and nicotine yields of Marlboro Lights and Cambridge Lights cigarettes. Here again, Philip Morris attempts to inject the FTC measurements as an apparent justification for the fraudulent use of these descriptors.

126. The First Amendment of the United States Constitution does not protect speech in the commercial context that is deceptive and misleading. This Court has found that Philip Morris' use of these descriptors violates the Illinois Consumer Fraud Act because these representations are false, misleading, deceptive and untrue. Therefore, the First Amendment does not protect this speech.

127. Philip Morris' Ninth Affirmative Defense – Article I, Sections 4 and 5 of the Illinois Constitution – is denied for the same reasons the Eighth Affirmative Defense is denied.

128. Philip Morris' Tenth Affirmative Defense – No Safer, Feasible, Alternative Design –

is denied as a matter of law because this defense is inapplicable to a claim under the Illinois Consumer Fraud Act. The issue in this case is not whether Philip Morris could have designed genuinely safer “Light” cigarettes but whether Philip Morris deceptively used the descriptors “Lights” and “Lowered Tar and Nicotine” on the packages of Marlboro Lights and Cambridge Lights sold in Illinois. In any event, Philip Morris has failed to establish that a safer alternative design for Lights cigarettes was not feasible. In fact, the testimony of William Farone both as a fact witness and as an expert witness on cigarette design established that alternative cigarette design options were available to Philip Morris that would have actually reduced the tar delivery to consumers without raising the level of toxins in cigarette smoke.

129. Philip Morris’ Eleventh Affirmative Defense – Failure to Mitigate – is denied as a matter of law. The Court finds as a threshold matter that this contention of Class members’ failure to mitigate has no applicability to the facts and circumstances of this case. Moreover, Philip Morris has failed to offer evidence that establishes Class members knew about the fraud during the Class Period and failed to take reasonable steps to prevent new harm or damages.

130. Philip Morris’ Twelfth Affirmative Defense – Assumption of the Risk – is denied. Even if Class members knew all of the factual allegations identified in paragraph 43, any risk related to the fraud at issue in this case would not be “assumed.” These allegations relate largely to the harmful aspects of cigarettes generally as opposed to the fact that Light cigarettes are more harmful than their regular counterparts.

131. Philip Morris’ Thirteenth Affirmative Defense – Common Knowledge – is denied. Even if Class members knew of these facts, this would not establish the defense of common knowledge to the claims in this case. Moreover, this is not a proper Affirmative Defense but simply

a re-characterization of Philip Morris' defense against causation.

132. Philip Morris' Fourteenth Affirmative Defense – Information in the Public Domain – is denied for the same reasons as the Thirteenth Affirmative Defense.

133. Philip Morris' Fifteenth Affirmative Defense – Inappropriate Retroactive Application of the Law – is granted only to the extent that Plaintiffs' claims for damages on sales prior to October 1, 1973 are denied.

134. Philip Morris' Sixteenth Affirmative Defense – Inherent Characteristic – is denied because even if these facts are true, they do not constitute an Affirmative Defense to the fraud claims at issue in this case.

135. Philip Morris' Seventeenth Affirmative Defense – State of the Art – is denied for the same reasons as the Affirmative Defenses of “No Safer Feasible Design” and the “Inherent Characteristic” have been denied. The Court notes that these three Affirmative Defenses – although not relevant to the fraud claims for purposes of compensatory damages in this case – do allege facts that may be relevant to issues regarding punitive damages. However, these facts, even if relevant to punitive damages, do not constitute an Affirmative Defense to such a claim.

136. Philip Morris' Eighteen Affirmative Defense – Res Judicata – is based upon the allegation that the claims at issue in this case are barred, in whole or in part, by the res judicata effect of the case captioned Illinois v. Philip Morris, Inc. et al., No. 96 L 13146. The Court finds that the claims in this case are not barred by the res judicata effect (if any) of the judgment in this other Illinois case.

137. Philip Morris' Nineteenth Affirmative Defense – Master Settlement Agreement Release – is denied. The Court holds that the claims at issue in this case were not released under the

Master Settlement Agreement.

138. Philip Morris' Twentieth Affirmative Defense – Comparative Fault – is denied. Even if the allegations in support of this Affirmative Defense were true, Plaintiffs and Class members did not violate any duty to exercise reasonable care and caution to prevent the harm alleged in Plaintiffs' Complaint.

139. Philip Morris' Twenty First Affirmative Defense – Lack of Standing to Sue – is denied as not properly pled as an Affirmative Defense. Philip Morris' allegations regarding lack of standing to sue are simply that the Class has not suffered any damages. This is not sufficient to plead an Affirmative Defense for lack of standing in this case.

140. Philip Morris' Twenty Second Affirmative Defense – Punitive Damages Claim Barred as Excessive Fine as Violation of Due Process and Equal Protection Causes – is denied. The punitive damages award in this case does not violate either the Due Process or the Equal Protection clauses of the United States Constitution or the Illinois Constitution.

141. Philip Morris' Twenty Third Affirmative Defense – Punitive Damages Fails to Provide Jury with Adequate Safeguards – is denied as irrelevant to this case wherein there is no jury. To the extent this Affirmative Defense is meant to apply to the Court, the Court denies this Affirmative Defense. The Court will provide itself with adequate standards for imposing or determining punitive damages under Illinois law.

142. Philip Morris' Twenty Fourth Affirmative Defense – Punitive Damages Statute Unconstitutional – is denied. The Illinois Consumer Fraud and Deceptive Practices Act is not unconstitutional based upon any allegation in this Affirmative Defense.

143. Philip Morris' Twenty Fifth Affirmative Defense – Punitive Damages Barred Without

Rights Accorded to Criminal Defendants – is denied. Philip Morris has been denied no rights to which it is entitled under the United States Constitution or the Illinois Constitution.

144. Philip Morris' Twenty Sixth Affirmative Defense – Punitive Damages Claim Barred as Violation of United States and Illinois Constitutions – is denied. The claim of punitive damages in this case does not violate the United States Constitution or the Illinois Constitution based on the facts alleged in this Affirmative Defense. It appears these allegations misconstrue the Class Action procedure in Illinois or are an attempt to recharacterize Plaintiffs' claims. In addition, these allegations primarily relate to jury discretion and potential punitive damages awards by a jury. The Court believes this Affirmative Defense was filed in error and should have been voluntarily withdrawn by Philip Morris as there is no jury and has been no jury in this case.

145. Philip Morris' Twenty Seventh Affirmative Defense – Punitive Damages Claim Barred as Speculative – is denied. Plaintiffs have stated facts sufficient to entitle Plaintiffs and Class members to an award of punitive damages and the award in this case is justified.

146. After considering all the testimony and evidence admitted at trial, the Court finds that the Plaintiffs have proven that Philip Morris has violated the Consumer Fraud Act through the deceptive act of misrepresenting its Cambridge Lights and Marlboro Lights products as "Lights" and misrepresenting Marlboro Lights as "Lowered Tar and Nicotine". The Court further finds that Philip Morris intended that the Class members in this case rely upon the deception created by these misrepresentations. These misrepresentations occurred in the course of conduct involving trade or commerce and caused actual damage to the Plaintiffs in the amount of \$7.1005 Billion. This actual damage to the Plaintiffs was proximately caused by the misrepresentations of Philip Morris.

147. The Court finds that based upon Philip Morris' course of conduct with respect to the

representations of “Lowered Tar and Nicotine” and “Lights” that Philip Morris’ practices offend public policy, are immoral, unethical, oppressive and unscrupulous and that this course of conduct caused a substantial injury to the Class members in this case. Therefore, the Court finds that Philip Morris has violated the Illinois Consumer Fraud Act and the Uniform Deceptive Trade Practices Act.

148. The Court has also considered whether punitive damages should be awarded for Philip Morris’ violation of the Illinois Consumer Fraud Act. Section 10(a) of the Consumer Fraud Act permits the trial Court, in its discretion, to award punitive damages. 815 ILCS §505/10(a). The purpose of awarding punitive damages is to punish the wrongdoer and, in so doing, deter that party and others from committing similar wrongful acts.

149. The Court recognizes that punitive damages are not favored in the law and this Court is careful not to award such damages improperly or unwisely. However, the course of conduct by Philip Morris related to its fraud in this case is outrageous, both because Philip Morris’ motive was evil and the acts showed a reckless disregard for the consumers’ rights. As a consequence, punitive damages are appropriate in this case.

150. The Court has reconsidered its conclusions regarding “book value” and net worth for purposes of determining the amount of the punitive damages award in this case. As a threshold matter, there is no dispute that the evidence regarding Philip Morris’ worth is relevant to an award of punitive damages.

151. Philip Morris has argued and the Court initially indicated its agreement with the proposition that a company’s worth may be ascertained only by reference to the company’s book value net worth. Upon review of the case law cited by the parties, the Court finds that this is an inaccurate statement of Illinois law and of the law in the Fifth District Appellate Court in particular.

152. Philip Morris argued that the Fifth District's decision in Fopay v. Noveroske, 334 N.E.2d 79, 31 Ill.App.3d 182 (5th Dist. 1975), restricts the Court's valuation of Philip Morris' worth to its book value net worth. The Fopay Court held no such thing. As the Fifth District has itself explained on at least two subsequent occasions, "[i]n Fopay, the court held that evidence of net earnings was not admissible on the issue of punitive damages because earnings were intertwined with net worth." Cox v. Doctor's Assoc., Inc., 245 Ill.App.3d 186, 613 N.E.2d 1306, 1321, 184 Ill.Dec. 714, 729 (5th Dist. 1993). Accord Central Bank-Granite City v. Ziaee, 188 Ill.App.3d 936, 544 N.E.2d 1121, 136 Ill.Dec. 346 (5th Dist. 1989) ("The Fopay court found that evidence of net earnings in addition to net worth was wrong because 'past earnings are necessarily and inextricably intertwined with net worth . . ."). Moreover, in both of those cases Cox and Ziaee, the Fifth District permitted evidence of earnings in lieu of evidence of net worth; indeed, even in Fopay the trial court's admission of earnings evidence was held to constitute harmless error.

153. The issue for my determination which is not addressed in Fopay is what constitutes proper evidence of Philip Morris Incorporated's actual value or "worth." Philip Morris contends that only book value is proper evidence, but the Court finds that is not the law in this state. The Fifth District has held that discovery "aimed at discovering defendant's net worth or pecuniary position" is entirely proper on the issue of punitive damages. Pickering v. Owens-Corning Fiberglas Corp., 265 Ill.App.3d 806, 824, 638 N.E.2d 1127, 1139, 203 Ill.Dec. 1, 13 (5th Dist. 1994). "We are aware of no Illinois case which limits the scope of financial discovery relating to punitive damages." Id.

154. The purpose of such discovery is to enable a plaintiff to uncover a "defendant's true net worth, which may or may not be accurately reflected in its published annual reports and proxy statements." Id., 638 N.E.2d at 1140, 203 Ill.Dec. at 14. In Pickering, the Fifth District held that

the plaintiffs were entitled to discovery of “a detailed financial statement, similar to the one used by management and directors of defendant,” “all business plans and financial projections related to future operations of defendant,” and “all appraisals, estimates or other statements of the fair market value of the assets and liabilities of [defendant] along with the means or methodology of determining said market value and the purpose for which said fair market value was calculated.” *Id.*, 638 N.E.2d at 1139-40, 203 Ill.Dec. at 13-14.

155. As the Fifth District recognized in *Fopay*, “the objective of admitting evidence as to defendant's wealth is to give the jury a true idea of defendant's ability to pay a punitive judgment.” 334 N.E.2d at 94. As the Fifth District recognized almost twenty years later in *Pickering*, in order to get a “true idea” of a defendant’s ability to pay, a plaintiff is entitled to discover and prove a defendant’s “true net worth.” Therefore, this Court will consider all evidence submitted by Plaintiffs to determine Philip Morris Incorporated’s “true net worth.”

156. As the Court indicated during trial, a straightforward accounting calculation based upon Philip Morris USA’s operating income would establish the Defendant’s true net worth to be \$50 billion. Plaintiffs offered testimony that based upon the market capitalization of the parent company, Altria, the net worth would be approximately \$25 billion. The Court finds Defendant’s true value or worth to be between \$25 billion and \$50 billion.

157. The Court is mindful of the fact that in determining the amount of a punitive damages award, the Court should consider the nature and enormity of the wrong in addition to the Defendant’s financial status and potential liability in other cases. The Court has considered these factors and determined that an award of three billion dollars (\$3 billion) is appropriate under the facts and circumstances of this case. This entire sum of punitive damages is, hereby, awarded to the State of

Illinois.

158. Attorneys who recover a common fund for the benefit of persons other than themselves and their clients are entitled to compensation for their services out of the fund as a whole. Scholtens v. Schneider, 173 Ill.2d 375, 385, 671 N.E.2d 657, 662 (1996) (citing Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980)). This rule allows attorney's fees and costs to be shared among all persons who benefit from the creation of the fund. Id. at 385, 671 N.E.2d at 662-63. The common fund includes all monies recovered and even extends to punitive damages. See 735 ILCS 5/2-1207 ("The trial court may also in its discretion, apportion the punitive damage award among the plaintiff, the plaintiff's attorney and the State of Illinois Department of Human Services.")

159. As a matter of judicial economy and procedural efficiency, the Court finds that it is appropriate for the Court to determine the amount of attorney's fees to be paid out of the common fund simultaneously with my judgment on the merits establishing the common fund.

160. As a consequence, an appeal from an award of attorney's fees (which is a separately appealable final judgment) can be consolidated with any appeal related to the merits of an action. See Obin v. Dist. 9 of the Int'l Assoc. of Machinists & Aerospace, 651 F.2d 574, 584 (8th Cir. 1981); see also Duane Smelser Roofing Co. v. ARMM Consultants, Inc., 609 F.Supp 823, 824 (E.D.Mich. 1985) ("[Decisions on the appealability of attorney's fees awards] have been predicated on the desirability of avoiding piecemeal appeals and have emphasized that motions for fees should be resolved promptly by District Courts 'so that any appeal by an aggrieved party from an allowance or disallowance of fees can be considered by this court together with any appeal taken from a final judgment on the merits.'") (quoting Obin).

We have observed . . . that the problem of fragmented appeals in cases calling for an award of attorney's fees may be obviated if trial judges enter but one judgment after

determining all issues in a case, including the merits of the action and any claim for attorney's fees.

See also Ann. Manual Complex Lit. § 24.222 (3d. ed. 2003) (“Prompt filing of [attorney’s fees] motions . . . affords the court an opportunity to rule on the application while the services are still fresh in mind, and allows an appeal to be taken at the same time as an appeal on the merits.”); Ross v. 311 N. Central Ave. Bldg. Corp., 130 Ill.App.2d 336, 342, 264 N.E.2d 406, 410 (1st Dist. 1970) (award of attorney’s fees set forth in same decree as final judgment by circuit court below).

161. The Court finds that Class counsel has rendered a beneficial service to all of the Class in filing and prosecuting this lawsuit and is entitled to compensation for attorneys fees’ and expenses. In addition to the verified application, Class counsel also presented Charles Chapman as an expert witness in this case to give opinions regarding attorneys’ fees. This Court finds that the percentage-of-the-fund method is the appropriate method of determining fees in this case. See Brundidge v. Glendale Federal Bank, F.S.B., 659 N.E.2d 909, 213 Ill.Dec. 563 (Ill. 1995); Court Awarded Attorneys Fees, Third Circuit Report, 108 F.R.D. 237 (1985); In the Matter of Continental Illinois Securities Litigation, 962 F.2d 566, 572 (7th Cir. 1992); In the Matter of Synthroid Marketing Litigation, 264 F.3d 712, 718 (7th Cir. 2001).

162. Having determined that the percentage-of-the-fund is the appropriate method for determining attorneys’ fees in this case, this Court must now consider the appropriate percentage. In In the Matter of Continental Illinois Securities Litigation, the Court noted that Class counsel are entitled to the fee they would have received had they handled a similar suit, with a similar outcome, for a paying client on a contingent fee basis. In the Matter of Continental Illinois Securities Litigation, 962 F.2d at 572. Other common fund cases confirm that a requested attorneys fee of 20 to 35% is within the range of reasonable. See, e.g., Spicer v. Chicago Board Options Exchange,

Inc., 844 F.Supp. 1226, 1252 (N.D. Ill. 1993) (court found the award of fees in the amount of 29% of the settlement to be within the “normal” range of attorneys’ fees allowed in class actions of that type; based on its own independent research, the court concluded that fee awards typically range from 20% to 50%, and most often constitute 20% to 30% of the fund); Ryan v. City of Chicago, 654 N.E.2d 483, 491, 211 Ill.Dec. 21, 29 (Ill.App. 1 Dist. 1995)(court upheld the district court’s award of attorneys’ fees calculated at 33_% of the settlement fund); Gaskill v. Gordon, 1995 WL 746091, 3 (N.D. Ill) (court found that case law indicates that the majority of class action fee awards fall between 20% and 30%); In re Abbott Laboratories Securities Litigation, 1995 WL 792083, 11, 18 (N.D. Ill.) (court adopted the Special Master’s report which concluded that the \$10 million fee calculated as just over 30% of the total recovery falls within a reasonable range of percentage-of-recovery fee awards in class action cases); Florin v. Nationsbank of Georgia, N.A., 60 F.3d 1245, 1248-49 (7th Cir. 1995) (Florin II) (court found that an award of approximately 18.5% of the total settlement fund of \$15.5 million was below that typically awarded under the percentage approach in cases with common funds of similar size); Camden I Condominium Association, Inc. v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991) (court found that the majority of common fund fee awards fall between 20% to 30% of the fund); Harmon v. Lyphomed, 787 F.Supp. 772, 772-74 (N.D. Ill. 1992) (Harman III) (on remand, the court awarded attorneys’ fees in the amount of 20% of the \$9.9 million settlement fund); Mashburn v. National Healthcare, Inc., 684 F.Supp. 679, 692 (M.D. Ala. 1988) (court indicated that the majority of common fund fee awards fall between 20% to 30% of the fund); In re Dun & Bradstreet, 130 F.R.D. 366, 372 (S.D. Ohio 1990) (commenting that the percentages awarded typically ranging from 20 to 50 percent of the common fund created). Judge Chapman also presented testimony that, in his opinion, 20 to 30% of the common fund was an appropriate range

for attorneys' fees and reimbursement of costs in class action cases.

163. This Court has presided over this entire case and conducted extensive hearings with the parties over a period of nearly three years. As a result of the numerous pre-trial proceedings, the court is very familiar with the efforts that were put forth in the prosecution of this case, as well as the complexity of the legal issues. This Court finds that Class counsel took extreme risk in the prosecution of this case, devoting an enormous amount of time and expense without any guarantee of compensation. This Court further finds that this case presented highly complex questions of law and fact, requiring attorneys with extensive skill and experience in complex litigation. The work undertaken by Class counsel and the costs expended in pursuit of this litigation were done so on a purely contingent basis. The large expenditure of costs and the large commitment of attorney and staff time created a very significant risk for Class counsel. Through its efforts, Class counsel has conferred an enormous benefit to the Class.

164. Based on the evidence put forth, and in light of its knowledge of the complexity of the issues presented in this lawsuit, the Court finds that an attorney's fee and cost reimbursement of twenty-five percent (25%) of the compensatory damages awarded in this case is fair and reasonable. However, there will be no award for attorneys' fees on the punitive award in this matter.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the Plaintiffs in this Illinois Consumer Fraud Act Class Action shall recover from Defendant Philip Morris the sum of \$7.1005 billion in compensatory damages.
2. That Philip Morris is ordered to pay punitive damages in the amount of three billion dollars (\$3 billion). The entire amount of punitive damages is awarded to the State of Illinois.
3. That the Verified Application of Class Counsel for an Award for Attorneys' Fees upon

Entry of Judgment and Verdict is GRANTED in the amount of twenty-five percent (25%) of the compensatory award of \$7.1005 billion.

4. That the Court reserves continuing jurisdiction over this action to enforce all provisions of this judgment and to administer and distribute the judgment award among the Class members, based upon appropriate proof of Class membership and claims and to oversee the distribution of all unclaimed funds as provided in Par. 7 hereinbelow.

5. Judgment is entered in the amount of \$11,384.77 in favor of Plaintiff Sharon Price, plus all costs of suit.

6. Judgment is entered in the amount of \$17,811.64 in favor of Plaintiff Michael Fruth, plus all costs of suit.

7. That in the event there should remain unclaimed funds in the compensatory award rendered herein; then, under the Doctrine of Cy Pres, all said unclaimed funds, when so finally determined by this Court, hereby, are ordered then to be distributed to the following institutions through the Illinois Bar Foundation. Whereupon, the Illinois Bar Foundation is, hereby, appointed to receive, account, protect and so distribute said funds. The distribution of these funds is ordered as follows:

(1) Three percent (3%) to each of the following Law Schools for enhancing studies concerned with the protection of the consumer and with other socio-economic areas of law. Said funds may also be used for providing financial assistance to needy law students.

(The total of this award is thirty-three percent (33):

Washington University (St. Louis) School of Law
St. Louis University School of Law
University of Illinois College of Law

Southern Illinois University School of Law
Northern Illinois University College of Law
Northwestern University School of Law
University of Chicago Law School
John Marshall School of Law
Chicago – Kent College of Law (I.I.T.)
DePaul University College of Law
Loyola University Chicago School of Law

- (2.) Six percent (6%) to the American Cancer Society for Research in tobacco related cancers.
- (3.) Three percent (3%) to all domestic violence programs in the State of Illinois.
- (4.) Three percent (3%) to all of the Drug Court programs throughout the State of Illinois.
- (5.) Three percent (3%) to each of the following Legal Aid Services in the State of Illinois (all three being not-for-profit corporations):
 - Land of Lincoln Legal Assistance Foundation, Inc.
 - Prairie State Legal Services
 - Legal Assistance Foundation of Metropolitan Chicago
- (6.) The remaining funds, being forty-six percent (46%) to the Illinois Bar Foundation for costs that may be incurred in administering the above awards for its own charitable purposes which are statewide and which this Court endorses.
- (7.) In keeping with its position regarding any appeal, as stated in Par. 160, hereinabove, this Order is also a final appealable order.
8. That Defendant's request for stay of execution of this Judgment is allowed for a period

of thirty (30) days from the entry of this Order. Thereafter, enforcement of the Judgment will be stayed only if an appeal bond is presented and approved pursuant to Supreme Court Rule 305. Bond is set in the amount of twelve billion dollars (\$12 billion).

9. All other motions filed by Defendant on March 14, 2003, are denied.

10. That when and as funds become available for the distribution of claims, they will be processed, through primary facilities established in Edwardsville, Illinois, and secondary facilities in Chicago, Illinois with the costs of these facilities coming out of the attorney's fees herein awarded.

So Ordered.

The Clerk is directed to mail copies of this Order to Counsel of Record.

Entered this 21st day of March, 2003.


NICHOLAS G. BYRON
Circuit Judge