

**MISSOURI CIRCUIT COURT**  
**TWENTY-SECOND JUDICIAL CIRCUIT**  
(St. Louis City)

DAYNA CRAFT (withdrawn), DEBORAH LARSEN and WENDI ALPER-PRESSMAN, et al., Individually and on Behalf of All Others Similarly Situated, Plaintiffs

**VS**

PHILIP MORRIS USA INCORPORATED, Defendant.

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CASE NO. 22002-00406-02      DIVISION 6      DATE: September 2, 2011

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**COURT ORDER on DEFENDANT’S MOTIONS IN LIMINE**

On August 23, 2011, various motions filed by Defendant on August 5, 2011, were heard and submitted, to-wit: Philip Morris USA Inc.’s Motion *in Limine* to Preclude Evidence and Argument Concerning Past Proceedings Regarding Dr. Errol Zeiger (filed under seal); Philip Morris USA Inc.’s Motion *in Limine* to Exclude Evidence and Argument Concerning Alleged Misconduct Unconnected to Lights Claim; Philip Morris USA Inc.’s Motion *in Limine* to Preclude “Non-PM USA” Documents, Statements, and Testimony; Philip Morris USA Inc.’s Motion *in Limine* for the Adoption of Procedures to Preclude Plaintiffs From Requesting an Excessive Amount of Punitive Damages; Philip Morris USA Inc.’s Motion *in Limine* to Preclude Financial Resource Evidence; Philip Morris USA Inc.’s Motion *in Limine* to Exclude Evidence and Argument Concerning Section 537.675, Mo. Rev. Stat.; Philip Morris USA Inc.’s Motion *in Limine* to Exclude Evidence and Argument Concerning Judicial Decisions, Findings, and Court Filings Made in Other Lawsuits Against PM USA; Philip Morris USA Inc.’s Motion *in Limine* to Exclude Findings of Alleged Deception by Non-Judicial Bodies or Foreign Governments; Philip Morris USA Inc.’s Motion *in Limine* to Preclude Evidence and Argument Concerning Nicotine Toxicity; Philip Morris USA Inc.’s Motion *in Limine* to Preclude Marketing or Consumer Perception Testimony From Dr. William Farone; Philip Morris USA Inc.’s Motion to Compel Disclosure of Trial Exhibits for Dr. William Farone; Philip Morris USA Inc.’s Motion *in Limine* to Preclude Evidence and Argument That This Case Is the Only Opportunity to Bring a Case Against Philip Morris USA Inc.; and Philip Morris USA Inc.’s Motion *in Limine* to Exclude References to “Big Tobacco” and Similar Terms.

Upon its review of the proceedings and briefs filed by the parties, the Court now rules as follows:

By agreement of the parties at oral argument, Philip Morris USA Inc.’s Motion *in Limine*

to Preclude Evidence and Argument Concerning Past Proceedings Regarding Dr. Errol Zeiger (filed under seal) is sustained.

Philip Morris USA Inc.'s Motion *in Limine* to Exclude Evidence and Argument Concerning Alleged Misconduct Unconnected to Lights Claim seeks to exclude evidence and reference to its alleged misconduct relating to (1) its fraudulent denial that smoking generally is addictive and causes diseases, (2) an alleged conspiracy with other tobacco companies and organizations, (3) its targeted youth marketing, (4) document destruction, and (5) the number of deaths caused by smoking. Defendant argues that these topics are irrelevant to the issues in this case or, if relevant, their prejudice outweighs any marginal relevancy.

Defendant acknowledges that even though liability can only be predicated on representations that were made during the 1995 – 2003 class period, evidence from outside the class period may be relevant and admissible if it bears on those representations. Plaintiffs add that they have never asserted (and do not now) that conspiracy, document destruction or youth marketing, for example, are theories upon which they seek recovery. To the extent that the objected to evidence will be offered, they recognize that they must and assert they can connect it to their allegations concerning Marlboro Lights. In short, Plaintiffs assert that some of this evidence is necessary to put Defendant's conduct and Plaintiffs' allegations in context and that other of such evidence is relevant to form the basis for their experts' opinions.

The Court recognizes that an important consideration in this case could be what Defendant knew (in comparison with the **public** health community) and when it knew it and what and when it said it (or didn't say when it arguably should have). Plaintiffs claim that Defendant's allegedly fraudulent historical denials of the ill effects of smoking (as well as the number of annual deaths therefrom) is material to Defendant's offering (and marketing) of a "lowered tar and nicotine" alternative (i.e. Marlboro Lights). The "conspiracy" evidence may also be material to this issue as well as the extent to which Defendant might go in their misrepresentations. It does not, however, form any independent basis of liability. To the extent that product pricing is relevant to any damages model, testimony regarding any strategic pricing determination as opposed to a truly competitive market pricing determination may also be material. While youth marketing is also not an independent basis for liability, it, in the very least, could form the basis for an expert opinion on relevant consumer perception. At this time, the Court fails to see how evidence of the destruction of some unknown document(s) is, in and of itself, material or relevant without a foundation from an expert or otherwise that would tie it to any issues in this case.

Except for the issue of document destruction, this motion is overruled – which is **not** to say that **every** document or statement or **all** testimony related to these issues **is** admissible. Defendant's further objections to the words associated with conspiracy claims: cartel, conspiracy, conspire, enterprise are denied as vague and overbroad although any such reference to Defendant must not be made in a manner designed to appeal to the prejudice, passions or sympathy of the jury. Any counsel may, of course, fairly comment on the evidence adduced or on those matters

properly seen by the jury.

In the related (but not identical) Philip Morris USA Inc.'s Motion *in Limine* to Preclude "Non-PM USA" Documents, Statements, and Testimony, Defendant seeks to prevent the introduction of these types of items from other non-party tobacco manufacturers as being irrelevant to Plaintiffs' claim against it in that there is no allegation or suggestion that Defendant knew anything about these documents or that they influenced it in any way in connection to its marketing of Marlboro Lights or effected its understanding of the way its consumers perceived the product.

Plaintiffs respond that not all of the documents on the exhibit list and envisioned by the motion will be introduced at trial and that they are not trying to hold Philip Morris liable for what a different tobacco company knew. However, what other tobacco companies knew which then became available to the scientific community and upon which changed their recommendation relating to Marlboro Lights seems to this Court to be material to this case. Other third party documents may also form at least part of the foundation for appropriate expert testimony relating to relevant consumer perceptions in this case. Motion denied.

In Philip Morris USA Inc.'s Motion *in Limine* for the Adoption of Procedures to Preclude Plaintiffs From Requesting an Excessive Amount of Punitive Damages, Defendant seeks to preclude Plaintiffs from mentioning any amount of punitive damages they may wish to seek in all portions of Phase 1 of the trial (Phases 1 and 2 were defined by this Court's 7/21/11 ORDER ON PLAINTIFFS' TRIAL PLAN AND DEFENDANT PHILIP MORRIS USA INCORPORATED'S PROPOSED TRIAL PLAN) and to require Plaintiffs to notify it and the Court of its intentions on this topic prior to Phase 2 of the trial. This motion is granted in part and denied in part. Regarding Phase 1, Plaintiffs are ordered precluded from mentioning the amount of punitive damages **that they will actually seek** in Phase 2 but they **will be allowed – they must be allowed** – to make inquiry of the potential jurors during oral voir dire regarding any prejudices those jurors may have regarding specific dollar amounts, provided such inquiry is made as a general proposition or a non-committing hypothetical question. During oral argument Plaintiffs acknowledged (though not in these terms) the almost self-regulating observation frequently made by this Court that often in trial "pigs get fat and hogs get slaughtered" (i.e. the high likelihood that if a plaintiff asks for significantly more than is justified under the evidence he runs the serious risk of alienating the jury to the extent that they deny the claim altogether). Defendant's motion regarding Phase 2 is denied at this time.

Philip Morris USA Inc.'s Motion *in Limine* to Preclude Financial Resource Evidence seeks to preclude evidence or argument "concerning" its financial resources in **either** of the two phases of the trial. Of course, evidence of wealth and the financial ability to pay is not, barring some other determination of relevance (see Section 510.263(2) RSMo), admissible in Phase 1. In this regard, Plaintiffs assert that there is economic data of Defendant's (sales, for example) that

goes to show Defendant's motive for its allegedly fraudulently deceptive marketing<sup>1</sup> and there may be economic data (of a sort) used, directly or indirectly, to establish damages.

With respect to Phase 2, as in the previously tried City Tobacco<sup>2</sup> case, the Court has some concern that the various financial metrics on which Plaintiffs' witnesses may wish to opine are a true and fair measure of Defendant's financial condition and/or ability to pay punitive damages. Consequently, prior to the offering of opinions on these topics other than Defendant's net worth, any tendered witness on these topics will be required to lay a foundation outside of the hearing of the jury (a sufficiently complete affidavit **could** perform this function) as to how such financial metric is, in whole or in part, a true and fair measure of the particular financial condition and/or ability to pay punitive damages of the particular party.

Philip Morris USA Inc.'s Motion *in Limine* to Exclude Evidence and Argument Concerning Section 537.675, Mo. Rev. Stat. is sustained.

The Court believes that Philip Morris USA Inc.'s Motion *in Limine* to Exclude Evidence and Argument Concerning Judicial Decisions, Findings, and Court Filings Made in Other Lawsuits Against PM USA and Philip Morris USA Inc.'s Motion *in Limine* to Exclude Findings of Alleged Deception by Non-Judicial Bodies or Foreign Governments can be handled here together as they, in very great part, involve the same judicial considerations. In each of these motions, Defendant tells the Court that essentially all they are trying to accomplish is to preclude Plaintiffs from introducing these documents into substantive evidence in Plaintiffs' case-in-chief. In this limited context, Plaintiffs agree that these documents are inadmissible hearsay so these motions (within these limited contexts) are, hereby, sustained. That said, this Court does not believe that this ruling resolves all considerations concerning the potential use of these documents (or portions thereof) in trial.

It is clear that experts can rely on documents, data or testimony as bases for their expert opinions **if** such are of the type relied upon by experts in the field **and** are otherwise reasonably reliable **even though** they **may** not be admissible. Further, wide latitude is given in cross-examination of expert witnesses regarding their reliance materials and, of course, once a subject

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<sup>1</sup> In order for such evidence to have probative value, the financial information Plaintiffs adduce should have some relation to an issue in the case. If, for example, the offered evidence bears on proof of a motive to misrepresent the product, the evidence should have some relation to the misrepresentations at issue. By way of example (but not limitation): financial information as to the sales of Lights compared to Reds or sales or profit information from before and after Lights cigarettes were introduced to the market could show that the misrepresented cigarettes had greater sales or profitability. With respect to the latter, presumably, a portion of Lights cigarettes consumers were formerly Reds consumers so the profits from Lights were "stolen" or "borrowed" from profits already generated by the sale of Reds – this information could reveal the extent that the misrepresentations may have actually generated profits for Defendant and accordingly, Defendant's motive for making the misrepresentations at issue.

<sup>2</sup> City of St. Louis, et al. v. American Tobacco Co., et al. (Cause # 22982-09652) tried before this Court earlier this calendar year – verdicts for Defendants not appealed.

is opened up in cross-examination, re-direct examination may then respond (**even if** the subject was originally forbidden territory on direct). As this Court cannot envision (at least for now in the admittedly limited scope of its knowledge of the particulars of either party's case) a situation where such a document may, in part, form the basis of an expert's legitimate opinion, it certainly cannot predict the manner in which it may arise. In this regard, the Court strongly suggests that the parties re-raise these considerations in advance of the direct, cross or re-direct of a particular witness in such a manner and at such a time as a more timely discussion can be had thereon with an eye to not disrupting the proceedings during normal business hours (i.e. when the jury is present and available for "work").

Philip Morris USA Inc.'s Motion *in Limine* to Preclude Evidence and Argument Concerning Nicotine Toxicity is denied. This evidence appears to this Court to be relevant at least to the materiality of the alleged deceptive practices. In other words, how could the allegedly deceptive marketing of lower tar and nicotine be material if not for the ill health effects of these substances. Further, the jury is fully capable of understanding the arguably factual counter points raised by Defendant in its brief (witness Defendants' verdicts in the recently concluded City Tobacco case).

Philip Morris USA Inc.'s Motion *in Limine* to Preclude Marketing or Consumer Perception Testimony From Dr. William Farone is granted in part and denied in part. As Dr. Farone has indicated that he is not a marketing expert and Plaintiffs have indicated no intent to call him as such, Defendant's motion in this regard is sustained. That said, as a former employee of high standing with Defendant, he may, of course, testify as a fact witness on topics within his knowledge that may touch on this topic. Further, Dr. Farone may testify as an expert in those areas noticed to Defendant and upon proper foundation.

There appears to be no reason to rule on Philip Morris USA Inc.'s Motion to Compel Disclosure of Trial Exhibits for Dr. William Farone as the parties have stipulated that they will exchange exhibit lists three (3) days prior to the witness's testimony and Plaintiffs have committed here to doubling same.

Philip Morris USA Inc.'s Motion *in Limine* to Preclude Evidence and Argument That This Case Is the Only Opportunity to Bring a Case Against Philip Morris USA Inc. is denied although Plaintiffs must not infer that the jury should, therefore, award them monies for potential claims other than those that are the subject of this action (e.g. those for potential personal injuries not yet discovered but that may accrue hereafter).

And finally, Philip Morris USA Inc.'s Motion *in Limine* to Exclude References to "Big Tobacco" and Similar Terms is, also, denied although any such reference to Defendant must not be made in a manner designed to appeal to the prejudice, passions or sympathy of the jury. Any counsel may, of course, fairly comment on the evidence adduced or on those matters properly seen by the jury.

The Court is mindful that the rulings herein are interlocutory and that if circumstances or

evidence relating hereto change so as to alter the propriety of these rulings, the Court directs the respective parties to hereafter raise them out of the hearing of the jury and in a time and manner sufficient to allow a review thereof. Also, when and where Defendant's motions involve challenges to Plaintiffs' experts (either as to qualification or the substance of said testimony), this Court has reviewed same in light of the statutory prerequisites for expert opinions pursuant to Section 490.065, RSMo and has, also, reviewed and followed the principles enunciated in State Board of Registration for the Healing Arts v. McDonagh, 123 S.W.3d 146 (Mo. Banc 2003) and its progeny. Further, the Court notes (although it probably need not do so) that Plaintiffs will need to lay a proper foundation for the admission of any of the opinions offered by the witnesses affected by these motions that have not been precluded by this ORDER.

**SO ORDERED:**

Michael P. David,  
Judge

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