

A05-1359

State of Minnesota
In Court of Appeals

Michael S. Dahl and David Scott Huber, Individually,
and on Behalf of All Others Similarly Situated,

Appellants;

v.

R.J. Reynolds Tobacco Company and
R.J. Reynolds Tobacco Holdings, Inc.,

Respondents.

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TABLE OF CONTENTS

I. RJR’s FACTUAL STATEMENTS ARE CONTRARY TO THE STANDARD OF REVIEW AND THE RECORD BEFORE THIS COURT 1

 A. This Court must accept facts of Complaint as true. 1

 B. FTC has never regulated the cigarette industry’s use of the descriptors “light” or lower tar and nicotine. 3

II. RJR’s EXPRESS PREEMPTION ARGUMENT IS BASED ON A MISINTERPRETATION OF CIPOLLONE AND A MISREADING OF PLAINTIFFS’ COMPLAINT 7

 A. The legal test to determine whether a claim is preempted is to determine whether the predicate legal duty is generally applicable or whether it specifically targets the cigarette industry 7

 1. Minnesota’s consumer protection laws apply equally to all commercial actors 7

 2. RJR’s argument is in accord with the Cipollone dissent 8

 B. Plaintiff’s allegations should not be recharacterized to assert claims that are not advanced in Plaintiffs’ complaint as RJR argues. 10

 1. Read in context, Plaintiffs’ claims are precisely the type of fraudulent misrepresentation claims that Cipollone held were not preempted. 10

 2. Plaintiffs’ lawsuit is not a products liability lawsuit. 11

 C. Cipollone does not distinguish between claims involving express and implied representation. 13

III. THERE IS NO BASIS TO AFFIRM ON THE ALTERNATIVE GROUND OF IMPLIED PREEMPTION. 15

 A. Cipollone holds there is no implied preemption. 15

 B. Congress did not intend to permit FTC to preempt state law except by direct conflict with validly enacted FTC Rules. 16

C. Compliance with both state and federal law is not a physical impossibility; there is no implied preemption. 20

D. Plaintiffs' claims do not stand as an obstacle to any federal purpose. . . . 21

CONCLUSION 23

TABLE OF AUTHORITIES

Statutes:

15 U.S.C. § 57a (1982)	6
15 U.S.C. § 57b(e)	17, 19
15 U.S.C. § 1331	21
15 U.S.C. § 1336	17, 19

Cases:

<u>American Financial Services v. FTC,</u> 767 F.2d 957 (2d Cir. 1979)	17
<u>Atascadero State Hospital v. Scanlon,</u> 473 U.S. 234 (1985)	22
<u>Barnett Bank of Marion County, N.A. v. Nelson,</u> 517 U.S. 25 (1996)	21
<u>Barton v. Moore,</u> 558 N.W.2d 746 (Minn.1997)	1
<u>Brown v. Brown & Williamson Tobacco Corp.,</u> 479 F.3d 383 (5th Cir. 2007)	14
<u>Burton v. R.J. Reynolds Tobacco Co.,</u> 884 F. Supp.1515 (D. Kan. 1995)	15
<u>Cipollone v. Liggett Group, Inc.,</u> 505 U.S. 504 (1992)	7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 22
<u>Commodity Futures Trading Comm'n v. Hanover Trading Corp.,</u> 34 F. Supp. 2d 203 19 (S.D.N.Y. 1999)	20
<u>Consumers Grain Co. v. Wm. Lindeke Roller Mills,</u> 153 Minn. 231, 190 N.W. 65 (1922)	10

<u>Falise v. American Tobacco Co.</u> , 94 F. Supp. 2d 316 (E.D.N.Y. 2000)	16
<u>Fed. Trade Comm'n v. Brown & Williamson Tobacco Corp.</u> , 778 F.2d 35 (D.C. Cir. 1985)	5, 6
<u>Forster v. R.J. Reynolds Tobacco Co.</u> , 437 N.W.2d 655 (Minn. 1989)	11, 12, 14
<u>Freightliner Corp. v. Myrick</u> , 514 U.S. 280 (1995)	15, 18, 20
<u>Gen. Motors Corp. v. Abrams</u> , 897 F.2d 34 (2nd Cir. 1990)	20
<u>Gerrity v. R.J. Reynolds Tobacco Co.</u> , 399 F. Supp. 2d 87 (D. Conn. 2005)	8
<u>Gregory v. Ashcroft</u> , 501 U.S. 452 (1991)	22
Henningfield WD, 56:8-11, 449 F. Supp. 2d	5
<u>Hillsborough County v. Automated Med. Labs.</u> , 471 U.S. 707 (1985)	17
<u>In re Simon II Litig.</u> , 211 F.R.D. 86 (E.D.N.Y. 2002)	14
<u>Izzarelli v. R.J. Reynolds Tobacco Co.</u> , 117 F. Supp. 2d 167 (D. Conn. 2000)	12
<u>Johnson v. Brown & Williamson Tobacco Co.</u> , 122 F. Supp. 2d 194 (D. Mass. 2000)	12
<u>Kellogg Co. v. Mattox</u> , 763 F. Supp. 1369 (N.D. Tex. 1991)	19
<u>Lorillard Tobacco Co. v. Reilly</u> , 533 U.S. 525 (2001)	8

<u>Falise v. American Tobacco Co.</u> , 94 F. Supp. 2d 316 (E.D.N.Y. 2000)	16
<u>Fed. Trade Comm'n v. Brown & Williamson Tobacco Corp.</u> , 778 F.2d 35 (D.C. Cir. 1985)	5, 6
<u>Forster v. R.J. Reynolds Tobacco Co.</u> , 437 N.W.2d 655 (Minn. 1989)	11, 12, 14
<u>Freightliner Corp. v. Myrick</u> , 514 U.S. 280 (1995)	15, 18, 20
<u>Gen. Motors Corp. v. Abrams</u> , 897 F.2d 34 (2nd Cir. 1990)	20
<u>Gerrity v. R.J. Reynolds Tobacco Co.</u> , 399 F. Supp. 2d 87 (D. Conn. 2005)	8
<u>Gregory v. Ashcroft</u> , 501 U.S. 452 (1991)	22
<u>Henningfield WD</u> , 56:8-11, 449 F. Supp. 2d	5
<u>Hillsborough County v. Automated Med. Labs.</u> , 471 U.S. 707 (1985)	17
<u>In re Simon II Litig.</u> , 211 F.R.D. 86 (E.D.N.Y. 2002)	14
<u>Izzarelli v. R.J. Reynolds Tobacco Co.</u> , 117 F. Supp. 2d 167 (D. Conn. 2000)	12
<u>Johnson v. Brown & Williamson Tobacco Co.</u> , 122 F. Supp. 2d 194 (D. Mass. 2000)	12
<u>Kellogg Co. v. Mattox</u> , 763 F. Supp. 1369 (N.D. Tex. 1991)	19
<u>Lorillard Tobacco Co. v. Reilly</u> , 533 U.S. 525 (2001)	8

<u>Falise v. American Tobacco Co.</u> , 94 F. Supp. 2d 316 (E.D.N.Y. 2000)	16
<u>Fed. Trade Comm'n v. Brown & Williamson Tobacco Corp.</u> , 778 F.2d 35 (D.C. Cir. 1985)	5, 6
<u>Forster v. R.J. Reynolds Tobacco Co.</u> , 437 N.W.2d 655 (Minn. 1989)	11, 12, 14
<u>Freightliner Corp. v. Myrick</u> , 514 U.S. 280 (1995)	15, 18, 20
<u>Gen. Motors Corp. v. Abrams</u> , 897 F.2d 34 (2nd Cir. 1990)	20
<u>Gerrity v. R.J. Reynolds Tobacco Co.</u> , 399 F. Supp. 2d 87 (D. Conn. 2005)	8
<u>Gregory v. Ashcroft</u> , 501 U.S. 452 (1991)	22
Henningfield WD, 56:8-11, 449 F. Supp. 2d	5
<u>Hillsborough County v. Automated Med. Labs.</u> , 471 U.S. 707 (1985)	17
<u>In re Simon II Litig.</u> , 211 F.R.D. 86 (E.D.N.Y. 2002)	14
<u>Izzarelli v. R.J. Reynolds Tobacco Co.</u> , 117 F. Supp. 2d 167 (D. Conn. 2000)	12
<u>Johnson v. Brown & Williamson Tobacco Co.</u> , 122 F. Supp. 2d 194 (D. Mass. 2000)	12
<u>Kellogg Co. v. Mattox</u> , 763 F. Supp. 1369 (N.D. Tex. 1991)	19
<u>Lorillard Tobacco Co. v. Reilly</u> , 533 U.S. 525 (2001)	8

Marquette Nat'l Bank v. Norris,
270 N.W.2d 290 (Minn. 1978) 1

Martens v. Minnesota Mining & Mfg. Co.,
616 N.W.2d 732 (Minn. 2000) 2

Pepin v. W.H. Brady Co.,
372 N.W.2d 369 (Minn. Ct. App. 1985) 12

Philip Morris, Inc. v. Harshbarger,
122 F.3d 58 (1st Cir. 1997) 15

Price v. Philip Morris, Inc.,
848 N.E.2d 1 (Ill. 2005) 20

Ray v. Atlantic Richfield Co.,
435 U.S. 151 (1978) 22

Smisek v. Comm'r of Pub. Safety,
400 N.W.2d 766 (Minn. Ct. App. 1987) 4

Sprietsma v. Mercury Marine,
537 U.S. 51 (2002) 18

State v. Amoco Oil Company,
293 N.W.2d 487 (Wis. 1980) 17

United States v. Phillip Morris USA, Inc.,
449 F. Supp. 2d 1 (D.D.C. 2006) 1, 2, 3, 4, 14

Watson v. Philip Morris Co.,
420 F.3d 852 (8th Cir. 2005) 14

Whiteley v. Philip Morris, Inc.,
117 Cal. App. 4th 635 (2004) 15

Wright v. Brooke Group Ltd.,
114 F. Supp. 2d 797 (N.D. Iowa 2000) 15

Rules:

64 Fed. Reg. 43,255 (1999) 17

Minn. R. Evid. 201 4

Notice of a Proposed Rulemaking Advertising of Cigarettes, 35 Fed. Reg. 12,671,
12,671 (1970) 5

Trade Regulation Rule under Section 18 of the FTC Act,
15 U.S.C. Section 57a (1982) 5

FTC, Cigarette Testing: Requests for Public Comment, 62 Fed. Reg. at 48, 163 6

Constitution

Minnesota Constitution, Art I, section 8 17

Other Authorities:

Federal Trade Commission, Report of Congress, Appendix C,
December 31, 1970 5

FTC, Cigarette Testing: Request for Public Comment,
62 Fed. Reg. 48 (Sept. 12, 1997) 5, 6

5A Minn. Prac. Methods of Practice 6.48,
(3d ed. 2006) 12

FTC, Cigarette Testing: Requests for Public Comment, 62 Fed. Reg. at 48, 163
..... 6

I. RJR's FACTUAL STATEMENTS ARE CONTRARY TO THE STANDARD OF REVIEW AND THE RECORD BEFORE THIS COURT.

A. This Court must accept facts of Complaint as true.

RJR voluntarily marketed cigarettes to consumers as “light” and as providing lowered tar and nicotine than regular cigarettes. (A. 26-28). Such representations are false and misleading. Id. RJR contends it has never made any representations that Winston Lights or Camel Lights are safer or produce less adverse health effects than Winston or Camel regular brand cigarettes. (Respondents Brief p. 5-6). It states with no record citation that “undisputed consumer survey evidence” shows that a substantial percentage of “lights” smokers believe that “lights” cigarettes are *not* healthier than regular cigarettes. RJR’s statements are disingenuous in light of its own survey information and the findings recently made against it in the federal government’s RICO action. See United States v. Phillip Morris USA, Inc., 449 F. Supp. 2d 1 (D.D.C. 2006)(“RICO Action”).

RJR’s lack of candor is compounded here when it ignores the Minn. R. Civ. Proc. 12.02 standard.¹ In reviewing Rule 12 dismissal cases, the question is solely whether the complaint sets forth a legally sufficient claim for relief. Barton v. Moore, 558 N.W.2d 746, 749 (Minn.1997). A reviewing court must accept the facts of the complaint as true and construe all reasonable inferences in favor of the nonmoving party. Marquette Nat'l Bank v. Norris, 270 N.W.2d 290, 292 (Minn. 1978). A claim must prevail against a

¹ The trial court dismissed this case looking solely to the allegations of Plaintiffs’ Complaint. (A. 13-22).

dismissal motion if it is possible to grant the demanded relief on any evidence that might be produced consistent with complainant's theory. Martens v. Minnesota Mining & Mfg. Co., 616 N.W.2d 732, 739-40 (Minn. 2000). It is "immaterial whether or not the plaintiff can prove the facts alleged." Id. at 739. Applying these standards requires reversal here.

A review of the RICO Action findings establishes two things: 1) RJR's willingness to offer unfounded statements as undisputed fact and 2) the relief sought here is available based upon Minnesota consumer protection statutes and the available existing evidence supporting those allegations. In RICO Action, the court found that RJR had "marketed and promoted their low tar brands as being less harmful than conventional cigarettes" and that such claim was false. RICO Action, 449 F. Supp. 2d 430, Finding ("F.") 2023. The court also found that RJR used brand descriptors such as "light" to communicate reassuring messages that these are healthier cigarettes. Id., F. 2024. While doing so, RJR either lacked evidence to substantiate its claims or knew them to be false. Id. at 430-431, F. 2025. The court found:

- RJR's internal documents show that it has had evidence for a long time that low tar cigarettes are no safer than regular cigarettes. Id. at 458, F. 2159.
- RJR was fully cognizant that smokers of its purportedly light cigarettes did not receive any reduction in tar and nicotine. Id. at 235, F. 976; at 339, F. 1515; at 437, F. 2066; at 467, F. 2201.
- An April 1974 "Qualitative Consumer Evaluation for four Winston Lights Positionings" noted that those who liked Winston Lights believed low tar cigarettes were a 'safe' cigarette. Id. at 481, F. 2262.
- A 1979 study prepared for RJR, "An Exploratory Study of Smokers' Comprehension of and Reaction to Several Proposed Winston Lights Campaigns," noted that with respect to one of the Winston Lights advertisements, consumers

typically reported that they understood the advertisement to mean: “A low tar cigarette that tastes good, is satisfying and safer.” Id. at 534, F. 2501.

- Internal RJR documents show that it knew and intended its advertisements and marketing for low tar cigarettes, featuring “light” and “ultra light” brand descriptors, contributed to and reinforced consumers’ belief that low tar cigarettes are better for their health and caused consumers to smoke them for this reason. Id. at 535, F. 2504.

That court concluded RJR knew there was no clear health benefit from smoking low tar/nicotine cigarettes; knew many smokers were concerned about the health effects of smoking and would trade flavor for reassurance that their brands carried lower health risks; and that health claims made about low tar cigarettes became a reason to not quit smoking. Id. at 560, F. 2627-2629. Despite this knowledge, RJR extensively – and successfully – marketed and promoted its low tar/light cigarettes as less harmful alternatives to full-flavor cigarettes. Id.

The RICO Action’s factual findings demonstrate that ample evidence is available to support Plaintiffs’ consumer fraud claims in this action. RJR’s attempt to deflect the consumer fraud allegations by asserting that “whatever this case may be about, it is not about claims of misrepresentation of material fact” fails.

B. FTC has never regulated the cigarette industry’s use of the descriptors “light” or lower tar and nicotine.

The trial court ordered this action dismissed on express preemption grounds, concluding the FCLAA preempted each cause of action. (A. 22-23) The trial court did not conclude Plaintiffs’ claims were impliedly preempted by FTC rule or regulation nor did it address, in any respect, FTC’s purported involvement. Because RJR’s motion on

implied preemption was premised on matters outside the pleadings and Plaintiffs' countered with relevant affidavit testimony and documents, such a decision would have been based on a summary judgment standard. Plaintiffs, as a non-moving party, are entitled to a view of the facts of record in a light most favorable to them. RJR does not so present on appeal.

In its brief, RJR has misconstrued FTC's role relative to the use of the descriptors "light" and lower tar and nicotine to support its preemption arguments. RJR would have this Court believe its use of deceptive descriptors is somehow permitted by law or FTC regulation. This is incorrect. In the RICO Action, the United States presented evidence demonstrating "the FTC has never taken an official position on the use of descriptors [such as light and lower tar] and has never defined or recognized the descriptors used by cigarette manufacturers in their advertisement."² (Supplemental Appendix [S.A.] 160) Both prior to trial and based on a fully developed trial record, the federal district court rejected the cigarette manufacturers argument that they were merely following FTC's mandate. United States v. Philip Morris U.S.A., Inc. 263 F. Supp. 2d 72, 81 (D.D.C. 2003). The federal court after hearing all the evidence declared:

Defendants [cigarette manufacturers which included RJR] claim that prohibition of their deceptive use of descriptors ["low tar" "light" "mild" "medium" and "ultra light"] would improperly invade the primary jurisdiction of the FTC. JD PFOF, Ch. 13 Para. 599, but "[t]he FTC does not impose,

² This Court can take judicial notice on appeal of the arguments submitted in the briefs filed by the United States government in the RICO Action. See Minn. R. Evid. 201; Smisek v. Comm'r of Pub. Safety, 400 N.W.2d 766, 768 (Minn. Ct. App. 1987) For the Court's benefit, excerpts are included at SA of the Supplemental Appendix.

regulate or require [descriptors]. How those terms are applied, and on which brands, is entirely up to the tobacco companies.” Henningfield WD, 56:8-11.

449 F. Supp. 2d at n. 88.

The undisputed public record facts do not justify RJR’s characterizations to this

Court. The critical points are:

- RJR does not claim - because it cannot - that FTC ever required it to sell “low tar” cigarettes or compelled it to call its cigarettes “lights” or otherwise ordered it to use advertising that would mislead consumers by suggesting, on the basis of measured tar and nicotine levels, “light” cigarettes are somehow healthier than regular cigarettes.
- FTC has never promulgated regulations requiring cigarette manufacturers to test the tar and nicotine levels of cigarettes, let alone regulations defining how such tests must be conducted, how the results must be disclosed, or how the results may be used in cigarette advertising. (SA. 5-10; SA. 24-27).
- In 1970, FTC sought comment on a formal Trade Regulation Rule that would have made it “an unfair or deceptive act or practice. . . to fail to disclose, clearly and prominently, in all advertising the tar and nicotine content [of cigarettes]” based on the Cambridge Filter Method. Notice of a Proposed Rulemaking Advertising of Cigarettes, 35 Fed. Reg. 12,671 (1970). (SA. 48).
- Later that year, to stave off the FTC’s proposed formal rule eight cigarette manufacturers, including RJR voluntarily undertook - in an agreement to which FTC was not a party - to disclose in their advertising tar and nicotine data culled from FTC test results. See Federal Trade Commission, Report of Congress, Appendix C, (Dec. 31, 1970.); Fed. Trade Comm’n v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 37 (D.C. Cir. 1985); See FTC, Cigarette Testing: Request for Public Comment, 62 Fed. Reg. 48, 158 (Sept. 12, 1997)³ (SA. 5-6; 49; 104; 110)

³ Notably RJR omits this critical fact and others in its self serving rendition of the “critical elements related to the federal program” on pages 2-3 of its brief. Ironically in 1990, the cigarette companies - including RJR - denied FTC even had the authority to promulgate trade rules and regulations. (SA. 95) It now argues it is so comprehensively regulated by FTC that it is not bound by state law.

- Absent agreement by the manufacturers to use FTC's test method, FTC could not, as a matter of law, foreclose use of other methods unless it could prove that advertising those results would be unfair or deceptive under the FTC Act. As the D.C. Circuit held in Brown & Williamson, 778 F.2d at 35, "[B]ecause the FTC has not adopted its system of testing pursuant to a Trade Regulation Rule under Section 18 of the FTC Act, 15 U.S.C. Section 57a (1982), one cannot say that the FTC system constitutes the only acceptable one available for measuring milligrams of tar per cigarette." (SA. 5-6)
- Significantly, the voluntary agreement entered into by some, but not all, of the cigarette companies in 1970 did not cover all cigarette manufacturers and still does not to this day. (SA 5-6; 25, 27)
- Although RJR asserts to this Court that the FTC formerly defined low tar cigarettes as those measuring 15 milligrams or less in tar according to FTC's method, RJR cannot cite any FTC regulation or other "formal action" of Commission embodying such a definition.⁴ Instead as FTC itself has stated, "Cigarette manufacturers use a number of descriptive terms (such as 'low tar', 'light', 'medium', 'extra light', 'ultra light', 'ultra low', and 'ultima') in advertising and labeling information about their cigarettes. . . There are no official definitions for these terms but they appear to be used by the industry to reflect ranges of FTC tar ratings." FTC, Cigarette Testing: Requests for Public Comment, 62 Fed. Reg. at 48, 163. (SA.109) (emphasis added) (See also SA.10, 26)
- In 2002, one tobacco company acknowledged FTC has not directed or controlled the use of the term "lights" or "lower tar or nicotine" in cigarette design manufacture advertising or sales. That year, Philip Morris petitioned the FTC to promulgate regulations. (SA. 114).

⁴ RJR relies in large part on the affidavit statement of John L. Peterman and it is to Mr. Peterman that RJR cites in support of its assertions. (Respondent's Brief p.3; 40). Plaintiffs presented opposing testimony explaining in detail that its consumer protection claims have not been impliedly preempted by FTC regulation or FCLAA, considered either separately or together. Plaintiffs presented affidavit testimony of Matthew Myers, J.D. (SA. 1) At the FTC, Myers was responsible for the oversight of the tar and nicotine testing laboratory and FTC's historic role with regard to tobacco. Also presented was the affidavit testimony of Judith Wilkenfeld. (SA. 14, 22, 54). Wilkenfeld spent the majority of her tenure at FTC as program director for cigarette advertising and testing. Ms. Wilkenfeld supplements and confirms Myers' affidavit testimony.

II. RJR's EXPRESS PREEMPTION ARGUMENT IS BASED ON A MISINTERPRETATION OF CIPOLLONE AND A MISREADING OF PLAINTIFFS' COMPLAINT.

In Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992), the Supreme Court held that “fraudulent misrepresentation claims that do arise with respect to advertising and promotions (most notably claims based on allegedly false statements of material fact made in advertisements) are not preempted by § 5(b). Such claims 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. Notwithstanding this explicit statement, RJR argues that Plaintiffs’ claims premised specifically on RJR’s violation of the general obligation of the duty not to deceive are expressly preempted by the FCLAA. In so arguing, RJR rewrites Plaintiffs’ claims and misinterprets Cipollone, such that no misrepresentation claim arising out of the sale of cigarettes could avoid preemption, despite the United States Supreme Court’s holding to the contrary. RJR’s assertions must be rejected.

A. The legal test to determine whether a claim is preempted is to determine whether the predicate legal duty is generally applicable or whether it specifically targets the cigarette industry.

1. Minnesota’s consumer protection laws apply equally to all commercial actors.

In order to determine whether a claim is “based on smoking and health” and thus preempted, the Court must look to the predicate legal duty upon which the claim is based and determine whether that duty is generally applicable, or whether it instead specifically targets the cigarette industry. Id. at 528. RJR incorrectly argues that the Court should not look to the source of the legal duty, but to the subject matter of the representation.

However, controlling precedent provides that if the predicate legal duty applies to all commercial actors on equal terms, there is no preemption, and the subject matter of the representation is immaterial. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 551-52 (2001).

Contrary to RJR's assertions throughout its brief, Reilly does adhere to the legal test adopted in Cipollone, distinguishing between regulations targeting the cigarette industry and those imposing general obligations on all products. Id. at 549-50, 551-52; Gerrity v. R.J. Reynolds Tobacco Co., 399 F. Supp. 2d 87, 96 (D. Conn. 2005) (Reilly did not alter Cipollone's holding).

Cipollone was a personal injury, lung cancer case involving New Jersey common law claims. 505 U.S. at 509. Accordingly, any misrepresentation claim advanced in Cipollone was inherently motivated by concerns about smoking and health. Despite that fact, Cipollone held that the plaintiffs' fraud and misrepresentation claim was not preempted where the predicate legal duty on which the claim was based was one of general applicability - i.e., the general obligation not to deceive. Id. at 528-29.

Plaintiffs contend RJR has violated Minnesota's consumer protection statutes. (A. 31-40). Minnesota's consumer protection statutes do not single out the cigarette industry or any industry in prohibiting the making of fraudulent statements. Minnesota's consumer protection laws apply equally to all commercial actors. There is no preemption.

2. RJR's argument is in accord with the Cipollone dissent.

RJR's argument here is the same as Justice Scalia made in his Cipollone dissent, but that is not the holding of the Supreme Court. Justice Scalia argued that the predicate legal duty test was meaningless and would create loopholes that would gut the preemption provision. Cipollone, 505 U.S. at 553. That is exactly RJR's assertion at footnote 5 on page 15 of RJR's brief. However, that is not legal precedent.

Justice Scalia argued the test should be, "whether, whatever the source of the duty, it imposes an obligation in this case because of the effect of smoking upon health." Id. at 554. That analysis was rejected by the Cipollone majority; but it is the very analysis RJR argues this Court to adopt. In rejecting Justice Scalia's argument, the majority in Cipollone held: "[T]o analyze fraud claims at the lowest level of generality (as Justice SCALIA would have us do) would conflict both with the background presumption against pre-emption and with legislative history that plainly expresses an intent to preserve the 'police regulations' of the States." Id. at 529 n. 27.

That Plaintiffs' articulation of the legal standard is correct can be determined simply by examining Justice Scalia's summary of the Cipollone holding that he found so objectionable in his dissent:

[O]nly duties deriving from laws that are specifically directed to "smoking and health" or that are uniquely crafted to address the relationship between cigarette companies and their putative victims, fall within § 5(b) of the Act [the preemption provision] as amended. Given that New Jersey's tort law "duty not to deceive," *ibid.*, is a general one, applicable to all commercial actors and all kinds of commerce, it follows from this assumption that § 5(b) does not preempt claims based on breaches of that duty.

Id. at 553.

B. Plaintiff's allegations should not be recharacterized to assert claims that are not advanced in Plaintiffs' complaint as RJR argues.

RJR asked this Court to affirm Judge Egan's improper recasting of the Plaintiffs' allegations into claims which were held preempted by Cipollone - i.e., failure to warn claims or warning neutralization claims. Such recharacterization is not permitted.

1. Read in context, Plaintiffs' claims are precisely the type of fraudulent misrepresentation claims that Cipollone held were not preempted.

Plaintiffs are entitled to the most liberal construction of their complaint. Their complaint is to be construed by taking all of its allegations as a whole and not in the light of a detached sentence or paragraph standing alone. Consumers Grain Co. v. Wm. Lindeke Roller Mills, 153 Minn. 231, 190 N.W. 65 (1922). That standard is not the one RJR has used in its Respondents' brief.

The heart of Plaintiffs' lawsuit is found in paragraph 13 of Plaintiffs' second amended complaint - a paragraph incorporated by reference into each of Plaintiffs' other counts. That is: "[RJR's] representations that Camel lights and Winston lights cigarettes are 'light' (lowered tar and nicotine) [in relation to] regular cigarettes are deceptive and misleading and constitute unfair business practices." (A. 26-27). The essence of Plaintiffs' suit is discussed more fully at paragraph 15 of Plaintiffs' second amended complaint which is also incorporated into every count of Plaintiffs' amended complaint. (A. 27-28) RJR deceitfully manufactured its cigarettes to register misleadingly low measurements of tar and nicotine. Id. In paragraph 16, Plaintiffs summarize that through

“longstanding fraudulent and unfair conduct, [RJR] willfully deceived consumers.” (A. 28)

Plaintiffs concede that in six of the 73 paragraphs of their second amended complaint they referenced examples of RJR’s failure to disclose certain evidence. Those references to RJR’s failure to inform are simply when read in context examples, among many other examples, of RJR’s deceptive acts and/or practices and “misrepresentations, unlawful schemes and courses of conduct intended to induce Plaintiffs and members of the class to purchase [RJR’s] Camel lights and Winston lights cigarettes in violation of Minnesota’s law. . .”. (A. 32-33; 35) Moreover, like the misrepresentation claims which the Minnesota Supreme Court already found were not preempted, Plaintiffs’ claims are “concerned with the truthfulness of what [RJR] says.” Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655, 662 (Minn. 1989). Read in context, Plaintiffs’ claims are precisely the type of fraudulent misrepresentation claims that Cipollone held not preempted.

2. Plaintiffs’ lawsuit is not a products liability lawsuit.

Intentionally absent from RJR’s brief is any discussion of the consumer protection statutes which Plaintiffs’ claim RJR has violated. Warnings, lack of warnings or neutralization of warnings simply are not implicated in the Minnesota’s consumer protection statutes on which Plaintiffs base their complaint. RJR’s liability under each statute at issue is predicated on a general duty not to deceive.

In Cipollone, the plaintiffs’ products liability action specifically alleged recovery in strict liability/negligence based on the failure to warn that cigarettes were “defective as

a result of [cigarette manufacturer's] failure to provide adequate warnings of the health consequence of cigarette smoking.” 505 U.S. at 509. Like that of New Jersey, under Minnesota law the duty to warn of products' dangers incident to their use exists under both strict liability and negligence theories of products liability recovery. Pepin v. W.H. Brady Co., 372 N.W.2d 369, 374 (Minn. Ct. App. 1985); 5A Minn. Prac. Methods of Practice 6.48 (3d ed. 2006). Unlike the Cipollone, Plaintiffs have not brought a products liability action and are not seeking tort recovery based on purported failure to warn.

In Cipollone, plaintiffs specifically asserted in their complaint that the cigarette manufacturers “had willfully, through their advertising attempted to neutralize the [federally mandated] warnin[g]” labels.” 505 U.S. at 510. (internal quotations omitted). In finding that claim preempted, the Supreme Court held such a fraudulent misrepresentation claim was not premised on a general obligation of the duty not to deceive but was “merely the converse of a state-law *requirement* that warnings be included in advertising and promotional materials.” Id. at 527. (emphasis in original).

Again, Plaintiffs herein are not contending that state law requires additional warnings be included on RJR's packages. Rather Plaintiffs claim RJR's misrepresentations, words it chose to place on its packaging, should not have been made in the first instance and RJR must answer, like everyone else, for its deceit. See also Forster, 437 N.W.2d at 662; Izzarelli v. R.J. Reynolds Tobacco Co., 117 F. Supp. 2d 167, 174-176 (D. Conn. 2000); Johnson v. Brown & Williamson Tobacco Co., 122 F. Supp. 2d 194, 203 (D. Mass. 2000).

C. **Cipollone does not distinguish between claims involving express and implied representation.**

RJR argues Plaintiffs' claims are actually based on implied misrepresentations and are therefore preempted.⁵ RJR asserts an implied misrepresentation claim is actually a failure to warn claim in disguise because the representations here are, in the eyes of RJR at least, literally true. RJR also argues that unless preempted, implied misrepresentation claims are likely to lead to different adjudicatory outcomes in different states creating the sort of diverse legal standards that it says the FCLAA was designed to prevent. Both arguments are without merit.

There is no legal authority for RJR's position. The Cipollone court makes repeated references to the preservation of state police powers over fraud and deceptive advertising without ever distinguishing between implied and express representation claims. See Cipollone, 505 U.S. at 529. Plaintiffs' claims rest on those police powers.

Moreover, had RJR sold the same cigarettes and not chosen to include its deceptive descriptors on the package, Plaintiffs would not bring this lawsuit. It is beyond reasonable dispute that it is not the omission of information or failure to warn that gives rise to Plaintiffs' claims. Rather, it is RJR's affirmative act of making false statements on its cigarette packages.

RJR's statements on its package are no more true than a representation that "lights do not cause emphysema." Simply because smoking does not cause emphysema in every

⁵ RJR did not argue before the trial court that there was any distinction in Cipollone between purported express and implied representations.

light smoker does not make such representation literally true. On the contrary, as the Minnesota Supreme Court has held such statements are demonstratively false. See Forster, 437 N.W.2d at 662.

RJR resurrects yet another argument advanced by Justice Scalia that was considered and rejected by the Cipollone majority. Id. at 529 n. 27. Justice Scalia argued in his dissent that varying fraud adjudications will create diverse legal standards contrary to the purpose of the FCLAA. Cipollone, 505 U.S. at 553.

RJR relies heavily on the Fifth Circuit's decision in Brown v. Brown & Williamson Tobacco Corp., 479 F.3d 383 (5th Cir. 2007). The Fifth Circuit's decision is premised in large part, on its view that the FTC had specifically approved the terms "lights" and "lower tar and nicotine" and therefore, the terms "light and lower tar nicotine" cannot "be inherently deceptive or untrue". Id. at 391-92. It is unknown on what record the Fifth Circuit relies in making such statements. The Fifth Circuit cites to the Eighth Circuit's decision in Watson v. Philip Morris Co., 420 F.3d 852, 860 (8th Cir. 2005), a case which the Supreme Court has accepted for review.

Notably, RJR ignores the fact that the Fifth Circuit's statements are directly contrary to record evidence and evidence presented by the U.S. Government in RICO Action. On a fully developed trial record it has been held that RJR descriptors are not imposed or regulated or required by the FTC. United States, 449 F. Supp. 2d at n. 88. Other courts since Cipollone have also concluded such claims are not preempted. See In re Simon II Litig., 211 F.R.D. 86, 137-44 (E.D.N.Y. 2002), vacated and remanded on

other grounds, 407 F.3d 125 (2d Cir. 2005) (fraud/misrepresentation based claims not preempted); Burton v. R.J. Reynolds Tobacco Co., 884 F. Supp.1515, 1521(D. Kan. 1995) (Plaintiffs misrepresentation and fraudulent concealment claims not preempted under Cipollone); Whiteley v. Philip Morris, Inc., 117 Cal. App. 4th 635, 674-77 (2004) (same). See also Wright v. Brooke Group Ltd., 114 F. Supp. 2d 797 (N.D. Iowa 2000).

III. THERE IS NO BASIS TO AFFIRM ON THE ALTERNATIVE GROUND OF IMPLIED PREEMPTION.

RJR raises implied preemption as an alternative ground for affirmance. RJR specifically relies on the affidavit testimony of John Peterman. (RJR brief p. 40-41). RJR ignores the affidavit testimony offered to the contrary by Mathew Myers and Judith Wilkenfeld as well as the public record on this issue. (SA. 1, 14, 22, 54) In so presenting, RJR does not view the record in a light most favorable to Plaintiffs. The implied preemption doctrine is not applicable.

A. Cipollone holds there is no implied preemption.

The United States Supreme Court has already engaged in an analysis of implied conflict preemption related to cigarettes. In Freightliner Corp. v. Myrick, 514 U.S. 280 (1995), the Supreme Court stated: “[I]n Cipollone, we engaged in a conflict pre-emption analysis of the [FCLAA]. . . and found ‘no general inherent conflict between federal preemption of state warning requirements and the continued vitality of state common-law damages actions.’” 514 U.S. at 288-89 (quoting Cipollone, 505 U.S. at 518) (internal citations omitted); Philip Morris, Inc. v. Harshbarger, 122 F.3d 58, 78 (1st Cir. 1997) (finding an application of implied preemption barred)

The claims RJR argues are the exclusive jurisdiction of FTC are virtually identical to the misrepresentation claims held not preempted in Cipollone. Plaintiffs' complaint charges RJR intentionally misled consumers about its product. (A. 26-28) Just as in Cipollone, misrepresentation claims herein are predicated on a duty not to deceive, a duty not to conspire to defraud and duties voluntarily undertaken by RJR in representations made to consumers.

While RJR argues Plaintiffs' claims are preempted by FTC's administrative responsibilities, RJR fails to explain how that can be the case when the Supreme Court has already concluded in Cipollone that state law claims based on the same duties will not have that adverse effect. In sum, Cipollone involved the same "comprehensive" regulatory scheme at issue here and necessarily rejected RJR's argument that FTC has exclusive authority over all tobacco advertising, marketing, promotion and warning claims.⁶ For the same reasons, RJR implied preemption arguments must be rejected here. See United States 263 F. Supp. at 80; Falise v. American Tobacco Co., 94 F. Supp. 2d 316, 357 (E.D.N.Y. 2000).

B. Congress did not intend to permit FTC to preempt state law except by direct conflict with validly enacted FTC Rules.

⁶ In Cipollone, the Supreme Court considered the interaction of the FCLAA with the FTCA, observing that the Labeling Act explicitly reserves FTC's authority over deceptive advertising. 505 U.S. 504. The Court viewed FTC's continued overlapping of authorities an argument against preemption. Id. at 529. "Congress offered no sign that it wished to insulate cigarette manufacturers from long standing rules governing fraud." Id.

RJR makes no effort to analyze the legislative history behind the FTC act to determine the extent to which Congress intended the FTC to preempt state law. This is not surprising, as the statute has a savings clause expressly preserving state law remedies and every court that has examined the intent of Congress in enacting the FTC has found there can be no preemption absent a conflict with a validly enacted FTC rule. 15 U.S.C. § 57b(e). See American Financial Services v. FTC, 767 F2d 957, 989-990 n. 41 (2d Cir. 1979); State v. Amoco Oil Company, 293 N.W.2d 487, 494-495 (Wis. 1980). Under the FTC act, state law actions are preserved. The FCLAA did not in anyway increase the FTC's authority. See 15 U.S.C. § 1336. (SA. 6; 93)

In a case where, as here, the federal government has not undertaken any formal rulemaking regarding the conduct at issue, preempting Plaintiffs' state claims would result in the eradication of state claims without any meaningful notice to the states or opportunity for them to comment on the propriety of such a restriction - a result wholly at odds with "the federal-state balance embodied in . . . Supremacy Clause jurisprudence." Hillsborough County v. Automated Med. Labs., 471 U.S. 707, 717 (1985). Additionally it would violate Art I. Sec. 8 of Minnesota's Constitution. It is also at odds with the Executive Branch's own requirement that the states must be afforded the opportunity to participate in any rulemaking that involves the possible preemption of state law. See 64 Fed. Reg. 43,255, 43,257 (1999) (discussed in Geier v. Am. Honda Motor Co., 529 U.S. 861, 909 n. 24 (Stevens J., dissenting). (SA. 161)

There was no formal rule enacted pursuant to the notice and rule making provisions of the FTC and there can be no preemption of state law. (SA. 7) Thus, the implied preemption defense fails as a matter of law.

RJR suggests Plaintiffs' claims would impose liability for its adherence to FTC mandates regarding the disclosure of tar and nicotine yields. Despite RJR's attempt to manufacture regulations from FTC "awareness" and correspondence, the fact is that none of the alleged FTC actions created a federal regulation that is in conflict with the claims asserted under Minnesota law. (A. 27-28) Moreover, where the regulating agency has decided not to adopt a regulation "it is quite wrong to view that decision as the functional equivalent of a regulation prohibiting" states from adopting regulations in that area. Sprietsma v. Mercury Marine, 537 U.S. 51, 65 (2002). The Sprietsma Court considered, and rejected, the assertion that state claims were impliedly preempted under the Federal Boat Safety Act ("FBSA") of 1971. One of FBSA's main goals was fostering uniformity in manufacturing regulations. Id. at 70. The unanimous Court concluded: "[T]his interest [in uniformity] is not unyielding . . . the concern with uniformity does not justify the displacement of state common-law remedies." Id. at 70.

Here, Congress gave FTC the authority, but did not require it to act. FTC has neither implemented regulations which required RJR to place the words "light" and "low tar" on its cigarettes nor has it made the affirmative decision not to regulate. Freightliner, 514 U.S. at 286.

Pursuant to 15 U.S.C. § 1336, FTC has authority to regulate unfair or deceptive acts or practice in the advertising of cigarettes. However, the FCLAA does not require FTC to take any specific action or to require it to issue any particular rule or regulations. FTC has exercised its authority under Section 5 of the FTCA to regulate cigarette advertising. This, however, does not demonstrate that Plaintiffs' pursuit of their state consumer protection claims will conflict with, instead of supplement, FTC's exercise of its responsibilities.⁷ As previously set forth, Cipollone rejects RJR's assertions.

Plaintiffs do not dispute that voices inside and outside the federal government have *considered* whether or not the misleading use of descriptors in cigarette advertising and packaging should be regulated - but it is not true that FTC affirmatively refused to suspend the right to use the term "lights." The preemptive effect of FTC Guides and interpretive rules was discussed at length in Amoco Oil, 293 N.W.2d at 494-96. The court concluded: "We do not think the [FTC] Guides, interpretive rules which do not carry the force and effect of law, pose a preemption issue under the supremacy clause." Id. (internal citations omitted).

RJR cites to two inapplicable and irrelevant consent orders regarding another tobacco company. FTC's two enforcement actions and the subsequent consent orders do

⁷ A private litigant's claim is not preempted solely because FTC could have brought an action for the same deception. See Kellogg Co. v. Mattox, 763 F. Supp. 1369, 1380 (N.D. Tex. 1991) ("Congress has not, in the FTC Act or elsewhere, expressly preempted state laws regulating false, misleading, or deceptive advertising by companies."). The FTCA states "remedies provided in this section [regarding civil actions for deceptive acts or practices] are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law." 15 U.S.C. § 57b (e) (emphasis added).

not define the term “low tar” or any similar descriptor; nor did they establish a numerical standard for “low” tar. Rather, they simply prohibited the use of the terms in two specific contexts unless certain conditions were met. Neither context included a tar claim in conjunction with the term “light”. (SA. 6; 25; 56-57) Gen. Motors Corp. v. Abrams, 897 F.2d 34, 36 (2nd Cir. 1990) (“Unlike an agency regulation which has industry-wide effect, a consent order is binding only on the parties to the agreement.”). As the dissent properly observed in Price v. Philip Morris, Inc., 848 N.E.2d 1 (Ill. 2005), “it is simply incorrect for the court to refer to the 1971 and 1995 consent orders as establishing FTC policy . . . The 1971 and 1995 consent orders must be viewed only as what they are: two private agreements between the FTC and individual cigarette companies without industrywide force of law.” Id. at 307. See also Commodity Futures Trading Comm’n v. Hanover Trading Corp., 34 F. Supp. 2d 203, 206 n. 19 (S.D.N.Y. 1999)

C. Compliance with both state and federal law is not a physical impossibility; there is no implied preemption.

A conflict arises if compliance with both state and federal laws are a physical impossibility. Freightliner, 514 U.S. at 287. “Impossibility” is also not an issue in this case, because:

- FTC abandoned its rule making efforts in 1970 when some cigarette companies voluntarily choose to disclose tar and nicotine ratings;
- FTC has never enacted any rule or regulation requiring all cigarette companies to disclose tar and nicotine levels in cigarette advertising;
- FTC has not adopted any regulation defining “lights” or any “low tar” descriptors;

- FTC has not adopted any rule or regulation defining the terms “low tar, lower tar”, “lowest tar”, “light” or “lights” in cigarette advertising;
- FTC has enacted no formal rules or regulations regarding the disclosure of tar and nicotine yields of cigarettes;
- FTC has never promulgated any rule which regulates the design, content or manufacture of cigarettes;
- FTC has never issued a ruling, regulation or complaint permitting or restricting the use of the descriptor “light” in cigarette advertising or packages;
- FTC did not contemplate and was not aware that tobacco companies could or would manipulate or design cigarettes which would produce lower tar and nicotine yields when tested on the machine while permitting consumers to extract higher levels of tar and nicotine.

(S.A. 4-10; 24-27; 56-57).

Thus it is not impossible for RJR to comply both with the FCLAA and Minnesota’s Consumer Protection statutes. By avoiding deceptive statements, RJR can easily comply with both.

D. Plaintiffs’ claims do not stand as an obstacle to any federal purpose.

One of the key factors to consider in analyzing whether implied preemption based on “conflicts” exists is Congressional purpose. Id.; See Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 31 (1996). Plaintiffs’ claims do not “stand as an obstacle” to Congress’ purposes. The goal of the FCLAA was to create a “comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health.” 15 U.S.C. § 1331. Minnesota’s state consumer protection claims proscribe exactly the same type of deceptive conduct the federal government proscribes - unfair and deceptive acts.

RJR also argues Congress' main goal in passing the FCLAA was to achieve uniformity by delegating all regulatory authority over cigarette advertising to FTC. This argument does not withstand analysis. First, as explained above, there is no sound basis for concluding Congress ever intended to preempt the entire field of state common or positive law with respect to cigarettes. Moreover, the FCLAA merely permits - rather than requires - FTC to regulate cigarette advertising. The FCLAA's most logical reading - and the one consistent with Cipollone - is Congress intended to leave the states free to act in areas where the federal government has not regulated. Ray v. Atlantic Richfield Co., 435 U.S. 151, 171-72 (1978). In such areas, the states are free to do as they choose, and there is no federal interest in "uniformity" that could possibly trigger a finding of conflict preemption.

In summary, the Supreme Court has emphasized that the federal government's power to impose its will on the states under the Supremacy clause "is an extraordinary power in a federalist system," Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) and that "it is incumbent" on courts "to be certain of Congress' intent before finding that federal law overrides" state law. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985). Surely an equivalent degree of certainty should be required when determining whether a federal *agency* intended to override state law. Such is not the situation here.

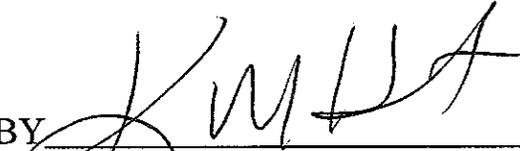
In its essence RJR argues that because of FTC's actions this State cannot do a single thing to remedy RJR's violation of its Minnesota duty not to deceive. That simply is not correct.

CONCLUSION

Appellants respectfully request that the trial court be reversed and their action be ordered reinstated.

Dated: April 30, 2007

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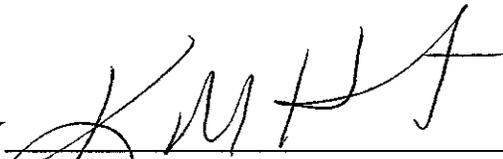
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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6,277 words. This brief was prepared using Word Perfect 10.

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