

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT OF  
THE TRIAL COURT  
CASE NO. 98-6002-H

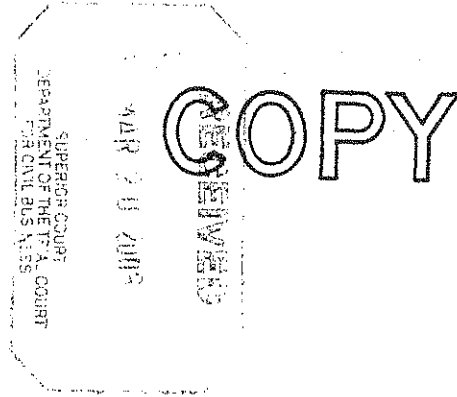
LORI ASPINALL and THOMAS  
GEANACOPOULOS, on Behalf of Themselves  
and All Others Similarly Situated,

Plaintiffs,

v.

PHILIP MORRIS COMPANIES, INC. and  
PHILIP MORRIS, INC.,

Defendants.



**ANSWER, DEFENSES, AND JURY DEMAND OF PHILIP MORRIS USA INC. TO  
PLAINTIFFS' THIRD AMENDED CLASS ACTION COMPLAINT**

Defendant Philip Morris USA Inc. (formerly known as "Philip Morris Incorporated" and hereinafter referred to as "Philip Morris USA")<sup>1</sup> answers Plaintiffs' Third Amended Class Action Complaint ("Complaint") as follows:

**PRELIMINARY STATEMENT**

This Complaint improperly mixes factual averments with argumentative rhetoric so as to make admissions or denials of such averments difficult or impossible. Further, many of the allegations in the Complaint are overbroad, vague, or conclusory and include terms which are undefined and which are susceptible to different meanings. Accordingly, by way of a general response, all allegations are denied unless specifically admitted, and any factual averment admitted is admitted only as to the specific facts and not as to any conclusions, characterizations, implications or speculations which are contained in the averment or in the Complaint as a whole.

The Complaint also contains purported quotations from different sources, some identified, some not. Plaintiffs do not provide copies of the documents from which quotations were taken which impairs Philip Morris USA's ability to confirm or deny the accuracy of the quotations in the Complaint as compared to the original text. Philip Morris USA, therefore, does not admit the authenticity of any documents from which the quotations were taken and reserves the right to challenge the accuracy of the quotations (either as quoted or in the context of material not quoted). Further, with reference to all quotations, citations to documents, or any such averments that might be offered into evidence, Philip Morris USA specifically reserves its right to object to any use of such averments or the Complaint as a whole in evidence for any purpose whatsoever.

To the extent these quotations originate in documents protected by the attorney-client privilege, the work product doctrine, the joint defense privilege and/or the common interest privilege, Philip Morris USA states that it is improper for Plaintiffs to have referred to and quoted from such documents in the Complaint, and Philip Morris USA reserves its right to assert such privileges and to move to strike such references.

Philip Morris USA further submits that the use of headings throughout the Complaint is improper, and therefore no response to them is required. To the extent that a response is required, and to the extent that such allegations are directed toward Philip Morris USA, Philip Morris USA denies those allegations. Philip Morris answers these allegations only for itself.

These comments and objections are incorporated, to the extent appropriate, into each numbered paragraph of this Answer.

In response to the specific allegations of the Complaint, Philip Morris USA states:

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<sup>1</sup> Effective January 15, 2003, Philip Morris Incorporated changed its legal name to Philip Morris USA Inc.

## I. NATURE OF THE ACTION

1. Philip Morris USA admits that Plaintiffs purport to seek relief as described and alleged in Paragraph 1 on behalf of themselves and other members of a putative class, but denies that this lawsuit is appropriate for class action treatment and denies that Plaintiffs and putative class members are entitled to the relief sought in Paragraph 1 or any relief whatsoever. Philip Morris USA denies that Altria Group, Inc. (formerly known as “Philip Morris Companies” and hereinafter referred to as “Altria Group”)<sup>2</sup> has ever manufactured, distributed or sold Marlboro Lights cigarettes or any other consumer product. Philip Morris USA further denies that it manufactured a cigarette named “Marlboro Lights ‘low-tar,’ filtered cigarettes” and denies the remaining allegations of Paragraph 1.

2. Philip Morris USA admits that it has manufactured Marlboro Lights, a “lowered tar,” filtered cigarette, since 1971. Philip Morris USA further admits that it has sold its cigarettes to its direct customers for ultimate resale to consumers of legal age for purchasing cigarettes in the Commonwealth of Massachusetts and throughout the United States. Philip Morris USA denies that Altria Group has ever manufactured, distributed or sold Marlboro Lights cigarettes or any other consumer product. Philip Morris USA denies that it made any “representations” as alleged in the second sentence of Paragraph 2. Philip Morris USA admits that the packaging of Marlboro Lights cigarettes contains the words “Lights” and “Lowered Tar & Nicotine.” Philip Morris USA denies the remaining allegations of Paragraph 2.

3. Philip Morris USA denies that it made any “representations” as alleged in Paragraph 3. Philip Morris USA is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 3 regarding the alleged cigarette purchases of

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<sup>2</sup> Effective January 27, 2003, Philip Morris Companies Inc. changed its legal name to Altria Group, Inc.

Plaintiffs and putative class members and, therefore, denies the same. Philip Morris USA admits that the packaging of Marlboro Lights cigarettes contains the words “Lights” and “Lowered Tar & Nicotine.” Philip Morris USA denies that Altria Group has ever manufactured, distributed or sold Marlboro Lights cigarettes or any other consumer product. Philip Morris USA denies the remaining allegations of Paragraph 3.

4. Philip Morris USA denies that it made any “claims” as alleged in the first sentence of Paragraph 4. Philip Morris USA is informed and believes that the Federal Trade Commission’s (“FTC’s”) Cambridge Filter Method employs a smoking machine to measure the amount of “tar” and nicotine yields in cigarette smoke. Philip Morris USA denies that the Cambridge Filter Method was designed to (or purports to) measure “tar” and nicotine intake by individual smokers. Philip Morris USA further denies that the allegations of Paragraph 4 accurately or fairly describe the Cambridge Filter Method.

5. Philip Morris USA denies the allegations of Paragraph 5.

6. Philip Morris USA denies the allegations of the first and third sentences of Paragraph 6. In response to the allegations of the second sentence of Paragraph 6, Philip Morris USA is informed and believes that the FTC’s Cambridge Filter Method employs a smoking machine to measure the amount of “tar” and nicotine yields in cigarette smoke. Philip Morris USA admits that the “tar” and nicotine yield numbers that are reported for cigarette brands are not meant, and were never intended, to communicate the precise amount of “tar” or nicotine inhaled by any individual smoker from any particular cigarette. Further answering, Philip Morris USA states that in 1966 it cautioned the FTC that “tar” and nicotine yields derived from the FTC test methods would not reflect the actual yields to any particular smoker. Philip Morris USA denies the remaining allegations of Paragraph 6.

7. Philip Morris USA denies that it engaged in the conduct alleged and denies the remaining allegations of Paragraph 7.

8. Philip Morris USA denies that it engaged in the conduct alleged and denies the remaining allegations of Paragraph 8.

9. Philip Morris USA denies the allegations of Paragraph 9.

10. Philip Morris USA admits that Plaintiffs purport to seek various forms of relief as described and alleged in Paragraph 10 on behalf of themselves and other members of a putative class, but denies that this lawsuit is appropriate for class action treatment or is manageable as a class action. Philip Morris USA denies that Plaintiffs and putative class members are entitled to any of the relief requested in Paragraph 10, or any relief whatsoever. Philip Morris USA denies the remaining allegations of Paragraph 10.

11. Philip Morris USA admits that Plaintiffs purport to disclaim seeking recovery of damages for themselves or for the class "on account of personal injuries" allegedly suffered, but denies that Plaintiffs or putative class members have suffered any such injuries. Philip Morris USA further denies that this lawsuit is appropriate for class action treatment or is manageable as a class action and that Plaintiffs and putative class members are entitled to any relief whatsoever. Philip Morris USA denies the remaining allegations of Paragraph 11.

## **II. PARTIES, JURISDICTION AND VENUE**

12. Philip Morris USA admits that Plaintiffs purport to bring this lawsuit on behalf of themselves and other members of a putative class, but denies that this lawsuit is appropriate for class action treatment or is manageable as a class action. Philip Morris USA further denies that Plaintiffs can or should be permitted to act as class representatives.

13. Philip Morris USA denies that Plaintiffs are entitled to any damages whatsoever. Philip Morris USA further denies that this lawsuit is appropriate for class action treatment or is manageable as a class action.

14. Philip Morris USA is without knowledge or information sufficient to form a belief as to the truth of the allegations of the first two sentences of Paragraph 14 and, therefore, denies the same. Philip Morris USA denies that it engaged in the wrongful conduct alleged in this Complaint and denies the remaining allegations of the third sentence of Paragraph 14. The last sentence of Paragraph 14 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of the last sentence of Paragraph 14.

15. Philip Morris USA is without knowledge or information sufficient to form a belief as to the truth of the allegations of the first two sentences of Paragraph 15 and, therefore, denies the same. Philip Morris USA denies that it engaged in the conduct alleged in this Complaint and denies the remaining allegations of the third sentence of Paragraph 15. The last sentence of Paragraph 15 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of the last sentence of Paragraph 15.

16. Philip Morris USA admits that Altria Group is a Virginia corporation with its principal place of business located at 120 Park Avenue, New York, New York. Philip Morris USA further admits that it is a wholly-owned subsidiary of Altria Group and that it manufactured, promoted, marketed, distributed and sold Marlboro Lights cigarettes to its direct customers for ultimate resale to consumers of legal age for purchasing cigarettes in the Commonwealth of Massachusetts and throughout the United States. Philip Morris USA further

admits that it conducts and has conducted business in the Commonwealth of Massachusetts. Philip Morris USA denies that Altria Group has ever manufactured, promoted, marketed, distributed or sold cigarettes or any other consumer product and denies the remaining allegations of Paragraph 16.

17. Philip Morris USA admits that it is a Virginia corporation with its principal place of business located at 120 Park Avenue, New York, New York. Philip Morris USA further admits that it is a wholly-owned subsidiary of Altria Group. Philip Morris USA is unable to respond to the allegations contained in the third and fourth sentences of Paragraph 17 in any meaningful manner because the phrases "at all times relevant hereto" and "at all relevant times" are not defined in the Complaint. To the extent a response is required, Philip Morris USA admits that it manufactured, promoted, marketed, distributed and sold Marlboro Lights cigarettes to its direct customers for ultimate resale to consumers of legal age for purchasing cigarettes in the Commonwealth of Massachusetts and throughout the United States. Philip Morris USA further admits that it conducts and has conducted business in the Commonwealth of Massachusetts. Philip Morris USA denies the remaining allegations of Paragraph 17.

18. Philip Morris USA admits that it began selling Marlboro Lights cigarettes to its direct customers for ultimate resale to consumers of legal age for purchasing cigarettes throughout the United States, including in the Commonwealth of Massachusetts, in 1971. Philip Morris USA denies that Altria Group has ever sold cigarettes or any other consumer product in the Commonwealth of Massachusetts or elsewhere.

### **III. CLASS ACTION ALLEGATIONS**

19. Philip Morris USA admits that Plaintiffs purport to bring this action as stated in Paragraph 19, but denies that Plaintiffs are entitled to any relief whatsoever. Philip Morris USA

further denies this action is appropriate for class action treatment or is manageable as a class action.

20. Philip Morris USA admits that this action purports to be brought as a class action, that Plaintiffs' putative class and putative class period are defined in Paragraph 20, and that Plaintiffs purport to exclude certain persons from the putative class. Philip Morris USA denies that this action is appropriate for class action treatment or is manageable as a class action, denies that Paragraph 20 states a proper class or class period, and denies the remaining allegations of Paragraph 20.

21. Philip Morris USA denies that this action is appropriate for class action treatment or is manageable as a class action. Philip Morris USA admits that it has sold its cigarettes, including Marlboro Lights, to its direct customers for ultimate resale to consumers of legal age for purchasing cigarettes in the Commonwealth of Massachusetts and throughout the United States. Philip Morris USA denies that Altria Group has ever sold cigarettes or any other consumer product in the Commonwealth of Massachusetts or elsewhere. Philip Morris USA denies the remaining allegations of Paragraph 21.

22. Philip Morris USA denies that purported common questions of law and fact exist and predominate over individual issues, denies that common issues of law and fact apply to all members of the putative class, denies that it violated M.G.L. ch. 93A, and denies the remaining allegations of Paragraph 22, including all subparagraphs.

23. Philip Morris USA denies that this action is appropriate for class action treatment or is manageable as a class action, and denies the allegations of the first, second and third sentences of Paragraph 23. Philip Morris USA is without knowledge or information sufficient to



form a belief as to the truth of the allegations of the fourth sentence of Paragraph 23 and, therefore, denies the same.

24. Philip Morris USA denies that Plaintiffs and putative class members are entitled to the relief requested in Paragraph 24 or any relief whatsoever in the Complaint. Philip Morris USA further denies that this action is appropriate for class action treatment or is manageable as a class action and denies the remaining allegations of Paragraph 24.

25. Paragraph 25 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies that it has engaged in any “wrongful conduct” and denies the remaining allegations of Paragraph 25.

26. Philip Morris USA denies that this action is appropriate for class action treatment or is manageable as a class action and denies the remaining allegations of Paragraph 26.

#### **IV. FACTUAL ALLEGATIONS**

27. Philip Morris USA admits that the Centers for Disease Control and Prevention (“CDC”) publication referred to in Paragraph 27 contains the statistics referenced in the second sentence of Paragraph 27, but is without knowledge or information sufficient to form a belief as to the truth and accuracy of those statistics and of the remaining statistics and allegations of Paragraph 27 and, therefore, denies the same.

28. Philip Morris USA denies that it “manipulate[s]” the “tar” and nicotine delivery levels in its Marlboro Lights cigarettes or any of its other cigarette brands. Philip Morris USA states that, as required by law, it publishes smoke yields of “tar” and nicotine for its cigarettes and controls its manufacturing process to produce a consistent and quality controlled cigarette in line with its published figures. Philip Morris USA denies that Altria Group has ever manufactured or sold cigarettes or any other consumer product. Philip Morris USA denies the remaining allegations of Paragraph 28.

29. Philip Morris USA admits that Marlboro Lights cigarettes have ventilation holes in the filters. Philip Morris USA also admits that these ventilation holes permit the controlled introduction of diluting air into the smoke stream during puffing by the smoker but denies that the allegations of Paragraph 29 accurately or completely describe the design or function of the ventilation holes. Philip Morris USA denies the remaining allegations of Paragraph 29.

30. Philip Morris USA admits that Marlboro Lights cigarettes have ventilation holes in the filters which are not marked. Philip Morris USA also admits that these ventilation holes permit the controlled introduction of diluting air into the smoke stream during puffing by the smoker. Philip Morris USA further admits that some smokers, depending on how they smoke the cigarette, may block some of the ventilation holes of the cigarette. Philip Morris USA denies the remaining allegations of Paragraph 30.

31. Philip Morris USA states that the allegations of Paragraph 31 are vague and ambiguous and, therefore, no response is required. To the extent that a response is required, Philip Morris USA is without knowledge or information sufficient to form a belief as to the truth of the unidentified "studies" and denies the remaining allegations of Paragraph 31.

32. Philip Morris USA admits that the Massachusetts Department of Public Health ("MDPH") publication contains the language quoted in Paragraph 32, but denies the truth and accuracy of the language quoted to the extent it is meant to apply to Marlboro Lights cigarettes. Philip Morris USA denies the remaining allegations of Paragraph 32.

33. Philip Morris USA admits that the 1997 CDC publication referred to in Paragraph 33 contains the referenced study, but denies the truth and accuracy of the conclusions in that study to the extent they are meant to apply to Marlboro Lights cigarettes. Philip Morris USA is

without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 33 and, therefore, denies the same.

34. Philip Morris USA admits that the 1997 CDC publication referred to in Paragraphs 33 and 34 contains the referenced study, but denies the truth and accuracy of the conclusions in that study to the extent they are meant to apply to Marlboro Lights cigarettes. Philip Morris USA is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 34 and, therefore, denies the same.

35. Philip Morris USA admits that the 1997 MDPH publication referred to in Paragraph 35 contains the language quoted in Paragraph 35, but denies the truth and accuracy of the quoted language to the extent it is meant to apply to Marlboro Lights cigarettes. Philip Morris USA admits that it has known, just as the scientific community, governmental and regulatory bodies, and public health community have known, that it is possible for smokers to block ventilation holes in cigarettes. Philip Morris USA denies the remaining allegations of Paragraph 35.

36. Philip Morris USA denies the allegations of the first sentence of Paragraph 36. Responding to the second sentence of Paragraph 36, Philip Morris USA admits that it has been well known since at least 1967 that the way in which individuals smoke varies widely. Philip Morris USA further admits that the "compensation" hypothesis has been reported in the scientific literature since at least the late 1960's as well as in literature published by the United States Government. Furthermore, discussions of "compensation" have appeared in the popular press since at least the 1970's. Philip Morris USA denies the remaining allegations of Paragraph 36.

37. Philip Morris USA admits that language similar to that quoted in Paragraph 37 appeared in a 1975 document prepared by a then Philip Morris USA employee, but denies that this document is quoted in context or in its entirety, denies Plaintiffs' characterization of this document, and denies Plaintiffs' innuendo and implication regarding the content or meaning of this document. Philip Morris USA denies the remaining allegations of Paragraph 37.

38. Philip Morris USA is unable to respond to the allegations of Paragraph 38 in any meaningful manner because the phrase "at all relevant times hereto" is not defined in the Complaint. To the extent a response is required, Philip Morris USA admits that the FTC's Cambridge Filter Method employs a smoking machine to measure the amount of "tar" and nicotine yields in cigarette smoke. Philip Morris USA admits that the "tar" and nicotine yield numbers that are reported for cigarette brands are not meant, and were never intended, to communicate the precise amount of "tar" or nicotine inhaled by any individual smoker from any particular cigarette. Further answering, Philip Morris USA states that in 1966 it cautioned the FTC that "tar" and nicotine yields derived from the FTC test methods would not reflect the actual yields to any particular smoker.

39. Philip Morris USA admits that the quoted language appeared in a 1974 Philip Morris USA document, but denies that this document is quoted in context or in its entirety, denies Plaintiffs' characterization of this document, and denies Plaintiffs' innuendo and implication regarding the content or meaning of this document. Philip Morris USA denies the remaining allegations of Paragraph 39.

40. Philip Morris USA admits that, as required under federal law, it publishes smoke yields for "tar" and nicotine for its cigarettes based on the FTC testing method and controls its manufacturing process to produce a consistent and quality controlled cigarette in line with its

published figures. Philip Morris denies the remaining allegations of Paragraph 40, including all subparagraphs.

41. Philip Morris USA states that, as required under federal law, it publishes smoke yields of “tar” and nicotine for its cigarettes and controls its manufacturing process to produce a consistent and quality controlled cigarette in line with its published figures. Philip Morris USA denies the remaining allegations of Paragraph 41.

42. Philip Morris USA admits that it has used and continues to use reconstituted tobacco in some of its cigarettes, but denies that the allegations of Paragraph 42 accurately or fairly describe its reconstituted tobacco process. Philip Morris USA denies that Altria Group has ever manufactured cigarettes or any other consumer product. Philip Morris USA denies that it “manipulate[s] the nicotine levels in cigarettes” and denies the remaining allegations of Paragraph 42.

43. Philip Morris USA states that ammonia is a naturally occurring constituent of tobacco. Philip Morris USA admits that it uses certain ammonia compounds as processing aids and flavorants during the manufacturing process. Philip Morris USA denies that Altria Group has ever manufactured cigarettes or any other consumer product and denies the remaining allegations of Paragraph 43.

44. Philip Morris USA denies that it “manipulate[s]” the nicotine delivery in its Marlboro Lights cigarettes. Philip Morris USA states that, as required under federal law, it publishes smoke yields of “tar” and nicotine for its cigarettes and controls its manufacturing process to produce a consistent and quality controlled cigarette in line with its published figures. Philip Morris USA denies that Altria Group has ever manufactured cigarettes or any other consumer product and denies the remaining allegations of Paragraph 44.

45. Philip Morris USA denies that it uses any technique to “manipulat[e]” the nicotine and “tar” delivered to smokers. Philip Morris USA denies that Altria Group has ever manufactured cigarettes or any other consumer product and denies the remaining allegations of Paragraph 45.

46. Philip Morris USA denies the allegations of Paragraph 46, including all subparagraphs.

47. Philip Morris USA denies the allegations of subparagraph (b) of Paragraph 47. Further responding, Philip Morris admits that the FTC’s Cambridge Filter Method employs a smoking machine to measure the amount of “tar” and nicotine yields in cigarette smoke. Philip Morris admits that the “tar” and nicotine yield numbers that are reported for cigarette brands are not meant, and were never intended, to communicate the precise amount of “tar” or nicotine inhaled by any individual smoker from any particular cigarette. Further answering, Philip Morris USA states that in 1966 it cautioned the FTC that “tar” and nicotine yields derived from the FTC test methods would not reflect the actual yields to any particular smoker.

48. Philip Morris USA denies the allegations of Paragraph 48, including all subparagraphs.

49. Philip Morris USA denies that it engaged in the conduct alleged and denies the remaining allegations of Paragraph 49.

**COUNT I**  
**DECEPTIVE AND UNFAIR TRADE PRACTICES**

50. Philip Morris USA restates, realleges and incorporates by reference herein its responses to Paragraphs 1 through 49 of the Complaint as if fully set forth herein.

51. Philip Morris USA admits that Plaintiffs purport to bring this claim pursuant to M.G.L. ch. 93A, §§ 2 and 9, but denies that Plaintiffs or putative class members have any claims or are entitled to any relief thereunder.

52. Paragraph 52 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 52.

53. Paragraph 53 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 53.

54. Paragraph 54 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 54.

55. Paragraph 55 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 55.

56. Paragraph 56 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 56.

57. Paragraph 57 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 57.

58. Paragraph 58 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies that Plaintiffs and putative class members are entitled to the relief requested in Paragraph 58, or any relief whatsoever. Philip Morris USA denies the remaining allegations of Paragraph 58.

59. Paragraph 59 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA admits that it received a demand letter, but denies that the letter alleged sufficient facts to allow Philip Morris USA to evaluate individual claims and damages, or to determine whether any party has cognizable claims for which Philip

Morris USA could be held liable under M.G.L. ch. 93A, § 9(3). Philip Morris USA denies the remaining allegations of Paragraph 59.

60. Paragraph 60 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 60.

**COUNT II**  
**UNJUST ENRICHMENT**

61. Philip Morris USA restates, realleges and incorporates by reference herein its responses to Paragraphs 1 through 60 of the Complaint as if fully set forth herein.

62. Paragraph 62 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies that Altria Group has ever manufactured cigarettes or any other consumer product. Further responding, Philip Morris USA denies that it engaged in the conduct alleged and denies the remaining allegations of Paragraph 62.

63. Philip Morris USA denies that it engaged in the conduct alleged and denies the remaining allegations of Paragraph 63.

64. Philip Morris USA denies that it engaged in the conduct alleged and denies the remaining allegations of Paragraph 64.

65. Paragraph 65 asserts legal conclusions to which no response is required. To the extent a response is required, Philip Morris USA denies the allegations of Paragraph 65.

Philip Morris USA denies all allegations contained in Plaintiffs' Prayer for Relief, including all subparagraphs, and denies that Plaintiffs and putative class members are entitled to the relief requested in the "prayer", or any relief whatsoever.

Philip Morris USA denies each and every allegation of the Complaint not specifically admitted herein.



**AFFIRMATIVE DEFENSES**

**FIRST AFFIRMATIVE DEFENSE**

The Complaint fails to state a cause of action against Philip Morris USA upon which relief can be granted.

**SECOND AFFIRMATIVE DEFENSE**

Plaintiffs' and putative class members' causes of action and claims alleged in the Complaint may not be properly maintained or certified as a class action.

**THIRD AFFIRMATIVE DEFENSE**

Plaintiffs' and putative class members' claims, if any, are barred, in whole or in part, by the applicable statutes of limitation, statutes of repose, and the equitable doctrines of laches, waiver, and estoppel.

**FOURTH AFFIRMATIVE DEFENSE**

Plaintiffs' and putative class members' claims are barred, in whole or in part, by the Supremacy Clause of the United States Constitution, art. VI, § 2, because those claims are preempted and/or precluded by federal law, including but not limited to, the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 et seq., and the Federal Trade Commission's policies and regulations regarding the cigarette industry.

**FIFTH AFFIRMATIVE DEFENSE**

Plaintiffs' and putative class members' claims are barred, in whole or in part, by the First Amendment to the United States Constitution and Article XXI, Part the First of the Constitution of the Commonwealth of Massachusetts which protect the rights of freedom of speech, to petition the government and to freedom of association.

**SIXTH AFFIRMATIVE DEFENSE**

Plaintiffs' and putative class members' claims are barred, in whole or in part, because the sale of cigarettes to persons of legal age for purchasing cigarettes is a legal activity in the Commonwealth of Massachusetts.

**SEVENTH AFFIRMATIVE DEFENSE**

Philip Morris USA avers that it did not know, and in light of the existing reasonably available scientific and technological knowledge, could not have known, of (1) the design characteristics, if any, that allegedly caused the damages complained of herein or the alleged danger of such characteristics, or (2) any alternative design referred to by Plaintiffs. Philip Morris USA further avers that any alternative design was not feasible, either scientifically or technologically, nor was one economically practical.

**EIGHTH AFFIRMATIVE DEFENSE**

Plaintiffs and putative class members failed to mitigate any damages which they allegedly suffered, which failure bars or reduces any recovery by Plaintiffs and putative class members.

**NINTH AFFIRMATIVE DEFENSE**

The alleged risks associated with smoking are and have been widely known; these alleged risks were known to Plaintiffs and putative class members; and these alleged risks, if any, were consented to and voluntarily assumed by Plaintiffs and putative class members.

**TENTH AFFIRMATIVE DEFENSE**

Plaintiffs and putative class members are barred from recovering any damages by virtue of the fact that the dangers alleged by Plaintiffs and putative class members, if any, were open and obvious.

**ELEVENTH AFFIRMATIVE DEFENSE**

Plaintiffs and putative class members have no right to recover, or a verdict should be reduced by, the value of any benefits received by Plaintiffs and putative class members, paid on Plaintiffs' and putative class members' behalf, or available to Plaintiffs and putative class members, from any collateral source.

**TWELFTH AFFIRMATIVE DEFENSE**

The class action allegations of the Complaint are barred in that, if this lawsuit is certified as a class action, Philip Morris USA's rights under the United States Constitution, including but not limited to, its rights under the Fifth, Seventh and Fourteenth Amendments, and Philip Morris USA's rights under the constitutions of the various states whose laws may apply to this lawsuit including, but not limited to, the Commonwealth of Massachusetts, would be violated.

**THIRTEENTH AFFIRMATIVE DEFENSE**

The causes of action set forth in the Complaint may not be certified or maintained as a class action because the questions of fact at issue are not common to the alleged class, but rather, are factually specific and will vary dramatically from person to person.

**FOURTEENTH AFFIRMATIVE DEFENSE**

Philip Morris USA is not liable to Plaintiffs or any putative class member because it had no legal duty to disclose any of the information allegedly not disclosed.

**FIFTEENTH AFFIRMATIVE DEFENSE**

Philip Morris USA is not liable to Plaintiffs or any putative class member because all information allegedly not disclosed was in the public domain.

**SIXTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs' and putative class members' claims cannot be sustained because Philip Morris USA did not have superior knowledge of material facts pertaining to Marlboro Lights that were not also readily available to Plaintiffs and putative class members.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

To the extent Plaintiffs' and putative class members' claims are based on an alleged duty to disclose the risks allegedly associated with cigarette smoking, and smoking of Marlboro Lights, Plaintiffs' and putative class members' claims are barred because those risks, to the extent they exist, are and always have been commonly known.

**EIGHTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs' and putative class members' claims are barred to the extent that Plaintiffs and putative class members seek to impose liability retroactively for conduct that was not actionable at the time it occurred.

**NINETEENTH AFFIRMATIVE DEFENSE**

Plaintiffs' and putative class members' claims are barred because the alleged injuries for which Plaintiffs and putative class members seek to recover damages were allegedly caused by an inherent characteristic of cigarettes, including Marlboro Lights, which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and which is recognized by the ordinary person with the ordinary knowledge common to the community.

**TWENTIETH AFFIRMATIVE DEFENSE**

Plaintiffs' and putative class members' claims are barred, in whole or in part, because the cigarettes manufactured and sold by Philip Morris USA are, and always have been, consistent

with available technological, medical, scientific and industrial state-of-the-art and comply and have complied with all applicable governmental regulations.

**TWENTY-FIRST AFFIRMATIVE DEFENSE**

Plaintiffs' and putative class members' claims are barred because Philip Morris USA's advertisements for its cigarettes comply, and always have complied, with all applicable regulations of the Federal Trade Commission.

**TWENTY-SECOND AFFIRMATIVE DEFENSE**

Plaintiffs' and putative class members' claims are barred, in whole or in part, to the extent that Plaintiffs and putative class members have released, settled, entered into an accord and satisfaction or otherwise compromised their claims.

**TWENTY-THIRD AFFIRMATIVE DEFENSE**

To the extent that Plaintiffs and putative class members attempt to seek equitable relief, they are not entitled to such relief because they have an adequate remedy at law.

**TWENTY-FOURTH AFFIRMATIVE DEFENSE**

Plaintiffs and putative class members may not recover on the claims pleaded in the Complaint because the damages sought are too speculative and remote.

**TWENTY-FIFTH AFFIRMATIVE DEFENSE**

While denying at all times that Plaintiffs have stated valid claims under the Massachusetts Consumer Protection Act, Philip Morris USA asserts that those claims are barred, in whole or in part, because Plaintiffs have not complied with the requirements of M.G.L. ch. 93A, § 9 in that they have failed to provide an adequate written demand for relief identifying each claimant and reasonably describing the unfair or deceptive act or practice allegedly relied upon and the injury they allegedly suffered.

**TWENTY-SIXTH AFFIRMATIVE DEFENSE**

Plaintiffs' and putative class members' claims are barred, in whole or in part, because Philip Morris USA did not engage in more than an insignificant or indirect business relationship with Plaintiffs and/or putative class members.

**TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

Any claim of Plaintiffs or putative class members for multiple damages is barred because Philip Morris USA did not engage in any willful or knowing violation of M.G.L. ch. 93A.

**TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

Plaintiffs' and putative class members' claims are barred, in whole or in part, because any alleged injuries and damages sustained by Plaintiffs and putative class members were caused, in whole or in part, by Plaintiffs' and putative class members' contributory or comparative negligence, fault, responsibility or causation and want of due care, including, among other things, Plaintiffs' and putative class members' choice to smoke.

**TWENTY-NINTH AFFIRMATIVE DEFENSE**

While denying at all times that Plaintiffs have stated a valid claim under the Massachusetts Consumer Protection Act, Philip Morris USA asserts that Plaintiffs and putative class members did not suffer any economic harm and are, therefore, precluded from recovery under the Massachusetts Consumer Protection Act.

**THIRTIETH AFFIRMATIVE DEFENSE**

While denying at all times that Plaintiffs have stated a valid claim under the Massachusetts Consumer Protection Act, Philip Morris USA asserts that Plaintiffs and putative class members are precluded from recovery under the Massachusetts Consumer Protection Act because the representations and actions alleged by Plaintiffs do not constitute deceptive acts or practices because they were and are not material, in that they were and are not likely to affect the

decisions or conduct of Plaintiffs and putative class members or to have caused Plaintiffs and putative class members to have chosen differently but for such alleged representations or actions in light of the information available and known to Plaintiffs and putative class members, and in that the alleged representations and actions were not likely to mislead Plaintiffs and putative class members acting reasonably under the circumstances.

**THIRTY-FIRST AFFIRMATIVE DEFENSE**

While denying at all times that Plaintiffs have stated a valid claim under the Massachusetts Consumer Protection Act, Philip Morris USA asserts that Plaintiffs and putative class members are precluded from recovery under the Massachusetts Consumer Protection Act because the representations and actions alleged by Plaintiffs were not intended to deceive Plaintiffs and putative class members.

**THIRTY-SECOND AFFIRMATIVE DEFENSE**

The remedy of restitution to Plaintiffs and putative class members is barred to the extent that neither Plaintiffs nor putative class members relied upon the alleged representations or actions and to the extent that such alleged representations or actions did not cause any loss to Plaintiffs and putative class members.

**THIRTY-THIRD AFFIRMATIVE DEFENSE**

While denying at all times that Plaintiffs have stated a valid claim under the Massachusetts Consumer Protection Act, Philip Morris USA asserts that the remedy of disgorgement to Plaintiffs and putative class members is barred because Philip Morris USA did not profit from violations of the Massachusetts Consumer Protection Act, and any such disgorgement does not reasonably approximate the amount of any alleged unjust enrichment.

**THIRTY-FOURTH AFFIRMATIVE DEFENSE**

Plaintiffs and putative class members may not recover under a theory of unjust enrichment because Plaintiffs have failed to allege any cognizable “enrichment” of Philip Morris USA.

**THIRTY-FIFTH AFFIRMATIVE DEFENSE**

The Complaint fails to allege facts or a cause of action sufficient to support a claim for attorney’s fees.

**THIRTY-SIXTH AFFIRMATIVE DEFENSE**

Plaintiffs’ and putative class members’ claims are barred, in whole or in part, by the equitable doctrine of unclean hands.

**THIRTY-SEVENTH AFFIRMATIVE DEFENSE**

Plaintiffs and putative class members are not entitled to any of the injunctive relief requested in the Complaint because the hardship that would be imposed on Philip Morris USA by the relief is greatly disproportionate to any hardship that Plaintiffs and putative class members might suffer in its absence.

**THIRTY-EIGHTH AFFIRMATIVE DEFENSE**

Plaintiffs’ and putative class members’ claims are barred, in whole or in part, by the doctrines of res judicata and estoppel and by executed releases of the Commonwealth of Massachusetts.

**THIRTY-NINTH AFFIRMATIVE DEFENSE**

Plaintiffs’ and putative class members’ claims are barred, in whole or in part, to the extent that the claims or relief sought are moot.



**FORTIETH AFFIRMATIVE DEFENSE**

Plaintiffs' and putative class members' claims are barred because the alleged conduct of Philip Morris USA was undertaken in good faith for a valid business purpose.

**FORTY-FIRST AFFIRMATIVE DEFENSE**

Plaintiffs' and putative class members' claims are barred, in whole or in part, because Plaintiffs and putative class members had the means of knowing, by the exercise of ordinary intelligence, the truth or real quality of alleged statements concerning smoking and health.

**FORTY-SECOND AFFIRMATIVE DEFENSE**

Plaintiffs' and putative class members' claims are barred, in whole or in part, by Plaintiffs' and putative class members' consent.

**FORTY-THIRD AFFIRMATIVE DEFENSE**

Philip Morris USA hereby gives notice that it intends to rely upon any other defense that is now or may become available or appear during, or as a result of the discovery proceedings in, this lawsuit and hereby reserves its right to amend its answer to assert such defense.

**FORTY-FOURTH AFFIRMATIVE DEFENSE**

Philip Morris USA reserves the right to assert such other and related defenses as may become available in the event of a determination that the lawsuit, or some part thereof, is governed by the substantive law of a jurisdiction other than Massachusetts.

WHEREFORE, Philip Morris USA respectfully requests that the Court dismiss the Complaint for failure to state a claim or, in the alternative, enter judgment in its favor and against Plaintiffs and putative class members on this Complaint and grant such further relief as the Court deems just and proper.

Philip Morris USA demands a trial by jury on all issues.

Respectfully submitted,

PHILIP MORRIS USA, INC.

By its attorneys,



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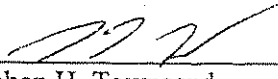
Boston, MA 02109

617-570-1000

March 19, 2003

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Answer, Defenses, and Jury Demand has been duly served by delivering a copy of same upon all counsel of record by hand on this 19<sup>th</sup> day of March, 2003.

  
\_\_\_\_\_  
Stephen H. Townsend

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