# 03-7140

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE SIMON II LITIGATION
*Plaintiffs- Appellees,*

v.

PHILIP MORRIS USA INC., (formerly known as Philip Morris Inc.), R.J. REYNOLDS TOBACCO CO., BROWN & WILLIAMSON TOBACCO CORP. (individually and as successor by merger to The American Tobacco Co.) and LORILLARD TOBACCO COMPANY,
*Defendants- Appellants,*

**LIGGETT GROUP, INC.,**
*Defendant.*

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On Appeal From The United States Court Of Appeals
For The Eastern District Of New York

BRIEF OF *AMICI CURIAE* AMERICAN CANCER SOCIETY, AMERICAN HEART ASSOCIATION, AMERICAN LUNG ASSOCIATION, NATIONAL CENTER FOR TOBACCO-FREE KIDS, TOBACCO CONTROL RESOURCE CENTER, CENTER FOR A TOBACCO FREE NEW YORK, TOBACCO CONTROL LEGAL CONSORTIUM AND DR. C. EVERETT KOOP IN SUPPORT OF NEITHER PARTY

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No. 03-7140

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In Re Simon II Litigation

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure, the undersigned hereby certifies that the American Cancer Society, American Heart Association, American Lung Association, National Center for Tobacco-Free Kids, Tobacco Control Resource Center, Center for Tobacco Free New York, Tobacco Control Legal Consortium, are non-profit, non-stock corporations with no parents or subsidiaries.

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**David C. Vladeck**
**Counsel for *Amici***

## TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

No. 03-7140

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In Re Simon II Litigation

## STATEMENT PURSUANT TO RULE 29(c)(3), FEDERAL RULES OF APPELLATE PROCEDURE, REGARDING THE IDENTITY AND INTERESTS OF *AMICI CURIAE*

This brief is filed on behalf of seven public health organizations and Dr. C Everett Koop, the former Surgeon General of the United States. Each of the *amici* share a common interest in ensuring that the tobacco industry is held responsible in court for the unparalleled costs that cigarette smoking has exacted on society. *Amici* thus support class action litigation against the tobacco industry for compensatory and punitive damages, and believe that punitive damages represent an important tool to vindicate society's interest in punishing the tobacco industry for its misdeeds, to force the industry to disgorge its ill-gotten profits, and to deter it and other industries from engaging in conduct that threatens the lives and well-being of millions of Americans.

Nonetheless, *amici* do not support the class certification order entered by the district court. As *amici* explain below, the district court's effort to conscript virtually every injured smoker in the United States in a sprawling, unitary punitive

damage proceeding jeopardizes the rights of those excluded from the class. For that reason, *amici* submit that the class certification order should be set aside.

*Amici* have moved for leave to file this brief and counsel for *amici* has been authorized to represent that none of the parties to this appeal will oppose *amici*'s motion. The *amici* are:

**The American Cancer Society** is a nonprofit public health organization with a membership of over 2.3 million volunteers throughout the country, including over 50,000 physicians. ACS is committed to the mission of controlling and eliminating cancer through research, education, advocacy and service. Research conducted and supported by ACS since the 1950s has played a pivotal role in identifying the use of tobacco products as the most preventable cause of cancer.

**The American Heart Association** (AHA) is the largest voluntary health organization fighting heart disease, stroke and other cardiovascular diseases, which annually kill approximately 950,000 Americans. Nationwide, AHA has grown to include more than 22.5 million volunteers and supporters who carry out its mission in communities across the country. Tobacco use prevention remains a top priority for the Association. More than 4000,000 people die each year from smoking-related diseases, nearly half of those are from tobacco-related cardiovascular diseases.

**American Lung Association** (ALA) is the nation's oldest voluntary health organization, with over 400,000 volunteers and affiliates in all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands. Cigarette smoking is a major cause of chronic obstructive lung disease, therefore, ALA has long been active in research, education and public policy advocacy on the adverse health effects of tobacco products.

**National Center for Tobacco-Free Kids** works to protect minors from tobacco by raising awareness that tobacco is a pediatric disease, changing public policies to limit the marketing and sales of tobacco to children, and altering the environment in which tobacco use and policy decisions are made. The National Center has over 100 members organizations, including health, civic, corporate youth, and religious groups dedicated to reducing children's use of tobacco products.

**The Tobacco Control Resource Center** is a non-profit public interest organization founded in 1979 and dedicated to providing legal information and support for the tobacco control community. The Center's Tobacco Products Liability Project was formed in 1984 to encourage lawsuits against the tobacco industry as a public health strategy. The Project has held 20 national and international conferences on issues related to tobacco liability, and has filed amicus

briefs in several Courts of Appeals and the United States Supreme Court.

**The Center for Tobacco Free New York** is a statewide tobacco control advocacy project funded by the Robert Wood Johnson Foundation and the American Cancer Society and dedicated to reducing the toll of tobacco caused death and disease through public and private sector policy change.

**The Tobacco Control Legal Consortium** is a collaborative network of tobacco control legal resource centers across the United States, formed to improve the quality of legal technical assistance available to those addressing legal issues raised by the use of tobacco. Housed at the William Mitchell College of Law in Saint Paul, Minnesota, the Consortium was formed by state-funded legal programs in the states of California, Maryland, Massachusetts, Michigan, and Minnesota, each of which assists citizens in understanding and protecting their legal rights with respect to the impact of tobacco on health.

**C. Everett Koop, M.D.**, is an eminent physician and served as the Surgeon General of the United States from 1981 through 1989. Dr. Koop is currently the Elizabeth DeCamp McInerny Professor at Dartmouth College, and a Senior Scholar of the C. Everett Koop Institute, also at Dartmouth.

David C. Vladeck

No. 03-7140

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In Re Simon II Litigation

BRIEF OF *AMICI CURIAE* AMERICAN CANCER SOCIETY, *et al.*,
IN SUPPORT OF NEITHER PARTY

*Introduction and Summary of Argument*

This *amicus curiae* brief is submitted by a number of public health groups and the former Surgeon General of the United State in support of neither party. *Amici* generally support the use of the class action device in cases seeking compensatory and punitive damages against the tobacco industry. Nonetheless, *amici* submit that Rule 23(b)(1)(B), punitive-damage-only, non-opt-out class certified by the district court should not be upheld. *Amici* wish to make three points that may not stand out in the parties' more comprehensive treatment of the issues:

**First**, in principle, there is much to commend in the district court's approach, especially given the devastation the tobacco industry has unleashed on society and the economic impediments that discourage individual cases for tobacco related injuries and deaths. We agree that class actions against the industry for both compensatory and punitive damages are permissible, but only under Rule

23(b)(3) and not under Rule 23(b)(1)(B).

*Amici* also agree with the district court that the tobacco industry's argument that *its* due process rights are impaired by the certification or a damage class (under

any subsection of Rule 23(b)) is without merit. There is no substantive due process problem in this case. This is not a case like *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995), where the court found that the certification of a nation-wide class placed such intense pressure on the defendant to settle a possibly meritless case that the certification order itself violated the defendant's due process rights. The factors *Rhone-Poulenc* cited as reasons to de-certify the class actually *support* class certification here, where the industry's liability is far from speculative. Indeed, the industry has already entered into a $246 billion settlement with the states for the health care expenses incurred as a result of tobacco-induced disease and the trend in recent tobacco litigation is in plaintiffs' favor.

Nor is there any plausible procedural due process objection. The elaborate procedures developed *by* the *court for* the trial of the punitive damage claim--including an initial comprehensive advisory trial on compensatory damages--afford the industry ample due process protection. And any objections the industry may raise to the advisory trial on compensatory damages would ring especially hollow since strict proportionality between the punitive award and the

compensatory award is not required. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996).

**Second,** the class certification order cannot stand because it violates the due process rights of persons improperly excluded from the class, yet bound by the judgment. According to the district court, this proceeding will "discharge" the tobacco industry's "total liability for punitive damages." As a result, non-class members will be denied the right to seek punitive damages in the future. *In re Simon II Litig.*, 21 F.R.D. 86, 104 (E.D.N.Y. 2002).

There are two distinct groups of non-class members whose due process rights are compromised by the certification order. The order excludes "futures: that is, current and past smokers who may develop smoking-related disease, but will not be diagnosed within the class period. There is no reason for their exclusion. In this respect, the certification order runs directly counter to *Ortiz* v. *Fibreboard*, 527 U.S. 815 (1999), which held that Rule 23(b)(1)(B) certification is permissible only where the court has before it all persons who may be entitled to share in the fund. Thus, the class must be decertified, or the class definition must be broadened to include futures.

Equally problematic, the class definition includes *only* those asserting a physical injury claim based on their own smoking. The class thereby *excludes*

everyone else with a potential punitive damage claim, including those having personal injury claims based on exposure to second hand tobacco smoke and those having claims against the industry for economic loss. The district court apparently intends to foreclose pending and future punitive damage claims by plaintiffs alleging injuries of a different kind than those covered by the class, which violates the due process rights of these absent litigants. There is no principled basis for stripping away the state-law created rights that these individuals may have to seek punitive damages and give them nothing in return.

The irony in narrowly defining the class here is palpable. Rule 23(b)(I)(B) certification may be justified only as a means of preserving a limited fund to ensure that *all* of those injured by the defendants' conduct will be able to obtain at least their pro rata share of the recovery. The Rule avoids the possibility that the early litigants will deplete the fund, leaving nothing for those who come later. *Ortiz*, 527 U.S. at 838-39. But the certification order here does *exactly what the Rule aims to prevent:* it gives nothing to categories of persons injured by the misconduct of the tobacco industry, denying them any possibility of recovering punitive damages.

Finally, we have doubts that the "fund" here is "limited" for Rule 23(b)(l)(B) purposes. At this point, we know nothing about how the district court

anticipates determining the constitutional limit on punitive damages that may be imposed against the industry, what the limit might be, and whether the claims against the industry exceed the limit. Given these uncertainties, Rule 23(b)(1)(B) certification is not appropriate.

**Third,** if this Court decides that this class should be certified, we urge it to make clear that the limits suggested by the district court on the use of any unclaimed punitive damages are not binding and that such funds may be used for education, prevention and cessation programs that benefit society as a whole *Ciraolo v. City of New York,* 216 F.3d 236,245 (2d Cir. 2000). We urge the Court to direct the district court to seek the broadest public input--including from public health organizations -about the best uses to put unclaimed funds before making any decisions about distribution.

## STATEMENT OF THE CASE

To understand the basis for *amici's* concerns, it is useful to describe briefly the class certification order as well a~ the district court's justification for class certification. The history of this case is chronicled in a number of opinions and law review articles and will not be repeated here. *In re Simon II,* 211 F.R.D. at 97-99 (listing prior decisions in *Simon II* and its predecessor cases).

The key points are these. In 2000, the district court consolidated the tobacco

cases pending before it under the name of *Simon.* After extensive proceedings, the plaintiffs decided to forego seeking certification of an opt-out class for compensatory damages. *Id.* at 104. Prior efforts to certify nationwide compensatory damage class actions had been unsuccessful. *See, e.g., Castano* v. *American Tobacco Co.,* 84 F.3d 734 (5th Cir. 1996). Instead, plaintiffs sought, and the district court certified, a nation-wide class of smokers seeking only punitive damages in "an attempt to provide a procedural solution to the problem of repetitive and unrelated judgments for punitive damages (limited by constitutionally required overall caps) in this massive and complex litigation." *In re Simon* 11,211 F.R.D. at 96.

Two points about the class definition merit attention. First, by requiring that class members be diagnosed with a tobacco-related disease by the notice date, it excludes "futures" -that is, people who smoke or once smoked and have yet to be diagnosed with a disease, but who may ultimately develop a smoking-related disease. Second, it excludes everyone who potentially has a claim against the tobacco industry that is not based on physical injury caused by smoking, including persons injured by "second hand" smoke as well as smokers who have sustained economic rather than physical injury *(e.g.,* they were defrauded by representations that "light" cigarettes are safer than regular ones).

Non-class members are directly affected by the certification order because the district court intends that the punitive damage award in this case will bar punitive damages in subsequent cases. "If plaintiffs' theory is accepted, as this court has held it should be, future plaintiffs in cases seeking compensatory damages will get no punitive award. The public interest in punishment will have been satisfied." *Id.* at 108. The court recognized that, given the intended sweeping preclusive effect of a judgment in this case, perhaps "the whole universe of possible claims should be embodied in the class, including people injured in the future and [by] passive smoke inhalation," and that "the complaint might be expanded" to that end. *Id.* But the court noted that "no such broadening seems to be sought by named plaintiffs or defendants," suggesting that its hands were tied. *Id.*

The district court's certification order envisions a three-step procedure for determining an aggregate punitive damage award. *ld.* at 100. First, a jury will be empaneled and directed "to make a class-wide determination of liability and estimated total value of national undifferentiated compensatory harm to all members of the class" applying New York law. *Id.* New York law would govern, the court explained, because the variations among the state laws on fraud and consumer protection are modest and the point of the estimating compensatory damages is simply to provide "a predicate in determining non-opt-out class

punitive damages." *Id.*

Assuming that the jury finds the industry liable, the second stage will focus on "whether the defendants engaged in conduct warranting punitive damages," again applying New York law. *Id.* The district court defended application of New York law by noting that each defendant has substantial contacts with New York law on punitive damages is generally in harmony with the laws in other jurisdictions. *Id.* at 166-67.

Assuming that an award of punitive damages is warranted, the jury in the final stage of the proceeding will "determine the mount of punitive damages to be awarded the class and how the damages will be allocated, on a disease-by-disease basis." *Id*. at 100. The district court's order sets for the principles that would guide the jury in assessing punitive damages. For one thing, punitive damages would provide a disgorgement remedy "where many individual compensatory claims cannot be brought so that the total harm of tortious acts is not paid as an external cost of the operation of a tortfeasor ." *Id.* at 59. In the court's view, a unitary punitive damage award proceeding is the only available instrument to vindicate society's interest in punishing the industry and forcing it to internalize the cost for the harm it has unleashed. The court also noted that punitive damages

need not be directly proportionate to, or even based on, an award of compensatory damages, citing both federal and New York law that supports this theory . *Id*. at 160. And the court emphasized that because punitive damages are not compensatory in nature, "courts should place less emphasis on plaintiffs' rights when evaluating due process arguments. Plaintiffs' entitlements are, after all, met by compensatory damages." *Id.* at 162 (quoting *Dunn* v. *HOVIC*, 1 F.3d 1371 (3d Cir. 1993)).

The district court did not explain the distribution system it envisions, but instead pointed to the funds created by the Holocaust litigation, *Holocaust Victim Assets Litigation*, 105 F. Stipp. 2d 139 (E.D.N.Y. 2000) and the Agent Orange litigation, *see In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Stipp. 740, 750 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), as models. In both cases the parties created a matrix to govern the payouts, with a right to appeal to a special master if an individual plaintiff was dissatisfied with his or her recovery. Unclaimed funds would not revert to the tobacco industry. Instead, they would be "allocated by the court on a cy pres basis to treatment and research organizations working in the field of each disease on advice of experts in the field." *In re Simon II*, 211 F.R.D. at 100.

## ARGUMENT

### I. CLASS TREATMENT OF TOBACCO CLAIMS WOULD NOT IMPAIR THE TOBACCO INDUSTRY'S DUE PROCESS RIGHTS.

The plaintiffs-appellees' brief will explain why the tobacco industry's due process objections to class certification are not well founded. *Amici* wish to make only two points: first, tobacco litigation cries out for class treatment, and second, to the extent that the industry claims that certification or a nation-wide punitive damage class violates the *industry's* due process rights, that argument falls wide of the mark.

#### A. Amici Support Class Treatment Of Damage Claims Against The Tobacco Industry.

Although *amici* do not support the certification ordered entered below, our concern extends mainly to the problems inherent in Rule 23(b)(I)(B) certification of *this* class, as defined by the district court, not to certification of damage classes--punitive and compensatory--against the tobacco industry. Indeed, there is much to commend the district court's approach. We agree with the district court's effort to use the class action device to require the tobacco industry to absorb the costs it has forced society to bear while, at the same time, to provide significant recoveries to millions of people injured by tobacco. And we agree in principle with the district court's suggestion that, had the plaintiffs asked, it could have certified a

more limited class (*e.g.*, one consisting of New York plaintiffs) seeking both compensatory and punitive damages. *In re Simon II*, 211 F.R.D. at 109-11.

In our view, courts have made it too difficult to bring damage class actions against the tobacco industry, *see, e.g., Liggett Group, Inc. v. Engle*, No. 3D00-3400, 2003 WL 2180319 (Fla.3d DCA, May 21, 2003); *Barnes v. American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), and have failed to recognize the superiority of class litigation in mature, mass torts, such as tobacco cases. As the district court recognized, proceeding with damage litigation on a class basis spares plaintiffs many of the transaction expenses commonly associated with multiple individual actions. These costs include those incurred in repeatedly reproving the plaintiff's case, finding and paying for expensive expert witnesses, and fending off defendants who have the will and resources to litigate every one of these cases to the bitter end. *See In re Simon II*, 211 F.R.D. at 103; Elizabeth J. Cabraser, Engle v. R.J. Reynold Tobacco Co.: *Lessons in State Class Actions, Punitive Damages and Jury Decision-Making Unfinished Business: Reaching the Due Process Limits of Punitive Damages in Tobacco Litigation Through Unitary Classwide Adjudication*, 36 WAKE FOREST L. REV. 979 (2001). Even with the potential for large recoveries, these costs are often far too high for individual plaintiffs, especially given the risks

of non-recovery. And in light of the known transaction costs, many potential plaintiffs have faced great difficulties finding an attorney willing to play "David" in this battle with the Goliath tobacco industry. *See Id.* As a result, the industry has not only escaped paying compensatory damages to millions of smokers who have died or been injured and have legitimate although unasserted claims against the industry, but it has also largely evaded being punished by society for its misconduct. We thus commend the district court's analysis about the viability of class litigation against the tobacco industry, if not its ultimate conclusion.[1]

### B. Punitive Damage Class Actions Would Not Impair The Due Process Rights Of The Tobacco Industry.

The tobacco industry will likely raise two due process objections to damage class actions. First, the industry will contend that the certification of any large damage class action (punitive, compensatory, or both) violates its due process

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[1] *Amici* have reservations about the certification of punitive--damage--only classes, even those certified under Rule 23(b)(3), and even those limited to plaintiffs from a single state who are currently injured. *See also Amchem Products Inc.* v. *Windsor*, 521 U.S. 591,595 (1997). We recognize that Rule 23(b)(3) certification of a state-wide punitive damage class for persons currently diagnosed with tobacco-induced disease would carry with it the substantial protections of notice and opt-out rights and would address the choice of law and intra-class conflict problems. But punitive-damage-only classes nonetheless raise questions about whether class members will be deemed to have waived their claims for compensatory damages (at least in states forbidding claims-splitting) and may discourage lawyers from taking on compensatory-damages-only cases. For these reasons, we would not encourage the district court to reconfigure this into a Rule 23(b )(3) punitive-damages-only nationwide class on remand.

rights because the possibility of a mammoth class judgment places undue and perhaps irresistible pressure on the industry to settle. Second, the industry will claim that the procedures deve1oped by the district court to try this action impair its procedural due process rights. Neither argument has merit.

Although this Court has never held that class certification, standing alone, raises due process concerns for the defendant, other courts have expressed this concern in reviewing class certification. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995); In re Bridgestone/Firestone, Inc. *Tires Prods. Liab. Litig.*, 288 F .3d 1012 (7th Cir. 2002); *Newton v. Merrill Lynch, Pierce, Fenner* & *Smith, Inc.*, 259 F.3d 154, 168 (3d Cir 2001); *see also Rutstein v. Avis Rent-A-Car Sys.*, 211 F.3d 1228, 1241 n.21 (11th Cir. 2000).[2]

The concern outlined in these cases has no relevance here. In each case, the court worried that class certification placed unfair pressure on the defendant to settle even though the defendant's ultimate liability remained highly speculative. For instance, in *Rhone-Poulenc* the Seventh Circuit decertified a class action brought against the blood products industry by hemophiliacs who contended that they had contracted the HIV-virus from HIV-tainted blood products because prior

[2] Some circuits have rejected the *Rhone-Poulenc* approach. *E.g., Valentino v. Carter-Wallace, Inc.* 97 F.3d 1227, 1232 (9th Cir 1996); *see also In re American Medical Systems, Inc,* 75 F.3d 1069 (6th Cir. 1996).

litigation suggested the strong possibility that the industry bore no liability. 51 F.3d at 1296-98. The court was careful to temper its ruling by noting that "[ w]e do not want to be misunderstood as saying that class actions are bad because they place pressure on defendants to settle," rather, the potential for pressure to settle must be balanced in some cases against "the undoubted benefits of the class action that have made it an authorized procedure for employment by federal courts." *Id.* at 1299.

Similarly, in *Newton*, the Third Circuit affirmed a district court's denial of certification for a putative class of investors who claimed that their broker-dealers breached the "duty of best execution" while executing millions of stock trades. Although the court decertified the class because individualized injury assessments were necessary, the court also expressed skepticism about the strength of the case on the merits, observing that the district court found that, in a random sample of trades covered by the proposed class, only one of twelve was arguably improper and could have given rise to damages. 259 F .3d at 178.

Even assuming that it is permissible in evaluating the propriety of class certification to look at the merits--as was done in *Rhone-Poulenc* and its progeny--that approach would undercut any claim by the tobacco industry that class certification was unfair here. After all, the industry has already *settled* cases

brought against it by the States for $246 billion, it has lost at the trial court level class cases involving as much $10 billion *(Price* v. *Philip Morris, Inc.,* No. 00-L-112, Cir. Court, 3d Jud.Cir., Madison County, Ill. (March 21, 2002)), it has lost individual cases involving amounts as high as $80 million *(Williams* v. *Philip Morris,* 183 Ore. App. 192; 51 P.3d 670 (Ore. App. 2002)), and it is facing claims amounting to $289 billion in the government's RICO case, which is slated to go to trial next year. Moreover, the district court's comprehensive recitation of the tobacco industry's misconduct, *see* 211 F.R.D. at 114-126, strongly suggests that there are unusually solid grounds for the imposition of punitive damages. Thus:,. this case does not involve the kind of highly speculative claims that were present in *Rhone-Poulenc* and *Newton,* and certification of a damages class action against the industry would be proper even under the *Rhone-Poulenc* line of cases.

2. The industry will also argue that the procedures outlined by the district court for evaluating class-wide punitive damages are deficient. Not so. As discussed above, the district court has constructed an elaborate process--including a full-scale advisory jury trial on compensatory damages--to ensure that the industry's procedural due process rights are safeguarded. *E.g., Hilao* v. *Marcos,* 103 F.3d 767 (9th Cir. 1996); *Watson v. Shell Oil Co.,* 979 F.2d 1014 (5th Cir. 1992); *but cf, e.g., Liggett Group, Inc.* v. *Engle, supra; Allison* v. *Citgo Petroleum*

*Corp.*, 151 F.3d 402 (5th Cir. 1998). *Amici* will leave it to plaintiffs to more thoroughly address this point, but we want to respond briefly to one industry claim in particular, namely that its due process rights would be violated by setting punitive damages on the basis of an estimate of the aggregate compensatory damages that *could* be awarded, not just the compensatory damages that *have* been awarded against the industry. We believe that the district court is correct on this point for several reasons

First, subject to the limitations discussed above, *see* n.l, *supra*, there is no impediment to certifying a class seeking punitive but not compensatory damages, just as a class could be certified seeking only compensatory damages. The choice is up to class members. *See In re Exxon Valdez*, 1995 WL 527990 (D. Alaska 1989) (certifying with parties' consent punitive-damage-only class under Rule 23(b)(1)(B)).

Second, there is no requirement of strict proportionality between compensatory and punitive damages awarded. Just this Term, the Supreme Court reaffirmed that "because there are no rigid benchmarks that a punitive damage award may not surpass, ratios greater than those we have previously upheld may comport with due process. "*State Farm Mutual Ins. Co.* v. *Campbell*, 123 S. Ct. 1513, 1524 (2003); *see also TXO Products Corp.* v. *Alliance Resources Corp.*, 509

U.S. 443, 458 (1990). Thus, the trier of fact does not need to know the exact amount of compensatory damages that will be awarded against a defendant to fairly impose punitive damages. Rough proportionality is all that is required. *Id.*

Third, calculating a punitive damage award solely on the basis of actually awarded compensatory damages would disserve the important societal purposes served by punitive damages--punishment, deterrence and retribution--and would defeat class treatment of the plaintiffs' claims. As the Supreme Court has said time and again, "punitive damages serve a broader function [than compensatory damages]; they are aimed at deterrence and retribution." *State Farm,* 123 S. Ct. at 1519; *accord Cooper Industries v. Leatherman,* 532 U.S. 424,432 (2001); *Pacific Mut. Life Ins. Co.* v. *Haslip,* 499 U.S. **1,** 19 (1991). Awarding punitive damages based only on already awarded compensatory damages also assumes, wrongly, that the amount of compensatory damages is fixed, when in fact there are a steady stream of cases being decided in plaintiffs' favor. Under the industry's approach, the punitive damage award would likely never capture the full amount of compensatory damages awarded against the industry.

Over 440,000 Americans die each year from tobacco related illness while hundreds of thousands more are diagnosed with tobacco-related diseases.[3]

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1[3] American Cancer Society, Questions about Smoking Tobacco and Health, at http://www.cancer.org/docroot/PED/content/PED_l 0_2x-Questions_About_Smoking_Tobacco_and_Health.asp?sitearea=PED.

Although only a small fraction--far fewer than 1 percent --bring suit, Cabraser, *supra*, 36 WAKE FOREST L. REV. at 993-96, their deaths and injuries matter. In a case on their behalf certified under Rule 23 (b )(1)(B) or 23(b)(3), an estimate of the total compensatory damages may properly form the basis of a punitive damage award. Society's interest in retribution extends beyond those few who sue in their individual capacities to those who have sustained injuries because of the industry's misconduct. After all, it is society as a whole that bears the enormous costs associated with tobacco related illness and death and society therefore has a powerful interest in punishing the wrongdoers. Society also has a powerful interest in deterrence --both in deterring the tobacco industry from continuing its reprehensible conduct and more generally in deterring other industries from engaging in wholesale fraud and deception at the expense of public health. Thus, as the district court pointed out, one way to hold the tobacco industry accountable for its misdeeds is to certify a class to impose a sizable punitive damages award to those who have been victimized by the industry's wrongful practices, and doing so could not impair the due process rights of industry. *In re Simon 11,211* F.R.D. at 152-59.

## II. THE CERTIFICATION ORDER VIOLATES THE DUE PROCESS RIGHTS OF NON-CLASS MEMBERS.

*Amici* submit that *Ortiz v. Fibreboard*, 527 U.S. 815 (1999), dooms the certification order under review. *Ortiz* addressed whether a non-opt-out class could be certified under Rule 23(b)1(0(B) in a settlement where, as here, the defendant was an ongoing business whose potential liability might outstrip its assets. The Court observed that Rule 23(b)(1)(B) certification is proper, if, but only if, all potential claimants "Identified by a common theory of recovery" are before the court and are "treated equitably" and the fund has been shown to be a limited one that is insufficient to satisfy the claims against it. 527 U.S. at 839-40. These requirements are not met in this case.

1. Our principal concern is that the certification order jeopardizes the due process rights of absent parties. These non-class members fall into two camps: 1) "futures," and 2) persons not claiming personal injury as a result of smoking, including those claiming only economic injury and those harmed as a result of exposure to environmental tobacco smoke. All of those excluded from the class have potentially viable punitive damage claims that could be asserted against the same defendants. Yet the district court's ruling suggest that they are to be denied any opportunity to recover punitive damages, now and in the future. If the class is not expanded to include these persons, and the district court finds that the due

process limit on punitive damages has been reached, then the rights of the absent class members, too, will be de facto adjudicated because their rights to seek punitive damages will be extinguished.

That result would be contrary to *Ortiz.* Among the reasons for rejecting Rule 23(b)(1)(B) certification in *Ortiz* was the Court's concern that the class was substantially under-inclusive. According to the Court, the "definition of the class excludes myriad claimants with causes of action, or foreseeable causes of action, arising from exposure to Fibreboard asbestos," an exclusion the Court condemned is improper under the Rule. 527 U.S. at 854. Indeed, the Court noted that the Rule required that "the class will comprise everyone who might state a claim on a single or repeated set of facts, invoking a common theory of recovery, to be satisfied from the limited fund as the source of payment." *Id. at* 839.

If *Simon II* is the only punitive damage pie available to punish the industry for its misdeeds to date, and only class members get to share in the pie, the class definition must be carefully crafted to ensure that *everyone* with a claim may share in the recovery. The irony here is that in the name of preserving the assets of the tobacco industry so that the early claimants do not deplete the fund to the detriment of the late filers, the district court created *exactly* the same problem by excluding people with viable tobacco related claims who, were the class to proceed as

defined, would be barred from collecting punitive damages.[4]

The district court justified its approach, and its deviation from *Ortiz*, by observing that due process considerations apply with less force when assessing punitive rather than compensatory damages. *In re Simon 11,211* F.R.D. at 104, 162. Even if that argument is correct, it cannot excuse putting aside the due process concerns of absent parties altogether. As the district court recognized, this action is largely intended as a *substitute/or*, not a *supplement to*, compensatory actions against the tobacco industry precisely because few people actually sue, let alone recover compensatory damages against the industry. *Id.* at 159-60.

Moreover, the trial court's notion that the rights of the plaintiff are essentially irrelevant in determining punitive damages is not universally shared. Many states

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[4] If the Court concludes that Rule 23(b)(1)(B) certification is proper, these problems could be addressed on remand. With appropriate safeguards *(e.g.*, the appointment of separate counsel to represent the futures' interests), the court could include futures and hold-back funds to permit those who become ill to participate in the distribution of the fund's assets. *Cf Ortiz*, 527 U.S. at 846-48. For those claiming economic injury or harm from second hand-smoke, the Court could emphasize that this proceeding will *not* foreclose their right to seek punitive damages because they were injured by different misconduct than class members. Those injured by second-hand smoke were harmed because the industry concealed the dangers and thwarted regulation to protect non-smokers. Those suffering from economic loss, like the plaintiffs in "light" cigarette litigation, have successfully argued that the industry deceptively promoted these cigarettes as "safer" than regular cigarettes, even though they are not. *See Price* v. *Philip Morris, Inc., supra* (awarding class $3 billion in punitive damages in "light" cigarette consumer class action on top of a $7 billion compensatory award).

award punitive damages not simply for reasons of retribution, punishment and deterrence, but also to augment compensation to the victim and to provide an incentive for attorneys to take on cases that might be economically unattractive without the prospect of a punitive damage award. In those states, indeed, in all states that permit punitive damages, punitive damages are part and parcel of the bundle of rights the state confers on the individual plaintiff, and it is these rights that are impaired by the certification order.[5]

Making matters worse, the consequences of exclusion from *this* class may be dire. With tobacco litigation, the practical reality is that without the carrot of punitive damages contingency fee plaintiffs' attorneys may be less willing to accept these cases. Thus, those excluded from the class might end up losing not only their right to seek punitive damages, but any possibility of recovering even compensatory damages. We believe that the limited class definition here founders for the same reason it did in *Ortiz*, and hence this certification order cannot stand.

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[5] *See, e.g., Bullman v. D & R Lumber Co.*, 464 S.E.2d 771, 776-77 (W. Va. 1995) (punitive damages are damages awarded, for among other reasons, to provide additional compensation to the plaintiff); *Berry v. Louiseau*, 614 A.2d 414, 435 (Conn. 1992) ("punitive damages serve primarily to compensate the plaintiff for his injuries"); *Eide v. Kelsey-Hayes Co.*, 427 N.W. 2d 488, 498 (Mich. 1988) (punitive damages permitted for compensatory purposes); *Kinzua Lumber Co.* v. *Daggett*, 281 P .2d 221, 223 (Or. 1955) (punitive damages provide for "redress for an injury suffered by the victim").

2. There is one final reason why certification here oversteps the bounds of Rule 23(b)(1)(B)--neither the district court nor the parties have shown that this action involved a true "limited fund" within the meaning of the Rule. Typically, the term "limited fund" refers to either a fixed fund like a trust, or to a fund that is limited in practical terms by the defendant's ability to pay, as was alleged to be the case in *Ortiz.* In this case, in contrast, the alleged "limit" is a legal one -*i.e.*, the constitutional ceiling on the amount of punitive damages that may be awarded against a defendant for a specific pattern of misconduct. We recognize that, after *Gore,* "when an [punitive damage] award can fairly be categorized as 'grossly excessive' in relation to" the state's interests in imposing punitive damages, the award "enter[ s] the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." 517 U.S. at 562. To the extent that the district court suggests that this is a limited fund case simply because there is a constitutional limit on the amount of punitive damages that may be awarded--without a finding that that amount is likely to be inadequate to meet the probable claims against the fund-- we disagree. In that event, every, punitive damage case would involve a limited fund within the meaning of Rule 23(b)(1)(B), which would stretch the Rule beyond its text and purpose. *Ortiz*, 527 U.S. at 842.

To the extent that the district court suggests that the fund here is "limited" because the punitive damage claims that could be asserted against the industry

would both exceed the constitutional ceiling and swamp the industry's resources, the court made no effort to provide even a preliminary estimate as to the amount of the constitutional limit on the "fund" or determine that the fund will be inadequate to satisfy the claims that may be made against it.[6] At least some preliminary estimate must be made at the time of class certification. *Ortiz*, 527 U.S. at 849-50 (district court must have before it evidence regarding "the limit and the insufficiency of the fund" at the "moment of certification"). Indeed, even though the class has been certified, at this point the parties do not have any idea whether the ceiling is likely to be on the order of a billion dollars, a trillion dollars, or something in between.

This is not an idle concern, given the reprehensibility of the industry's misconduct and the enormity of the human and economic toll it has exacted. Suppose, for instance, that the district court, on the basis of the extensive prior proceedings before it and the discovery in this case, estimates that aggregate compensatory damages would amount to $50 to $80 billion; that punitive damages

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[6] As the *Ortiz* Court pointed out, 527 U.S. at 860 n.34, and as this Court has noted, *In re Drexel Burnham Lambert Group, Inc.*, 960 F .2d 285, 292 (2d Cir. 1992), Rule 23(b)(1)(B) is not a way for companies facing insolvency to avoid bankruptcy. If the punitive damages awarded by a jury are not "grossly excessive" in violation of the due process clause, Rule 23(b)(1)(B) would not justify less than a full award. To the extent that the district court suggests that Rule 23(b)(1)(B) provides a substantive limit that permits a company to limit its liability, that suggestion is contrary to *Ortiz.*

are likely to be warranted; and that punitive damages should be set at a multiple of or 7 times the compensatory award. *See In re Simon IL* 211 F.R.D. at 165 (suggesting that "[s]ince the instant case may involve serious physical injury, long continual deliberate frauds and large exposure to the public through subvention of medical costs, a ratio in excess of 6 to 1 or 10 to 1 may be justifiable"). Thus, the court might estimate that the appropriate punitive award in this case would be somewhere between $300 billion and $560 billion. But suppose as well that the court estimates that, given the reprehensibility of the industry's conduct and the enormity of the injury visited on society, an award of greater than $560 billion would not be "grossly excessive." In that case, the fund would not be "limited" within the meaning of Rule 23(b)(I)(B), because the resolution of this action would not, in that case, ''as a practical matter be dispositive of the interests of the other members not parties to the adjudication."[7]

We do not contend that to be "limited" within the meaning of Rule 23(b)(1)(B) the fund and the claims against it must be ascertainable with precision

[7] We also question whether, consistent with the Seventh Amendment, a court may decide in advance of a jury award the likely constitutional ceiling on punitive damages. Courts may set aside punitive damage awards that exceed constitutional limits. *State Farm*, 123 S. Ct. at 1519-20; *Gore,* 517 U.S. at 562. But the Seventh Amendment is generally understood as requiring the jury, in the first instance, to set damages, even punitive damages -an understanding that seems inconsistent with a court determining the constitutional ceiling on a punitive damage award on its own, in the absence of a prior jury finding. *Dimick* v. *Scheidt,* 293 U.S. 474, 486 (1935); *see also Feltner* v. *Columbia Pictures Television, Inc.,* 523 U.S. 340, 353 (1999); *but cf. Cooper Industries,* 532 U.S. at 437.

in advance. But we do contend that at the time of certification there must be evidence showing that the amount of the fund may be too small to fully compensate all potential claimants. Indeed, that is the heart of the Court's ruling in *Ortiz.* 527 U.S. at 837-39. *Amici* submit that given the uncertainties about this "fund" and whether it is in fact "limited" within the meaning of Rule 23(b)(l)(B), certification under Rule 23(b)(1)(B) is not appropriate.

## III. IF CERTIFICATION IS UPHELD, THE COURT SHOULD MAKE CLEAR THAT UNCLAIMED FUNDS MAY BE USED FOR EDUCATION, PREVENTION AND CESSATION PROGRAMS.

If this Court determines that class certification is proper, we ask the Court to extend the limits suggested by the district court on the appropriate use of unclaimed punitive damages and to direct the district court to hold a public proceeding--in which public health experts and others may participate--to explore the best uses to which such funds may be put.

The district court ruled that unclaimed funds would not revert to the tobacco industry, but would instead by "allocated to the court on a cy pres basis to treatment and research organizations working the field of each disease on advice of experts in the field." *In re Simon II,* 211 F.R.D. at 100. In so ruling, the court was applying law developed in compensatory damage cases to this case, see *id.* at 191-

93, even though the interests served by punitive damage awards are quite different. *Amici* submit that, notwithstanding the importance of research and treatment, there are additional uses to which unclaimed funds could be put. *Amici* believe that the key to reducing tobacco use in the United States is education, prevention and cessation especially programs aimed at young people. Statistics make clear that the vast majority of smokers become addicted to tobacco before they reach 18; the best way to "treat" tobacco-related disease is to prevent it from occurring in the first place. This, in fact, was the animating idea behind the Food and Drug Administration's effort to curb tobacco use by minors in the United States. *See* 61 Fed. Reg. 44396 (Aug. 28, 1996). Moreover, cessation programs would benefit the millions of addicted smokers, the vast majority of whom want to quit smoking, but are trapped in the vice of their addiction. Cessation programs offer a way out. We ask the Court to make clear that any punitive damage award encompasses, in part, "socially compensatory damages" which are "designed to make society whole," *Ciraolo v. City of New York,* 216 F.3d 236,245 (2d Cir. 2000).

Because these damages are being imposed, at least in part, to vindicate society's interest in punishing this industry, part of these damages should be used for the benefit of society as a whole. *Amici* strongly believe that society will be most benefitted if at

least some of the residual funds were allocated for education, prevention and cessation programs.

We do not believe that the Court need decide the question of the most appropriate uses of cy pres funds at this time. We urge the Court to direct the district court, at the appropriate time, to have a public proceeding on this matter and to invite the participation of the public health community to help it determine how to maximize the public benefit that could flow from unclaimed funds.

*Conclusion*

For all of the aforementioned reasons, the certification order should be vacated.

Respectfully submitted,

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[8] Counsel wish to acknowledge the assistance of Julie Klusas, a Georgetown University Law Student, in the preparation of this brief.

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UNITED STATES COURT OF APPEALS
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In Re Simon II Litigation

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 32(a)(7)(C), Fed.R.App.P., I hereby certify that the foregoing brief is in compliance with the word limitations set forth in Rule 32(a)(7)(B) inasmuch as the brief contains fewer than 7,000 words, exclusive of tables and certifications, as measured by Word Perfect 10.0, the word processing program used to prepare the brief, which counted 6,768 words.

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David C. Vladeck

No. 03-7140

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 30th day of May, 2003, I have caused to be served by United States mail, first class, postage prepaid, two copies of the foregoing brief of *Amici Curiae* American Cancer Society, *et al.*, upon the following counsel of record:

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