THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE: ENGLE PROGENY CASES	Case No: 3:09-cv-10000-WGY-JBT
THIS DOCUMENT RELATES TO: *DeShaies v. R.J. Reynolds Tobacco Co., et al.*, Case No. 3:09-cv-11080 *Elkins v. R.J. Reynolds Tobacco Co., et al.*, Case No. 3:09-cv-11595 *Harford v. R.J. Reynolds Tobacco Co., et al.*, Case No. 3:09-cv-13631 *Meeker v. R.J. Reynolds Tobacco Co., et al.*, Case No. 3:09-cv-12867	

PLAINTIFFS' MOTION FOR JUROR QUESTIONNAIRE AND ATTORNEY FOLLOW-UP VOIR DIRE (PREVIOUSLY DEFERRED TO THE TRIAL JUDGE)

Voir dire in the federal *Engle* trials has confirmed what the state courts have already discovered: a significant number of potential jurors cannot serve impartially in these cases. As Judge Edward Nicholas recently commented, jury selection in *Engle* cases is uniquely difficult and challenging, due to deep seated biases against both parties—tobacco companies and smokers' families who seek recovery from them:

> I will say this, that I have tried three death penalty cases and did not have as many people who had as strong opinions in those cases as I have had in this case. Whether it be people who smoke and feel that it's a personal choice and say they aren't the right people for this jury or people who don't smoke and feel like cigarettes should be banned and say they are not the right person for this jury.
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> The point is, it is very, very difficult to find a group of people, even 6 out of 150 who do not have some opinion, who do not have some information about the issues that are relevant in this case. I'm not suggesting in any way that the standards for challenges for cause should be loosened in these cases or that a

> different rule should apply; that's clearly not the case. I'm familiar with the case law and will apply it. I've tried cases for nearly 20 years, criminal, civil, every kind. The rules are the rules are the rules.
>
> I guess what I am trying to say is that… these cases are…challenging, difficult, different. They're challenging in many respects. In the context of trying to find a group of six jurors who have a sufficiently clean plate to satisfy both sides is a challenge...

(Ex. 1, *Willis v. R.J. Reynolds, et al.*, No. 2008-CA-9589, Trial Tr. vol. 8, 1045-1047, (Fla. Cir. Ct. April 15, 2010).) Based on the strong opinions observed in federal trials, it is clear that these challenges are not unique to the state cases.

Voir dire is the critical element in obtaining a fair and impartial jury, and the process must elicit sufficient information for the parties to exercise intelligently their cause and peremptory challenges. The Eleventh Circuit has made clear that where, as here, many citizens are likely to have biases about the nature of the controversy, and the matter has attracted significant publicity, more searching voir dire is required to identify and root out bias.

To that end, consistent with federal practice and with Defendants' requests in the state cases, Plaintiffs respectfully ask this Court to approve a juror questionnaire (attached as Ex. 2), an updated version of a similar questionnaire used in *Chamberlain v. R.J. Reynolds et al,* No. 3:09-CV-10809, and to permit counsel a reasonable period of time to voir dire all potential jurors based on the responses.

A written questionnaire designed to elicit these biases with attorney follow-up will effectively and efficiently provide counsel with sufficient information to exercise cause and peremptory challenges. This process will not prejudice Defendants and can be accomplished within the time that the Court has already allocated for voir dire.

For these reasons, Plaintiffs respectfully move for a juror questionnaire and attorney follow-up voir dire.

I. The Law Requires That Voir Dire Be Sufficient To Guarantee a Fair trial

A. Voir Dire Must Elicit Sufficient Information to Allow the Parties to Intelligently Exercise their Challenges.

Courts and commentators have long stressed that voir dire is critical to obtain a fair and

impartial jury. *Swain v. Alabama*, 380 U.S. 202, 218-220 (1965); *Jordan v. Lippman*, 763 F.2d 1265, 1277 (11th Cir. 1985) ("Voir dire is the key element in the trial court's constitutionally-mandated search for juror impartiality."); *United States v. Shavers*, 615 F.2d 266, 268 (5th Cir. 1980); *Bailey v. United States*, 53 F.2d 982, 983-984 (5th Cir. 1931).

To serve this critical constitutional function, voir dire must provide "a reasonable assurance that any prejudice would be discovered if present." *United States v. Brooks*, 670 F.2d 148, 152 (11th Cir. 1982). Pursuant to Federal Rule of Civil Procedure 47(a), a court "may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper." Fed. R. Civ. P. 42(a). "When the trial judge conducts the voir dire, it must be conducted so competently, completely, and thoroughly that the prospective jurors' histories and personal prejudices are revealed." *Lips v. City of Hollywood*, 350 F. App'x 328, 338 (11th Cir. 2009) (citing *Vezina v. Theriot Marine Serv., Inc*., 610 F.2d 251 (5th Cir. 1980)).

In *Vezina*, 610 F.2d 251, a civil personal injury case, the appellant sought a new trial upon discovering that a juror failed to disclose that she was a defendant in a pending lawsuit, and that she had made prejudicial comments about her case during trial. While holding that the juror's conduct did not warrant a new trial, the Fifth Circuit Court of Appeals cautioned that "this court will not abide a trial court conducting the voir dire perfunctorily. The voir dire must be performed with sufficient thoroughness that the duty to learn a prospective juror's past history and personal prejudices is fulfilled." *Vezina*, 610 F.2d at 252.

Voir dire should elicit sufficient information to permit a party "to intelligently exercise both his for-cause and peremptory challenges." *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1036 (11th Cir. 2005). *See also United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976) ("The jury box is a holy place. To ensure that those who enter are purged of prejudice, both challenges for cause and the full complement of peremptory challenges are crucial."); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 143-44 (1994) ("Voir dire provides a means of

discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently.") "Peremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes." *United States v. Ible*, 630 F.2d 389, 395 (5th Cir. 1980) (citing *United States v. Ledee*, 549 F.2d 990, 993 (5th Cir. 1977). As a general rule, "it is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause, for this has the effect of abridging the right to exercise peremptory challenges." *Nell*, 526 F.2d at 1229. *Accord Bell v. Greissman*, 902 So. 2d 846, 847 (Fla. Dist. Ct. App. 2005) (internal citation omitted).

B. The Law Requires More Detailed Voir Dire Due to the Nature of and Publicity Surrounding These Cases.

A more specific inquiry into juror opinions is appropriate where, as here, "[t]he nature of the controversy. . .may involve matters on which a number of citizens may be expected to have biases or strong inclinations." *Darbin v. Nourse*, 664 F.2d 1109, 1113 (9th Cir. 1981). Failure to do so may be reversible error. *Jordan*, 763 F.2d at 1275 ("relief is required where there is a significant possibility of prejudice plus inadequate voir dire to unearth such potential prejudice in the jury pool"). If "an inquiry requested by counsel is directed toward an important aspect of the litigation about which members of the public may be expected to have strong feelings or prejudices," the court should permit adequate inquiry into the matter on voir dire. *United States v. Laird*, 239 F. App'x 971, 975 (6th Cir. 2007) (citing *Darbin*, 664 F.2d at 1113). Plaintiffs' concern that a substantial number of individuals have strong pre-existing biases is not theoretical. This has been amply demonstrated in state and in federal court, as is more fully described below.

Likewise, where there is "extensive pre-trial publicity and potential jurors are being exposed to such publicity, a more individualized inquiry into prejudice [must] be undertaken." *Jordan*, 763 F.2d at 1274 (citing *United States v. Davis*, 583 F.2d 190 (5th Cir. 1978)). When "pre-trial publicity is a factor, a juror's conclusory statement of impartiality is insufficient[;]…it is necessary to determine whether the juror can lay aside any impression or opinion due to the exposure." *Id.* Given that "[t]he juror is poorly placed to make a determination as to his own

impartiality, … the trial court should make this determination." *Id.*

These cases have received unprecedented publicity, especially when a plaintiff recovers a large award. *E.g.*, "Broward jury: Tobacco companies must pay $75.35 million to smoker's widow", South Florida Sun-Sentinel (Fort Lauderdale), June 1, 2012 Friday; "High court lets stand $17.5M local verdict against tobacco company," The Gainesville Sun, March 30, 2012 Friday; "Duval jury awards smoker's widower $40M damages", The Associated Press State & Local Wire April 30, 2011 Saturday; "$40M verdict against tobacco; 2 companies must pay husband of a woman who died after smoking 2 packs a day for 36 years", Florida Times-Union (Jacksonville) April 29, 2011 Friday; "$17M awarded in smoking suit; The decision in the three-week trial was against Lorillard Inc.", Florida Times-Union (Jacksonville) March 3, 2011 Thursday.

Even in cases where verdicts were overturned, headlines across Florida nevertheless note the millions of dollars awarded to plaintiffs. *E.g.*, "Court snuffs out $79.2 million award in tobacco case", Naples Daily News (Florida), April 9, 2012 Monday; "Jury awards local man $10 million" Jackson County Floridian (Marianna, Florida), March 28, 2012 Wednesday; "Jackson County jury awards $30 million in tobacco suit", The News Herald (Panama City, Florida), March 29, 2012 Thursday; "Court tosses $2 million judgment against Philip Morris in Broward smoker's case" South Florida Sun-Sentinel (Fort Lauderdale), February 23, 2012 Thursday; "Fla. justices uphold $28.3 million smoker verdict", The Associated Press State & Local Wire, July 19, 2011 Tuesday; "Lake Worth widow seeking millions in tobacco suit: Nicotine addiction killed her spouse, lawyer tells jury," Palm Beach Post (Florida), April 1, 2011 Friday.

Based on this publicity, it is likely that potential jurors have formed attitudes biased against one party or the other, and that they have discussed these opinions with friends or with family or at the water cooler at work. Defendants have readily acknowledged the impact of widespread publicity in these cases (in filings in other courts) and have demanded voir dire and questionnaires for this very same reason. For instance in one state case, *Hall*, R.J. Reynolds argued:

> The issues to be determined in this case have been the subject of widespread and inflammatory publicity that jeopardizes [the parties'] Seventh Amendment right to have the claims adjudicated by an impartial, open minded trier of fact. Where, as here, there has been extensive pretrial publicity, voir dire must be in-depth and cover a sufficiently wide range of topics to ensure that any latent bias is exposed. (citing to Justice Brennan, in *Nebraska Press Ass'n v. Stuart,*427 U.S. 539, 602 (1976)(Brenan, J., concurring) *and U.S. v. Boise*, 916 F.2d 497, 504-505 (9th Cir. 1990).[1]

In light of the pervasive bias among potential jurors and pretrial publicity, more specific voir dire is necessary to ensure a fair jury.

Further, in wrongful death and personal injury cases, where "the issues of permanent injury and past and future non-economic damages are hotly contested, allowing counsel to inquire about an individual's views on the sensitive area of non-economic damages is essential to a party's right to conduct a reasonable examination." *Sisto v. Aetna Cas. & Sur. Co.*, 689 So. 2d 438, 440 (Fla. Dist. Ct. App. 1997).

Not one, but three circumstances warranting more specific voir dire are present here: (1) strong opinions, (2) high publicity, and (3) non-economic damages.

C. The Law Requires Voir Dire Due To the Demonstrated Significant, Widespread Biases.

In response to tailored questions from plaintiffs' counsel or the Court, potential jurors candidly admitted strong bias against smokers and those who bring lawsuits on their behalf. For example:

> Prospective Juror: I just -- my brother's wife is dying of cancer, okay, lung, she's in hospice. I've been all over the place on this, but my final thing is I think that that was her choice to do that, so it's your personal responsibility to take your own -- to take your own personal choices, you know, you have to suffer the consequences. It's not necessarily the tobacco company's fault because my brother's wife has died of cancer, but – QUESTION: … Are you telling us that you don't feel you could set that aside? ANSWER: I don't think that our society is going in the right place. Nobody is taking any personal responsibility for anything that they do. You go out and do something, and you know it's wrong, and something happens when you do it, then it's always somebody else's fault. (Ex. 4, *Reider* Trial Tr., vol. 1 at 69:19-70:8.)
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> Prospective Juror: I quit smoking just the day they put on cigarette packs that the Surgeon General determined it wasn't good for you. So I don't understand. I never understood that. QUESTION: That would mean which side is right in

[1] Ex. 3, R.J. Reynolds Tobacco Company's Motion Requesting Use of A Juror Questionnaire, *Hall v. R.J. Reynolds Tobacco Co.* at 6.

this case? ANSWER: Pardon? QUESTION: Who is right in this case? ANSWER: Who is right? QUESTION: Who is right? Somebody -- Mr. Chamberlain is suing tobacco companies because he claimed they legally caused him to have lung cancer. The tobacco companies say they did not legally cause that. Do you have a view as to who's right? ANSWER: I would say that anybody that smokes doesn't have to smoke and so I would say the tobacco company didn't do anything wrong. They're just selling a product. (Ex. 5, *Chamberlain* Trial Tr., vol. 1 at 42:11-43:2.)

Prospective Juror: Yes, sir. I do believe it's a choice. I don't believe the judicial system should be used to redistribute wealth because of that choice. QUESTION: now, that's a -- thank you. Thank you for your -- hold on. You can hold -- thank you for your honesty about that. You said you don't believe the system should be used to redistribute wealth. And it sounds like you have some pretty strong beliefs about using the system in that way; is that right? ANSWER: yes, sir. QUESTION: you might have -- does this sound like a suit that, you know, in your opinion you would consider something frivolous or not a lot of merit and we're just --people shouldn't come and use lawsuits like that? I mean, I'm not –ANSWER: Well, I'm sure Mr. Graham has strong feelings, and he's entitled to those -- entitled to some compensation. I just don't think it's a rational expectation. QUESTION: and, therefore, you see this as a lawsuit that -- well, I mean, we're starting from behind. You'd even have to be convinced it has merit in the first place; is that right? ANSWER: Yes, sir. QUESTION: And so this really isn't a case that you could be fair in, I mean, for purposes of -- in this case, anyway, to be fair to Mr. Graham and both sides, those aren't beliefs that you can put at the courthouse door and then come in here and be fair; is that right? ANSWER: No, sir, knowing my heart, I could not. (Ex. 6, *Graham* Trial Tr., vol. 1 at 63:19-64:24.)

Prospective Juror: I just feel that no one forced anybody to smoke. They pick it up and they choose to do it, and they engage in the risky behavior. And since the 1950s, everyone's known about the risks. And it's pretty much in our face every day on commercials and TV. So it's sort of a belief that I've held for a long time. QUESTION: Okay. And you hold that belief no matter what time period we're talking about, right? Even if somebody was claiming back then that in a different decade that things were different, you still believe that -- ANSWER: Well, I wasn't back then, so I just know the history of it. I didn't live back then, but I just know the history of it. QUESTION: But even though there might be some history there, you believe that you just really couldn't be fair to Mr. Graham, and this -- you know, for a case like this, for blaming somebody later for what you say is a choice; is that right? ANSWER: Right. (*Id.* at 66:18-67:11.)

Prospective Juror: …. -- frivolous lawsuit don't even begin to cover how I feel about this. I'll do -- listen to the facts, I'll do what I can, but I got to tell you, it's like suing McDonald's if you're fat. You knew from the time we were little kids, don't smoke. I smoke cigars and I'm just going to take it. I've told my wife, I've brought this on myself. I asked for it, so be it. QUESTION: Thank you. And thank you for your candor. And that's a strong -- clearly a strong belief that you have and not something that you can check at the door. We would start from far behind; is that right? ANSWER: Yes, in this case, you are way behind these gentlemen. (Ex. 7, *Aycock* Trial Tr., vol. 1 75:13-76:4.)

Prospective Juror: And my opinion is that they should not be able to sue. C. Everett Koop put warnings on the cigarettes back in the early '80s. 38 years

> old, I've known my entire life that smoking is bad. Yet I still do it. I just truly think that they're not at fault, and I cannot be impartial about that. I think it's a frivolous lawsuit……QUESTION: …you haven't heard any facts in this case, right? ANSWER: no, sir, I have not. QUESTION: And you will hear facts from the parties, and then the judge will instruct you on the law. Do you think you can decide this case based on the facts that you hear and the law, even if you do have opinions outside of that? ANSWER: It would be extremely hard considering the way that I think. You know, I've always been taught right, wrong; what's right is right; what's wrong is wrong. If you know something is wrong -- I mean, you don't stick a fork in an electrical outlet. You know it's going to shock you. You know, basically, that's kind of the way I see it. (*Id.* at 73:14-74:11.)

In *Smith*, during counsel-led voir dire, seventeen potential jurors expressed that is wrong for a family member to sue a cigarette company for money damages. (Ex. 8, *Smith* Trial Tr., vol. 1 at 58:22-60:13, 80:2-82:10.) Of these, nearly all said that the plaintiff would start out behind. (*E.g.*, Ex. 8, *Smith* Trial Tr., vol. 1 at 62:1-4 ("we are representing the family of a smoker in this situation. We would start out behind. Before we've started, we're behind. ANSWER: Uh-huh (affirmative). Yes.").) In response to plaintiff's counsel's follow-up questions, many potential jurors explained that their strong convictions, often shaped by their own experiences with smoking or smokers, would prevent them from serving impartially:

> Prospective Juror 5: "[T]he cigarette people did not make anyone smoke. They smoked because…that's their choice. So she smoked that for years…I feel like somewhere down the road she should realize, or he should realize, that it was a detriment to their health…This has been about 60-something years an opinion of mine…QUESTION: In other words, you don't think this is a suit that should have been brought in the first place? ANSWER: No….I don't think it's fair, myself…if my family member smoked and died, nobody forced them. Nobody drawed [sic] a gun, a knife on them and made them do it….Until death I will stand by you don't have to smoke. You don't have to do much of anything in life that are wrong…I'm going to stand by that." (*Smith* Trial Tr., vol. 1 at 62:19-65:8.)
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> Prospective Juror 9: I don't smoke. My family doesn't smoke. My mom and dad never smoked. Neither did my grandparents. And I've got brother-in-laws and sister-in-laws that do smoke. And I've got an unemployed sister-in-law that spends more money on cigarettes than she does finding a job. But through my military career, through working for the state, I've seen too many smokers; and there was always some excuse about, Oh, I'm sick or I've got to go to the hospital... But, still, nobody -- like the gentleman said, nobody put it in your hand. It's like drinking a bottle. Nobody puts it in your hand. Nobody forces you to do these things. Everybody makes a choice. You make your own choice about it. It's tough. It's ugly business. And, you know, I hate to see a person lose their life, but they put 30 years -- that's a lot of years. …And I know they've got programs out there for quitting, but they're hard to do. I understand that. But that's a lot of years. And sometime along the way, a

choice has been made. And I don't know how many times you've had to buy your family member cigarettes, sir. You know, we do that, too, to sustain our family members sometimes. We help contribute to it instead of stopping it and all that…And just seeing what I saw over the years, I'm standing firm on it. I just don't see this. And usually they don't pay, sir. They don't pay. QUESTION: It sounds to me like you have some strong beliefs that would make it hard for you to be an impartial juror in this kind of case. Is that fair enough? ANSWER: Yes, ma'am. (*Id.* at 66:5-67:16.)

Prospective Juror 12: I pretty much agree with everyone else…I think we all have to accept the consequences of the choices we make, and I don't think that the company should be responsible for that… QUESTION: And is that something that you've held for a long time, something you feel strongly about? ANSWER: Yeah….QUESTION: So we'd start out…behind, in your mind. Fair enough? ANSWER: Absolutely. (*Id.* at 69:10-24.)

Prospective Juror 13: Like everyone else up here, I feel the same way. I…think you are responsible for your actions. I'm sorry for the death of the lady, but it's not the tobacco companies' responsibility. It's our responsibility… I'm not wishy-washy about this at all. I'm sorry. (*Id.* at 70:10-21.)

Prospective Juror 16: I lost both of my parents, heart-related, cancer issues. The anniversary of my mother's death is two years ago tomorrow….She quit smoking shortly after I did, and then she had a stroke. And she said to me, You have to pay the piper one day. She said, I've drank and I've smoked for years, and I'm going to have to pay for it one day. And little did I know how soon that was going to be, but…I did not sue…my father's cancer-related death, I did not sue. Both of them -- me -- we did it all by freewill. It's very hard to quit. I struggled with quitting. I know how hard it is. I get that when my parents started smoking it was the '60s. We didn't know it was as bad as it is -- as we know today. But they had the same opportunities to quit, and they chose not to, and they both paid the ultimate price for that. So it would be very hard for me to leave that outside. (*Id.* at 75:8-76:1.)

Prospective Juror 18: I started picking up cigarettes when I was 12 years old. No one ever sued my mother…I want to kind of try to leave the feelings out of it, but I've been a smoker for over 30 years. I've tried to quit…I am dealing with issues where -- you have to be taking responsibility. And I just don't think I could sit in judgment…when I know it's a conscious choice that I make every morning when I put that cigarette in my mouth. And I'm at a stage where I want to quit,…but I do it, and I know it's poison. I know every day it takes…days off of my life….I know that I am making a choice…to do harm to myself, physical harm. So I just, in all fairness,…I don't think I could…be impartial….I was raised in a smoking environment. And my mother left cigarettes around. And I think ultimately people have to be responsible for themselves. The responsibility starts at home. QUESTION: … you feel pretty strongly that it would be hard for you to set all of that aside and just listen to the evidence in this courtroom. ANSWER: It would be. (*Id.* at 77:5-78:8.)

Prospective Juror 19: Both of my parents are currently dying from cigarette smoke. They're in a nursing home. I work in the medical field. I see what I consider frivolous lawsuits all the time. I mean, the American country is made up of decisions we make on our own. And that's what this American country is about, is choices. That's our freedom and right, choices. And lawsuits like this are taking, in my opinion, American businesses and suing them, and they

wouldn't be able to keep going…QUESTION: [W]ithout having heard anything about this case, this is one you think is probably a frivolous lawsuit? ANSWER: Yes…. QUESTION: And you'd have doubts whether you'd be able to really set all that aside. Fair enough? ANSWER: Yes, ma'am. (*Id.* at 78:18-79:21.)

Prospective Juror 24: I'm a strong believer in the choices you make is a bed you make and the bed you have to lie in; that no one forces you to smoke…[P]eople that are smokers, they see the labels and their side effects. My fiancé has been smoking since he was 14, and he knows… what's going to happen. But he still decides he wants to do it…[Y]ou can lead a horse to water, but you can't make them drink. You can't make them change their mind. They're going to do it whether they want to or not…QUESTION: Based on your experiences and based on your beliefs, am I right to think that we would start out behind in this case? ANSWER: Yes, ma'am. QUESTION: And it would be hard for you to set those things aside and leave them at the door? ANSWER: Once again, yes, ma'am. (*Id.* at 82:19-83:19.)

Prospective Juror 25: I'm a smoker and my family smoked and I agree with what everybody says. It's a decision we make. Nobody made me smoke. I did it on my own. QUESTION: And how would that, your experiences, impact your ability to sit and leave that all aside and hear this case? ANSWER: I couldn't do it. To me, it's wrong. Everybody knows what it does to you or it can do to you. (*Id.* at 84:3-12.)

Prospective Juror 27: I smoked for 40 years. I quit about four years ago. I think a person is responsible for the conscious decisions that they have made. And, you know, there's consequences for things people do. You know, why sue the tobacco company that made the cigarette? Why not sue the farmer that grew the tobacco?...I did think about this a lot when I was smoking. You know, if something had come up, you know, I had died of an illness that was supposedly related to smoking, I told myself, you know, why sue the tobacco company? I chose to smoke. QUESTION: Based on your beliefs and your own experiences, we start out this trial behind…ANSWER: Yes. And it's almost as if -- unless I could be convinced that the person was locked in a room and smoke was fed through the ventilation for hours every day for years, I could not be supportive. (*Id.* at 85:1-86:8.)

Prospective Juror 31: I do believe it's a choice…And if you make a bad choice … there's always going to be a downside to the … bad choice. And so I don't…agree with the…lawsuit…My parents both smoked. They gave it up. They haven't smoked in 39 to 40 years. So they said it was very … difficult, and of course, they encouraged us as children not to smoke, my sister and I. But I do believe it's a choice, and I believe that you have to – or that you are responsible for the choices you make. QUESTION: I take it this is not something that you can just easily just set aside and forget about your experiences and your beliefs you've formed in this regard? ANSWER: I do not believe I could set it aside very easily. (*Id.* at 87:17-88:18.)

Prospective Juror 34: I come from a family -- mixed, smokers, non-smokers. I have resented smokers my entire life. I despise cigarettes…I don't want to have to breathe someone's smoke. … I don't have a relationship with my brothers because they won't put down their cigarettes long enough for us to have a conversation. I watched my stepfather die in the middle of the night from lung cancer. He quit smoking when it was too late. He was dying. He will tell you he knows why he died. He died from smoking cigarettes. So as

> much as I despise them, it's nobody's fault but the smoker. It's not the tobacco company's fault at all. QUESTION: And it would be hard for me to change your mind about that? ANSWER: Absolutely. QUESTION: We start out behind? ANSWER: Yes. (*Id.* at 91:17-92:10.)

Counsel had only 40 minutes to conduct voir dire in *Smith*, and due to the large number of jurors who expressed views requiring follow-up, plaintiff's counsel had time to ask only one question of the venire members. Nevertheless, even in that short time, Judge Huck noted that these potential jurors revealed "a lot of information." (*Id.* at 129:4-12.) In this regard, Judge Huck echoed Judge Edward Nicholas (*supra* at 1) in noting that jury selection in cigarette cases is "unique." *Id.* In fact, after hearing the potential jurors' strong views, Judge Huck offered to give the parties more peremptory challenges, but Defendants' declined. (*See id.* at 129:8-131:3.)

Similarly, in *Young*, the second federal *Engle* trial, when the Court asked questions jointly proposed by the parties to elicit known biases, more than 60 percent of the venire expressed biases against the plaintiff and difficulty with serving impartially.[2] For example:

> Prospective Juror 6: "[My husband's father] smoked two or three packs a day and died several years ago. They said part of it was from smoking. We did not sue when he died. I feel like it was a choice." (Ex. 9, *Young*, Trial Tr., vol. 1 at 110:13-17.) Agreeing with another juror that, when he heard what the case was about, he had an "immediate bias against the plaintiff." (*Id.* at 120:4-6.) "I just feel like the warnings are there. You made a choice and you have to live with those choices. … we are a sue-happy world today, and…you have to be careful with everything you do and you make choices in this world and that was a choice. Question: and that's something you feel strongly about? Answer: Very strongly. Question: Before you heard any evidence in this case, it's fair to say we start out behind? Answer: Yes, you do." (*Id.* at 130: 2-22.)
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> Prospective Juror 8: "I feel the same way. I mean, my grandpa smoked his whole life. He died in '84, but it was his fault." (*Id.* at 109:11-13.) "The Court: You just disagree with the idea of the children of a smoker suing a tobacco company, for the reasons you said earlier. Juror 8: Yes." (*Id.* at 110:6-9.) Agreeing with jurors who believe it is wrong to sue tobacco companies, explaining, "I feel the same way as everybody else. I'm not a good speaker, but that's what I feel like. … Question: Are these strongly-held beliefs that you have? Answer: Yes. Question: And they are beliefs you have without hearing the evidence? Answer: Next thing is, you are going to sue the farmer that growed the tobacco, and that's not right." (*Id.* at 128:15-129:3.)

[2] Four prospective jurors indicated a bias or at least negative feelings towards Defendants. (*See* Ex. 9, *Young* Trial Tr. vol. 1, 45:6-17, 66:22-67:15, 116:12-18.)

Prospective Juror 9: "I believe people are responsible for their actions and what they do. Yet, it might be a dangerous product, but you still choose to do it, and that's the way I see it. I would have a hard time getting over that." (*Id.* at 74:8-12.) "There are other things that you can buy that's going to kill you, or possibly addictive, and I believe that the person that does it is at fault, especially with all the warnings. Your actions, you are responsible for them." (*Id.* at 109:2-7.) Agreeing with jurors who stated it is wrong to sue tobacco companies, "I agree with what everybody is saying. … there is warnings on it, same as food. And if you choose to do it, then the responsibilities goes more to you. If you choose to drink cold drinks or something from soda and get diabetes or whatever … there is warnings everywhere about some of the stuff that's not safe nowadays, and that's just my belief." (*Id.* at 129:12-21.)

Prospective Juror 13: "I feel this is unfair. … as soon as we learned what this case was about, I had an immediate bias against the plaintiff." (*Id.* at 119:22-120:2.) "…there are other companies who sell products that are quite legal, including alcohol, as well as tobacco, and just because someone drinks and has a car accident and causes a death, then that person might be sued for causing the death, but the alcohol company is not sued for having supplied the beverage. I just don't feel if we make choices to use products, whether they are legal or illegal, that the producer of that product should be held liable." (*Id.* at 126:4-13.)

Prospective Juror 14: "Everyone has their own choices. They make their own decision. I don't think it is wrong that they have a lawsuit. I have a disagreement with - to go after the tobacco company when they made a choice to smoke for 40 years." (*Id.* at 111:2-7.) Agreeing with another juror that, when he heard what the case was about, he had an "immediate bias against the plaintiff," explaining, "I feel the same way." (*Id.* at 120:7-10.) "[The tobacco] companies should not be sued when you have the choice to quit, and you have the choice to smoke; and if you choose to smoke, then you are going to suffer the consequences, unfortunate as it may be, when you lose a loved one." (*Id.* at 128:4-11.)

Prospective Juror 21: After answering affirmatively to the question of "How many of you think that it is wrong or disagree with the idea of the children of a smoker suing a tobacco company for their mother's death?" explaining, "I'm predisposed to believe that people are responsible for their own actions." (*Id.* at 112:4-5.) "I have a bias for the defendants. I think they shouldn't be sued for something you do on your own." (*Id.* at 121:9-11.) Agreeing with other jurors who stated it is wrong to sue a tobacco company, "In the interest of your time, just ditto there." (*Id.* at 131:1-2.)

Prospective Juror 30: After answering affirmatively to the question of "How many of you think that it is wrong or disagree with the idea of the children of a smoker suing a tobacco company for their mother's death?" explaining, "I feel that there's been enough information over the last 15 or 20 years that people could understand the situation and make intelligent decisions. I would echo what I have heard, that I believe people could use that information and are responsible for doing that in their own health." (*Id.* at 113:4-9.) Agreeing with other jurors that it is wrong to sue a tobacco company, "I'm trying to find a way to say it differently than has been said 14 times, but I can't find one. Ditto's even already been used. I'm out of words. But, yes, it's an opinion." (*Id.* at 132:3-6.)

> Prospective Juror 31: Agreeing with other jurors who stated they have a bias for the defendants because "they shouldn't be sued for something you do on your own," stating, "I feel the same way." (*Id.* at 121:16-17.) Agreeing with other jurors that it is wrong to sue a tobacco company, "… I believe it is a personal choice; and we are in a society that likes to sue big companies, and I just don't think it's right because it is a choice and people need to take responsibility. Question: that's a firm belief that you hold? Answer: Yes. Question: Something that -- without having heard any of the evidence in this case, it's a way that you already feel about the parties in this case? Answer: Yes." (*Id.* at 131:7-132:1.)
>
> Prospective Juror 32: After answering affirmatively to the question of "How many of you think that it is wrong or disagree with the idea of the children of a smoker suing a tobacco company for their mother's death?" explaining, "I basically agree with everybody, what they said so far, but everybody is responsible for their own actions. I figured a way to [quit smoking] and I figured, if I could do it, anybody can do it." (*Id.* at 113:18-22.)
>
> Prospective Juror 34: After answering affirmatively to the question of "How many of you think that it is wrong or disagree with the idea of the children of a smoker suing a tobacco company for their mother's death?" explained, "I agree with a lot of the thoughts that have already been expressed today; and speaking personally, it's not my belief that people are forced to indulge in these risky behaviors, and I believe once you do so, then you are responsible." (*Id.* at 114:1-5.)

In addition to strong biases against the plaintiff on liability, when asked, several jurors also expressed strong opinions against awarding damages:

> Prospective Juror 6: answering affirmatively to whether any jurors have negative feelings against wrongful death suits for damages (*id.* at 118:13-21) and later explaining, "Money can't change the decision. Money can't replace that person." (*Id.* at 120:4-6.)
>
> Prospective Juror 13: "I don't believe it is right for anyone to go to try to get money from a company because of something their family member did. I do feel that if you have a cause that you want to take up against the tobacco companies, there are lots of avenues to do that; but I don't think any amount of money is going to bring your mother back, and that's why I just have a real moral issue." (*Id.* at 110:19-111:1.)
>
> Prospective Juror 25: "I have to ask myself, you know, times are hard, and why is this money being seeked? Does it hurt the tobacco company or shut them down or what?" (*Id.* at 112:21-113:1.)

These excerpts reflect only a sample of the strong views expressed when jurors were asked to explain their views. (*See also id.* at 98:17-24, 99:22-25, 111:9-7, 111:20-23, 111:25-112:2, 112:12-15, 113:4-9, 113:18-25, 114:1-5, 132:3-6, 132:18-21).

The strong opinions elicited during voir dire in *Chamberlain*, *Reider*, *Graham*, *Aycock*, *Smith* and *Young* echo the widespread biases expressed in state *Engle* progeny cases, where juror

questionnaires are commonly used and counsel generally have more time to conduct voir dire. Potential jurors in state court cases routinely reveal strong opinions that smoking is a choice and the cigarette companies should not be held responsible. (*E.g.*, Ex. 10, *In re: Engle Progeny Cases (Bowman)*, No: 2007-CA-11175-AXXX-MA, Trial Tr. vol. 3, 106 (Fla. Cir. Ct. September 7, 2011). *See also id.* at 145.) State *Engle* voir dire also shows that potential jurors hold significant prejudices against smokers in light of circumstances today, where knowledge is widespread, and there are many readily available nicotine replacement and smoking cessation therapies available (most of which did not exist for decedents who died in the mid-1990s). (*See, e.g.*, *id.* at 146; *id.* at 139-140.) Additionally, many potential jurors have had experiences in their own lives or with family and friends that would prevent them from fairly evaluating Plaintiffs' claims. (*E.g.*, *id* at 143-144, 149, 159.) Voir dire in state court *Engle* progeny trials has also shown that potential jurors are biased against awarding non-economic damages or any damages for a death. (*See* Ex. 11, *In re: Engle Progeny Cases* (*Warrick*), No. 16-2007-CA-11654-QXXX-MA, Trial Tr. vol. 7, 511-512, 614-616 (Fla. Cir. Ct. 4th. September 15, 2010); Ex. 12, *In re Engle Cases* (*Sury*), No. 2007-CA-1175-IXXX-MA, Trial Tr. vol. 2, 172 (Fla. Cir. Ct. November 1, 2011).)

These experiences in the *Engle* progeny cases are consistent with national polling producing "some disquieting results about Americans' views and attitudes about civil justice." Valene P. Hans & Alayna Jehle, *The Jury in Practice: Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1181 (2003). Professor Hans noted, a decade ago, that "significant minorities of polled respondents said that they could not be fair and impartial if they were asked to sit as jurors in cases involving tobacco companies," and that number is increasing. *Id.* (in 1999, "fifteen percent said they could not be fair if a case involved a tobacco company. . . . A year later, the numbers saying they could not be impartial increased: 34% for tobacco companies.") (citing Bob Van Voris, *Voir Dire Tip: Pick Former Juror*, NAT'L L.J., Nov. 1, 1999, at A1; Bob Van Voris, *Jurors to Lawyers: Dare to be Dull*, NAT'L L.J., Oct. 23, 2000, at A1.).

D. In These Cases, General Voir Dire Inquiries Are Not Sufficient To Ensure A Fair Trial.

The Eleventh Circuit has recognized that general inquiries often fail to reveal jurors' unconscious or unacknowledged bias. *Shavers*, 615 F.2d at 268 (general questions that are "too broad" "might not reveal latent prejudice"); *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985) (conclusory questions not calculated to elicit disclosure of actual prejudice); *Dennis v. United States*, 339 U.S. 162, 183 (1950) (Frankfurter, J., dissenting) ("[O]ne cannot have confident knowledge of influences that may play and prey unconsciously on judgment"); *United States v. Dellinger*, 472 F.2d 349, 367 (7th Cir. 1972) ("We do not believe that a prospective juror is so alert to his own prejudices [as to reveal prejudice in response to a general question]. Thus, it is essential to explore the backgrounds and attitudes of the jurors to some extent in order to discover actual bias, or cause"); *Kiernan v. Van Schaik*, 347 F.2d 775, 779 (3d Cir. 1965); *United Sates ex rel. Bloeth v. Denno*, 313 F.2d 364, 372 (2d Cir. 1963); *Delaney v. United States*, 199 F.2d 107, 112-13, (1st Cir. 1952); Gutman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 Brooklyn L. Rev. 290, 328 (1972).

These conclusions are consistent with numerous systematic studies and research demonstrating that general voir dire presents serious problems for identifying biased jurors. Valene P. Hans & Alayna Jehle, *supra* , 78 CHI.-KENT L. REV. at 1186 (citing Jurywork: Systematic Techniques, Release 21 (Elissa Krauss & Beth Bonora eds., 2d ed. 2000); Neal Bush, The Case for Expansive Voir Dire, 2 Law & Psychol. Rev. 9, 9 (1976); Valerie P. Hans, The Conduct of Voir Dire: A Psychological Analysis, 11 Just. Sys. J. 40, 41-42 (1986); Douglas B. Catts, Jury Bias, Advocate, Winter 2001, at 20; Frederick W. Iobst, The Goal of Expanded Voir Dire, Advocate, Winter 2001, at 24); Gregory E. Mize, Be Cautious of the Quiet Ones, Voir Dire, Summer 2003, at 1; Susan E. Jones, Judge-Versus Attorney-Conducted Voir Dire, 11 Law & Hum. Behav. 131 (1987); Michael T. Nietzel & Ronald C. Dillehay, The Effects of Variations in Voir Dire Procedures in Capital Murder Trials, 6 Law & Hum. Behav. 1 (1982); David Suggs & Bruce D. Sales, Juror Self-Disclosure in the Voir Dire: A Social Science Analysis, 56 Ind. L.J. 245 (1981).

Recent experience shows that generalized questions are insufficient to elicit the known biases in these cases. Potential jurors with deep seated biases did not speak up when asked, generally, whether they could be fair and impartial. For example, in *Denton*, when Court asked a potential juror whether she "could sit as a fair and impartial juror" in a lawsuit "by the widower of a smoker against tobacco companies," she responded "yes, I do." (Ex. 13, *Denton*, Trial Tr., vol. 1 at 149:7-16.) It was not until counsel asked specific follow-up questions that the juror revealed her personal beliefs in personal responsibility and her hesitation in being able to set aside her opinions and serve impartially. (*Id.* at 149:19-153:2.) The Court ultimately excused this juror cause. (*Id.* at 169:10-14.)

Similarly, in *Young*, when the Court asked initially whether anything about the nature of the case would in any way prevent anyone from acting impartially, only one venire person responded and admitted bias--against Defendants. (*See* Ex. 9, *Young* Trial Tr. vol. 1, 44:25-45:25.) The other proposed jurors did not reveal their strongly-held opinions, biases and preconceptions, described in detail above, until the Court asked the individualized questions requested by both parties. Likewise, in *Walker*, two jurors did not acknowledge bias against the plaintiff until the judge posed a specific question as to whether they would not award damages to a survivor in a wrongful death lawsuit such as this one, even if the damages are supported by the evidence and are consistent with the law. (*See* Ex. 14, *Walker* Trial Tr. vol. 1, 207:20-211:22.) In *Pickett* too, it was not until the Court asked follow-up questions regarding the proposed jurors' opinions or feelings about smokers, that those with strong negative feelings toward plaintiff revealed themselves.

> THE COURT: Do you have anything against those who do smoke, Mr. [juror]? ANSWER: I don't have anything against them, but -- and being a nonsmoker, I don't know the – the addiction to nicotine, but I was always raised that you're responsible for your actions.
>
> THE COURT: Okay.
>
> ANSWER: And my opinion on cigarette smoking is it's a personal choice, so...

> THE COURT: All right. So I take it from that you might have some difficulty serving impartially in this case and listening to a claim being made by or on behalf of a smoker?
>
> ANSWER: Yes, sir.

(Ex. 15, *Pickett* Trial Tr. vol. 1, 58:9-22.) These examples show that potential jurors are less likely to reveal their deep-seated, strongly-held beliefs through generalized questions, thereby preventing counsel from exercising their challenges intelligently.

Contrary to their position before this Court, in the state cases, Defendants argue that detailed questions in a written questionnaire are the best way to elicit "latent entrenched biases":

> … a detailed written questionnaire is the most practical and efficient way of identifying jurors who have latent entrenched biases who should be excused …[3]

> … [the parties have] a fundamental right to a fair trial with impartial jurors, and juror questionnaires would assist in identifying jurors who cannot be impartial because of latent entrenched biases…"[4]

Plaintiffs agree. Their proposed questionnaire is specifically targeted to effectively and efficiently elicit the biases that exist in these cases. Many of these proposed questions have been asked in at least one of the first set of cases, and the rest are routinely included in state voir dire. These questions have identified those jurors, like those described in detail above, who: (1) cannot set aside beliefs that smoking is a personal choice and that those who smoke should be accountable for their choices (*E.g.*, Ex. 8, *Smith* Trial Tr., vol. 1 at 87:17-88:18; Ex. 9, *Young* Trial Tr. vol. 1, 74:4-16, 98:17-24; Ex. 18, *Duke* Trial Tr. vol. 1, 27:8-28:2; Ex. 15, *Pickett* Trial Tr. vol. 1, 58:13-22); (2) cannot be impartial because they judge smokers based on knowledge we have today (*E.g.*, Ex. 8, *Smith* Trial Tr., vol. 1 at 84:3-12; Ex. 18, *Duke* Trial Tr. vol. 1, 27:8-28:2; Ex. 10, *Bowman* Trial Tr. vol. 4, 139-140, Sept. 7, 2011); (3) cannot set aside strong negative opinions about wrongful death/personal injury suits, generally, or in smoking cases in particular (Ex. 9, *Young* Trial Tr. vol. 1, 125:8-132:25; *see also* Ex. 14, *Walker* Trial Tr. vol. 1,

[3] Ex. 16, at 7 (*Ward*).

[4] Ex. 16, at 4 (*Ward*); Ex. 3, R.J. Reynolds Tobacco Company's Motion Requesting Use of A Juror Questionnaire, *Hall v. R.J. Reynolds Tobacco Company,* at 2; Ex. 17, at 3 (*Webb*).

207:20-211:22); and (4) are unwilling to award compensatory or punitive damages, notwithstanding the evidence (Ex. 9, *Young* Trial Tr. vol. 1, 119:10-120:18). The proposed questionnaires also include questions designed to elicit biases against Defendants.

When the Court permitted counsel to conduct voir dire or asked the parties' proposed voir dire questions, both parties learned critical information about the jurors' attitudes to inform their challenges. In *Smith*, for example, where the Court used a questionnaire and permitted counsel 40 minutes to conduct voir dire, the parties raised 25 cause challenges (19 of which were granted), and both sides used all three peremptory challenges. Likewise, in *Young*, where the Court asked the parties' jointly submitted voir dire, the parties challenged 19 jurors for cause (9 of which were agreed upon or granted). On the other hand, where the court placed constraints on voir dire precluding individualized inquiry beyond those jurors who raised their hands in response to a question addressed to the entire group, little was known about the jurors who remained silent. In fact, counsel knew little more than demographics about *most* jurors who deliberated and reached a verdict in these cases. Unfortunately, knowing demographic information or even whether an individual has ever smoked is not enough to exercise preemptory challenges meaningfully or to identify deep-seated biases that might give rise to a challenge for cause.

II. Providing Sufficient Voir Dire to Ensure a Fair Trial Will Not Unduly Burden the Court.

There are many tools that this Court could employ to ensure the robust voir dire that these cases require. More searching voir dire can and should be conducted efficiently, without extending the overall time for voir dire, unduly lengthening trial, or unnecessarily taxing the Court's resources. To this end, based on the experiences here in the first seven cases and those learned in state court, Plaintiffs propose that questions designed to elicit bias be included in a written questionnaire, with attorney follow-up.

Most recently, in *Chamberlain*, the Court used a juror questionnaire with the following attitude questions:

1. Is there anything about the parties involved in this case, the nature of the case, or anything else that could affect your ability to be fair to both sides?
2. Have you ever heard of, or read anything about, this case, the Engle case or any other case involving claims against cigarette manufacturers?
3. Do you now have any opinion as to which side of the case is more likely to be taking the right position?
4. Do you agree that Mr. Chamberlain has every right to pursue his claims in this case and that Reynolds and Lorillard have every right to defend against these claims?
5. Can you fairly and impartially find for Mr. Chamberlain or for the Defendants based upon your evaluation of the evidence and the Court's legal instructions regarding:
   a. Whether or not either or both Defendants are to be held liable to Mr. Chamberlain for compensatory damages?
   b. The amount of compensatory damages, if any, to be awarded?
   c. Whether or not Mr. Lawrence is to be awarded punitive damages from either or both Defendants?
   d. The amount of punitive damages, if any, to be awarded?
6. Do you have any doubt that you can and will follow the Court's instructions and render a verdict based upon those instructions and your evaluation of the evidence?

(*Chamberlain*, Doc. 209-1.) In response to these questions, jurors disclosed strong opinions and biases, providing critical information to the Court and the parties. Based on the responses to these questions, counsel and the Court could conduct targeted follow up, and exercise challenges intelligently and efficiently.

Plaintiffs' proposed questionnaire, Ex. 2, is based on the questionnaire used in *Chamberlain*, with several edits designed to make the questions easier to understand. Apparently some jurors in *Chamberlain* were confused on how to express their biases and opinions in the questionnaire (*see* Ex. 5 at 150:2-21), and these edits should elicit biases more clearly and thus streamline voir dire. The changes to the *Chamberlain* questionnaire are indicated in redline in Ex. 19.

In *Engle* state cases, written questionnaires are routinely used to identify and efficiently excuse those jurors who should be removed for cause. In many cases, the parties agree that certain responses to the questionnaire are sufficient to excuse potential jurors for cause, with no further follow-up required. This process permits the parties and the court to focus follow-up on those jurors who may potentially be seated, and not expend time or energy on those whose pre-existing opinions and biases will prevent them serving impartially.

Many courts and commentators agree that written questionnaires are effective and efficient tools for eliciting bias. In *United States v. Stephens*, No. 02-CR-661, 2006 U.S. Dist. LEXIS 42907, 30-35 (N.D. Ill. June 9, 2006), the court explained its shift toward written questionnaires as the primary means for obtaining information from potential jurors:

> The Court recently participated in a project of the Seventh Circuit Bar Association that involved testing, in civil cases, various "innovations" in the jury process. One of these involved the use of written questionnaires during the voir dire process as the primary means to obtain information to use in selecting the jury. That particular practice was not actually an innovation; this Court (like others in this District and elsewhere) has been using written questionnaires as the primary element of jury voir dire in both civil and criminal cases for several years. The Court's primary experience as a practicing lawyer trying civil and criminal cases was with oral voir dire, a practice that remains the norm in this District and elsewhere. Our goal in moving to the use of written questionnaires was to obtain more information, more efficiently, from the jury venire. Rather than each juror answering, one after the other, a series of identical verbal questions, all the prospective jurors can answer a set of written questions simultaneously. This allows the same amount of information to be obtained in less overall time; it also permits more information to be obtained in the same (or less) time that it would take to conduct a more cursory oral voir dire -- if extra inquiries are included in the written questionnaire.

The *Stephens* court determined that written questionnaires are superior to traditional oral voir dire for eliciting accurate information about potential jurors, so long as questions are worded "very simply":

> Having used written questionnaires in dozens of jury trials over the past several years, the Court has come to believe that if handled properly, they are a better means of obtaining accurate factual information about prospective jurors that the more common and traditionally used verbal voir dire process. This requires, among other things, the use of questions that are worded very simply.

Id. at *33.

Courts have also noted that written questionnaires are effective in eliciting bias. *E.g.*, *Cravens v. Smith*, 610 F.3d 1019, 1032 (8th Cir. Mo. 2010) (internal citation omitted) ("venirepersons' strong responses in the jury questionnaires in combination with their equivocal responses given during voir dire provide fair support for [a] district court's decision to strike the venirepersons."); *United States v. Edmond*, 52 F.3d 1080, 1092 (D.C. Cir. 1995) (finding that district court's use of a 20-page questionnaire was sufficiently extensive and detailed to enable the parties to "make effective use of their peremptory challenges"); *United States v. Scarfo*, 850 F.2d 1015, 1022-23 (3d Cir.), cert. denied, 488 U.S. 910, 102 L. Ed. 2d 251, 109 S. Ct. 263 (1988) (agreeing with district court that written questionnaire addressing juror demographics left counsel "in a much better position to assess the suitability of prospective jurors in this case than in most other trials, criminal or civil") (internal quotations omitted).

Research suggests that "all else being equal, jurors are more likely to answer written questions accurately and honestly than they do if required to respond to the same questions individually in front of a courtroom full of people, a process that prospective jurors often perceive as more intrusive and intimidating." *Stephens*, 2006 U.S. Dist. LEXIS 42907, at *31 (citing Principles for Juries and Jury Trials 39 (Amer. Bar Ass'n 2005); G. Mize, On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room, 36 Ct. L. Rev. 10-15 (1999)).

Defendants made this very point in support of *their* motions for juror questionnaires in *Engle* cases. For example, in *Hall*, *Webb*, and *Ward*, Defendants argued that questionnaires are critical for obtaining candid responses from jurors about their deep-seated biases:

> … a written questionnaire is especially appropriate here because prospective jurors are more likely to provide full and honest responses to a written questionnaire than to admit a bias in open court. *See Jurywork,* National Jury Project, § 2.10[1][b] at 2-72.5 (Elissa Krauss and Beth Bonora, 2d ed. 1985 and supp. 1990).[5]
>
> An analysis of the jury-selection process in *Campbell*-a representative progeny case- demonstrates the need for a juror questionnaire to adequately ferret out the biases of prospective jurors. In *Campbell*, two jury selections occurred due to a mistrial: one with a detailed questionnaire and one with no

[5] Ex. 3, at (*Hall*), Ex. 17, at 8-9 (*Webb*).

> questionnaire. The number of people who admitted bias in writing far exceeded the number who did the same after live questioning in open court. … For example, answers to the written questions demonstrated bias that led to the excusal of … 48 percent of the venire. But when those same questions were asked orally, just … 9 percent, were willing to respond candidly. … This data confirms that the failure to use a written questionnaire denied the parties the ability to learn critical facts and opinions that affect a juror's ability to be fair.[6]

Once the written questionnaires reveal biased jurors, attorney follow-up questioning is the most effective and efficient way to test the strength of those biases and determine if any potential jurors should be removed for cause. The Fifth Circuit has repeatedly stressed the need for attorney questioning during jury selection. *United States v. Ible,* 630 F.2d 389, 395 (5th Cir. 1980) ("[v]oir dire may have little meaning if it is not conducted at least in part by counsel. "); *see also United States v. Corey*, 625 F.2d 704, 707 (5th Cir. 1980) ("This court has previously stressed that voir dire examination not conducted by counsel has little meaning."); *United States v. Ledee*, 549 F.2d 990, 993 (5th Cir. 1977) ("Voir dire examination in both civil and criminal cases has little meaning if it is not conducted by counsel for the parties. . . . Justice requires that each lawyer be given an opportunity to ferret out possible bias and prejudice of which the juror himself may be unaware until certain facts are revealed").

Recognizing the critical role of attorney participation in voir dire, particularly where, as here, people likely have preconceptions about the case, the American Bar Association has codified the following "Principles for Juries and Jury Trials":

- Following initial questioning by the court, each party should have the opportunity, under the supervision of the court and subject to reasonable time limits, to question jurors directly, both individually and as a panel.
- Where there is reason to believe that jurors have been previously exposed to information about the case, or for other reasons are likely to have preconceptions concerning it, the parties should be given liberal opportunity to question jurors individually about the existence and extent of their knowledge and preconceptions.

Am. Jury Project, Am. Bar Ass'n, Principles for Juries and Jury Trials, Principle 11(C)(1)-(2), at 14 (2005), *available at*

[6] Ex. 17, at 9 (*Webb*); Ex. 16, at 10 (*Ward*).

http://www.americanbar.org/content/dam/aba/migrated/2011_build/american_jury/final_commentary_july_1205.authcheckdam.pdf. These principles apply to federal and state courts. *Id.* at 79.

These techniques—written questionnaires with attorney follow-up—are consistent with federal practice. *Stephens*, 2006 U.S. Dist. LEXIS 42907, at *31-33. ("Since moving to the use of written jury questionnaires, the Court has continued to use follow-up verbal questioning to supplement the voir dire process…This Court's experience is that the process we use allows us to obtain more information more efficiently than the more traditional method of oral voir dire. … [Oral follow-up to written questions] can give counsel valuable insight into whether, and how, the juror will understand the evidence in the case and the court's instructions on the law, and how the juror will relate to fellow jurors during deliberations."). This proposed approach is not uncommon in federal court; according to a 1994 Federal Judicial Center survey, 59 percent of federal judges ordinarily allow counsel to ask questions during voir dire in civil cases, and 66 percent permit attorney voir dire in "exceptional" civil cases. John Shapard & Molly Johnson, Memorandum from the Federal Judicial Center, to the Advisory Committee on Civil Rules and Advisory Committee on Criminal Rules 2 (Oct. 4, 1994) (attached as Ex. 20). Federal judges also reported using case-specific written questionnaires and limiting attorney-led voir dire to follow-up questions. (*Id.* at 5.)

As demonstrated in *Chamberlain*, adding the parties' voir dire to one, court-approved written questionnaire would not require substantially more resources or time to administer. Likewise, permitting attorney follow-up based on juror responses need not take longer than the Court has already spent on voir dire in these cases. [7] As noted above, in *Smith*, where the Court used both a questionnaire and attorney voir dire, a jury was selected before lunch. To be sure, the

[7] In the first seven trials, voir dire lasted, on average, approximately three hours and 48 minutes. Estimated time for each case was as follows: *Smith*—approximately two hours and 40 minutes (2:40); *Denton*—three hours and 15 minutes (3:15), *Walker*—six hours and 28 minutes (6:28); *Young*—five hours and two minutes (5:02); *Gollihue*—three hours and 40 minutes (3:40); *Pickett*—three hours and 19 minutes (3:19); and *Duke*—two hours and 14 minutes (2:14). Time estimates were drawn from the transcripts and do not reflect the Court's time spent processing questionnaires.

parties can derive substantial information from judicial-conducted voir dire, so long as the questions are designed and demonstrated to elicit bias. It is inefficient and unnecessary, however, for visiting trial judges to reinvent the wheel.

For these reasons, and those discussed in detail above, Plaintiffs respectfully submit that their proposed written questionnaire, based on the one used in *Chamberlain*, followed by attorney voir dire, is the most fair, effective and efficient method to elicit bias and provide sufficient information for the parties to exercise their cause and peremptory challenges.

III. There is No Prejudice to Defendants.

Defendants cannot credibly claim prejudice, as they previously agreed to, and in fact jointly submitted, most of Plaintiffs' proposed questions in *Young*. (*Compare* Ex. 21, *Young*, Joint Proposed Voir Dire with Exs. 1 and 2.) As always, Plaintiffs remain willing to work with Defendants to identify and submit joint questions and does not oppose voir dire designed to elicit biases against cigarette companies.

Nor should Defendants object to Plaintiffs' proposed voir dire method, as they have also sought use of a juror questionnaire and attorney follow-up in federal cases. (*E.g.*, *Gollihue*, Defs.' Mot. For Use of Jury Questionnaire (Doc. 69).) Despite their position in federal court that voir dire need not elicit information about potential jurors beyond demographics, Defendants have repeatedly taken the opposite position in state court proceedings for the same reasons Plaintiffs' state here. For example, Defendants argued in *Webb* and *Ward*:

> … a large portion of the venire will likely enter the courtroom already holding strong personal opinions about ... the issues that are central to this case – e.g. cigarette smoking, addiction, and tobacco litigation. …In a case like this, such a questionnaire is vital to lay a predicate so that counsel may determine whether to challenge for cause or exercise a preemptory challenge.[8]

Defendants suffer no prejudice from this voir dire proposal, and should in fact be

[8] Ex. 16, R.J. Reynolds Tobacco Company's Motion Requesting Use of a Juror Questionnaire, *In re Engle Progeny Cases Tobacco Litigation, pertains to Ward,* at 6-7; Ex. 17, R.J. Reynolds Tobacco Company's Motion Requesting Use of a Juror Questionnaire, *Webb v. R. J Reynolds Tobacco Company*, at 5-6.

judicially estopped from opposing it, as they have moved for the very same relief in other *Engle* cases. *See Jones v. United States*, 467 Fed. App'x 815, 817 (11th Cir. 2012) ("Judicial estoppel protects the integrity of the judicial system by barring litigants from deliberately taking inconsistent positions based on the 'exigencies of the moment.'").

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court establish a voir dire protocol based on Plaintiffs' proposed written questionnaire and attorney follow-up. To avoid any unnecessary delay or inefficiency, additional potential jurors should be available in the event the initial group proves to have too many individuals that have intractable biases.

Dated: December 9, 2013

Respectfully submitted,

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By: /s/ *Kathryn E. Barnett*

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RULE 3.01(g) CERTIFICATION

Plaintiffs have conferred with opposing counsel, and Defendants oppose the relief sought in this motion.

/s/ Kathryn E. Barnett
Kathryn E. Barnett

CERTIFICATE OF SERVICE

On December 9, 2013, I electronically filed this document through the ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Kathryn E. Barnett
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