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

IN RE: ENGLE PROGENY CASES. CASE NO. 3:09-cv-10000-WGY

THIS DOCUMENT RELATES TO:

Deshaies v. R.J. Reynolds Tobacco Co., et al., 3:09-cv-11080-WGY-HTS
Elkins v. R.J. Reynolds Tobacco Co., et al., 3:09-cv-11595-WGY-JBT
Harford v. R.J. Reynolds Tobacco Co., et al., 3:09-cv-13631-WGY-JBT
Meeker v. R.J. Reynolds Tobacco Co., 3:09-cv-12867-WGY-HTS

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR JUROR QUESTIONNAIRE AND ATTORNEY FOLLOW-UP VOIR DIRE

Defendants R.J. Reynolds Tobacco Company and Lorillard Tobacco Company ("Defendants") respectfully oppose Plaintiffs' motion to allow use of an expanded juror questionnaire and to permit attorney-conducted *voir dire*. Indeed, in prior cases where plaintiffs filed motions asking for attorney-conducted *voir dire* and an expanded written juror questionnaire, those requests have been rejected in at least ten *Engle* progeny cases in this District by ten different judges. *See* Defs.' Response to Pls.' Mot. for Juror Questionnaire and Attorney Follow Up *Voir dire* at 1, (Reider) M.D. Fla Dec. 21, 2012) (Doc. 108); *see* also 3/11/13 Trial Tr. at 12-13 (Giddens); Order at ¶ 3 (Reider) (M.D. Fla. July 29, 2013); 10/9/13 Mem. (Chamberlain) (collectively, Ex. 1). The Court should likewise reject Plaintiffs' request in this case.

Plaintiffs' motion is premised on the unsupported contention that smoking cases require a special approach to *voir dire*, and that *voir dire* conducted by this Court in the vast majority of *Engle* progeny cases tried to date has somehow been inadequate to protect plaintiffs' right to a fair trial. While Plaintiffs suggest that their proposal is based on "the uniquely difficult and challenging" nature of *Engle* progeny cases (Pls.' Mot. at 1), their argument is, in fact, nothing

more than a rehash of the arguments for expanded *voir dire* that federal progeny plaintiffs have made, and that this Court has rejected, in the vast majority of the *Engle* progeny cases it has tried since *Gollihue*. There is no reason to change this Court's established approach, which includes a concise written questionnaire; *voir dire* by the Court focused on specific facts in a juror's background that might create bias; and a venire of approximately 35 people. That approach has been both efficient and fair to all parties. The average time spent on jury selection in the first fifteen federal *Engle* progeny trials has been just over three hours (compared to an average of more than two and a half days in the state progeny cases).[1]

There is good reason why this procedure has gained such acceptance: it follows the general approach of the federal courts, and it has proven to be both efficient and fair in these particular cases. Plaintiffs, however, advocate for the outlier approach taken by Southern District Judge Huck in the *Smith* trial, where the parties were each provided 40 minutes for attorney questioning (with no questioning beyond hardship inquiries by the court). This format afforded plaintiff's counsel the opportunity to devote that entire time to pursuing a single, misleading question which encouraged potential jurors to offer their general opinions on smoking litigation – without determining whether they could lay aside any personal feelings and fairly decide the case based on the Court's instructions and the law and facts to be presented at trial. Defense counsel was therefore obligated to spend the majority of her allotted time attempting to deconstruct the responses elicited by plaintiffs' questioning. Consequently, based on this limited and skewed data, 19 of 38 potential jurors were excused (ten by agreement) before the parties exercised their peremptory strikes.

[1] For a detailed chart providing information concerning the size of the venire pool, the form of jury selection employed, how many cause challenges were made and granted for each party, the number of preemptory challenges made and used by each party, the number of challenged jurors seated, and the time expended on jury selection in the first fifteen cases to be tried, *see* Exhibit 2.

There is likewise no need for the much more detailed written questionnaire proposed by Plaintiffs. Experience has proven that the questionnaires employed in the vast majority of prior federal *Engle* cases have efficiently and effectively identified bias and led to meaningful follow-up examination by the Court. Those questionnaires satisfy the requirement of the Eleventh Circuit and this District that *voir dire* provide a "reasonable assurance that the jurors' prejudices could be discovered" (*Lips v. City of Hollywood*, 350 Fed. App'x 328, 339 (11th Cir. 2009); *United States v. Nash*, 910 F.2d 749, 753 (11th Cir. 1990)), and no more is required.

Essentially, Plaintiffs' proposed attorney-conducted *voir dire* and expanded written questionnaire invite this Court to adopt the *voir dire* procedures employed in *Engle* progeny cases tried in Florida state courts. However, that approach (which is a product of state law requiring that lawyers be permitted to conduct *voir dire*) is fundamentally at odds with the efficient approach that this Court has utilized in these cases. Indeed, this Court has completed *voir dire* in these cases in a matter of hours where it has taken the state courts days to select a jury. There is no reason for the Court to alter its process, which has proven to be fair, efficient, and economical in terms of both the Court time and juror resources.

Given this record, there is simply no reason to change course and impose a more onerous or inequitable procedure on future trial judges that is at odds with the fair, efficient and effective approach that has been employed in the majority of the federal trials.

FACTUAL STATEMENT

Judge Dalton – the judge initially assigned to establish procedures for these cases – instituted a *voir dire* procedure in the *Gollihue* case that had three basic components. First, a concise, but effective, written questionnaire designed to identify prospective jurors whose personal histories might give rise to bias against one side or the other.

Second, as is typical in federal courts, a more detailed oral examination by the Court itself. This approach is fully consistent with Eleventh Circuit precedent. *See, e.g.*, *Lips,* 350 Fed. App'x at 338 ("During federal voir dire, district judges are granted substantial control and may conduct the entire voir dire themselves."). In conducting follow-up examination, Judge Dalton and the other federal progeny judges have incorporated suggestions from the parties.[2] As Judge Dalton explained:

> If you have areas that you want me to follow up on with respect to the particular jurors in light of something that they have said or in light of something that's on their questionnaire, you can bring that to my attention; and if you have additional areas of inquiry that you think I should address that I haven't addressed, you can bring that to my attention as well. I'll either do it or not, depending on whether I think it's appropriate.

Jan. 31, 2012 Hr'g Tr. at 10-11 (Ex. 7).

Third, is a venire pool of 35 people. In *Gollihue*, Judge Dalton ultimately needed to question only 18 of the 35 before seating a jury of eight. *Gollihue* Tr. Vol. I at 134 (Ex. 3). And, with those 18 potential jurors, the judge was able to accommodate all cause challenges and all peremptory challenges of both the plaintiff and defendants. *Id.* at 122-27. Plaintiff then chose to exercise only one of her three peremptory challenges. *Id.* at 131-34. Notwithstanding the equity and efficiency of this procedure, in the wake of *Gollihue* plaintiffs' counsel filed motions strikingly similar to the present one seeking to change *voir dire* procedures in each of the next six *progeny* trials. In each they asked for some combination of the same relief they seek here.[3]

---

[2] *See, e.g.*, *Gollihue* Tr. Vol. I at 107-22 (Ex. 3); *Pickett* Tr. Vol. I at 78-85 (Ex. 4); *Duke* Tr. Vol. I at 44-46, 53-57 (Ex. 5); *Walker* Tr. Vol. I at 71-80, 119-140 (Ex. 6).

[3] *See* Pl.'s Proposed Voir dire Questions and Request for Counsel's Participation in Voir dire Examination (*McCray*) (Mar. 2, 2012) (Doc. 141); Pl.'s Proposed Voir dire Questions and Request for Counsel's Participation in Voir dire Examination (*Pickett*) (Mar. 9, 2012) (Doc. 126); Pl.'s Proposed Voir dire Questions and Request for Larger Juror Pool (*Duke*) (Mar. 28, 2012) (Doc. 128); Pl.'s Request for Case-Specific Voir dire and Expanded Venire (*Aycock*) (Mar. 30, 2012) (Doc. 140); Pl.'s Request for Case Specific Voir dire and Expanded Venire (*Walker*) (Apr. 17,

In at least nine of the *Engle* progeny cases tried in this District, the presiding federal judges have rejected plaintiffs' proposals:

- *Gollihue*: Judge Dalton "[w]hen I finish the voir dire, I'll have a sidebar with the lawyers; and if you have areas that you want me to follow up on with respect to the particular jurors . . . . I'll either do it or not, **depending on whether I think it's appropriate. So that's how the jury selection process will go**." Jan. 31, 2012 All-Cases Hr'g Tr. at 10-11 (emphasis added).

- *McCray* Judge Covington "there are some general questions that they ask up here in Jacksonville that are actually a little bit different than what we ask in Tampa. But I'm going to follow like the Romans and I'm going to follow Jacksonville's way of doing things" and explaining that "**I never have used a questionnaire, and I don't think this case is that different that it warrants a questionnaire**." *McCray* Trial Tr. Vol. I at 8-9 (emphasis added).

- *Pickett:* Judge Hodges **"I'm aware that there have been a couple of comments about the jury questionnaire and the suggestion that one or two of the questions be expanded. But I intend to do that orally during my examination of the – the venire**. And I will conduct the voir dire examination." Mar. 12, 2012 *Pickett* Hr'g Tr. at 34-36 (emphasis added).

- *Duke:* Chief Judge Conway "**I ask all the voir dire questions**. Of course you're welcome to submit questions, which you have already done." Mar. 21, 2012 *Duke* Pretrial Hr'g Tr. at 4 (emphasis added).

- *Aycock:* Judge Antoon "I will ask the following [seven] questions of the venire." Apr. 12, 2012 Order (Doc. 153).

- *Walker:* Judge Huck "[i] n selecting the jury we will follow the general procedures that have been used by the other Judges. It is my understanding that none of the prior Judges have allowed the lawyers any direct voir dire examination. **And that the Judge has used his or her own standard instructions or jury questions, together with those proposed by the parties. So we will follow that same procedure**." Apr. 18, 2012 *Walker* Hr'g, at 6[4] (emphasis added).

- *Denton:* Judge Howard reviewing plaintiff's motion for individual voir dire and expanded juror questionnaire, "**I'm not inclined to use the questionnaire. I'm just going to talk to the jurors.**" July 13, 2012 *Denton* Pretrial Hr'g, at 6 (emphasis added)

2012) (Doc. 120); Pl.'s Proposed Voir dire Questions and Mem. in Support (*Denton*) (July 3, 2012) (Doc. 125); Supp. to Motion for Juror Questionnaire and Limited Attorney Follow-Up Voir dire (Aug. 10, 2012) (Doc. 118).

[4] Judge Huck ultimately assigned Magistrate Judge Klindt to preside over *voir dire* in *Walker*.

- *Giddens:* Judge Magnuson "[o]nce we get into the selection process, **I will do the voir dire** and will try to ask the natural follow-up questions" and noting "**I'm not going to participate in lawyer voir dire in this case. I just don't think it's necessary or appropriate.**" March 11, 2013, *Giddens*, Trial Tr. at 12-13 (emphasis added).

- *Reider:* Chief Judge Rodgers denying plaintiff's request for attorney voir dire and ordering that "**[t]he court will conduct voir dire**" and that "**the Court intends to use the written questionnaire used recently in *Graham*, *Aycock*, and *Fazekas* trials.**" July 29, 2013 Order at ¶¶ 3-4 (emphasis added). (collected rulings attached hereto as Ex. 8).

Instead, most of the trial judges have used questionnaires very similar to the one employed by Judge Dalton in *Gollihue*. *See Gollihue* Questionnaire (Ex. 9). And, in six of the trials – *Gollihue*, *Pickett*, *Duke*, *Walker, Giddens,* and *Searcy* – the voir dire examination was conducted solely by the Court, with counsel participation in suggesting questions.

While Plaintiffs now suggest that *voir dire* conducted by the trial judges in these cases was somehow deficient, the record demonstrates exactly the contrary. It is telling that in *Gollihue* itself – after *voir dire* was conducted solely by the Court – plaintiff's counsel made no objection to the sufficiency of the Court's questioning. *Gollihue* Tr. Vol. I at 107-26. In *Pickett*, plaintiff's counsel went further and expressly acknowledged that the Court had "done a very, very good job" in covering topics of interest to plaintiff. *Pickett* Tr. Vol. I at 81-82.[5]

Likewise, in *Denton*, Judge Howard largely followed the approach taken by the five prior Middle District judges. Specifically, she rejected the expansive questionnaire proffered by

[5] In *McCray*, Judge Covington allowed limited lawyer follow-up questioning after she conducted her own examination. *McCray* Tr. Vol. I at 124-157 (Ex. 10). But the follow-up questioning had no significant effect. To be sure, Plaintiffs go to great lengths reciting the responses of 13 of the prospective jurors in *McCray* which, Plaintiffs contend, show "bias." *See* Pls.' Mot. at 11-13. But Plaintiffs fail to disclose that, for each of the 13 prospective jurors they so identify, at least one of the responses cited as indicative of "bias" was elicited by the Court before any attorney questioning. *See, e.g.*, Pls. Mot .at 11 (prospective Juror 8 initially questioned by the Court). Nor is there any reason to believe that, if the Court was asking follow-up questions suggested by counsel as in the four trials where voir dire was conducted exclusively by the Court, that those questions would not have been asked by the Court (as opposed to the attorneys themselves) in any event. Moreover, not one of these 13 allegedly "biased" prospects was ultimately seated on the jury. *McCray* Vol. I Trial Tr. at 158-80. *McCray* is currently on appeal to the Eleventh Circuit Court of Appeals. *See McCray v. R.J. Reynolds Tobacco Co.*, Case No. 12-13704 (11th Cir.).

plaintiffs' counsel containing questions about many supposed "issues" that in fact had nothing to do with jurors' obligation to be impartial. During *voir dire*, Judge Howard explained the case, asked the panel a series of questions, and followed up with individual questions of the jurors who had expressed some affirmative response. *See* July 24, 2012 *Denton* Trial Tr., at 56-89 (Ex. 11).

At the conclusion of questioning by the court, Judge Howard held a side-bar with counsel, where it was agreed that about half of all of the prospective jurors should be called for further, individualized examinations based on their responses to questions before the entire panel. *Id.* at 89-101. The court then conducted those individual examinations, giving the attorneys an opportunity to question each prospective juror, but confining them to the specific issue of potential bias so identified. *Id.* at 103-162. At the conclusion of the examination, plaintiff challenged 6 total jurors for cause.[6] By contrast, defendants challenged only one prospective juror – and that challenge was denied. *Id.* at 167-169.

Finally, in each of the fifteen cases tried to date, the Court ordered a venire consisting of between 30 and 60 people. *See* Chart Summarizing Voir dire Procedures in Federal *Engle* progeny Trials (Ex. 2). And in each of the cases, that number proved more than sufficient.

The only federal case tried to date that has varied from this model is the *Smith* case tried by visiting Judge Huck. Consistent with his usual practice in the Southern District of permitting some attorney questioning, Judge Huck provided each party forty minutes to conduct voir dire.[7] Plaintiff's counsel used all forty minutes going over a single question (over defendant's objection) with the venire:

[6] The court sustained 5 of the plaintiff's 6 cause challenges. *Id.* at 163-170. Significantly, plaintiff's counsel did not strike the remaining juror through the use of her peremptory challenges, although, of course, she had the opportunity to do so.

[7] Note however, that in Smith, Judge Huck used the defendant's proposed questionnaire as the "basis" for the questionnaire he ultimately employed, adding a few additional questions regarding residency and background – thereby not endorsing plaintiffs' more expansive proposal. Sept. 24, 2012 *Smith* Pretrial Hr'g, at 6-8 (Ex. 12).

> This case – Mr. James Lowell Smith has brought this lawsuit. He's the husband of Wanette Smith, who was somebody who smoked for 30 years and got sick and died. **And I know there are a lot of people who think it's just wrong for the family of a smoker to bring a lawsuit against the cigarette companies for money damages in a wrongful death suit because of a death that they say is from cigarettes.** So how many of you – how many of you feel that way?

Oct. 9, 2012 *Smith* Trial Tr., at 58-59 (emphasis added). To this end, plaintiff's counsel focused exclusively on identifying the jurors' general feelings about tobacco litigation, and made every effort to reinforce skepticism without focusing on whether panel members could lay aside their personal feelings and listen to the court's instructions and the evidence to be presented at trial:

> PROSPECTIVE JUROR: I feel strongly about it, but maybe I could be convinced. I don't know. I mean, I'm not that I'm not willing to try. I am. But in all fairness, I do have feelings about it.
>
> MS. BARNETT: And those feelings that you have would make it hard for you to be a juror in this kind of case and listen without thinking about those things; fair enough?
>
> PROSPECTIVE JUROR: Possibly.
>
> MS. BARNETT: I take it from what you're saying, you're not sure – you're not sure if those beliefs and those feelings would come up in your mind as you listen to the evidence, is that fair enough?

Oct. 9, 2012 *Smith* Trial Tr., at 81.[8]

In the end, the court excused 19 of the 38 potential jurors (10 of these jurors were excused based on agreement of the parties), before each party exhausted its peremptory challenges. However, the court also denied several of plaintiff's cause challenges, noting in one instance:

[8] The court declined to follow up with any of these jurors on its own, and defense counsel was likewise provided 40 minutes for questioning. At the conclusion of the questioning, Judge Huck noted that the information obtained from the venire was "interesting", in that several jurors appeared to give contradictory statements. *See* Oct. 9, 2012 *Smith* Trial Tr., at 129 ("For example, Mr. Frazier, who answered both your questions, you know, about shouldn't bring lawsuits, the tobacco companies are responsible and should share responsibility").

> Originally I agreed [on plaintiffs' cause challenge]. And I thought there would be a problem with him. **But I thought on his – I guess before the rehabilitation that he said he could be fair and listen to the evidence.** So I'm going to deny that one.

Oct. 9, 2012 *Smith* Trial Tr., at 134 (emphasis added).

ARGUMENT

As in their prior unsuccessful motions, Plaintiffs demand two uniform changes in the Court's *voir dire* procedures: attorney conducted voir dire and an expanded juror questionnaire. Neither has merit.

A. The Court Should Reject Plaintiffs' Request to Impose the Voir dire Procedures Adopted in the Outlier *Smith* Case.

Relying solely on *Smith*, Plaintiffs contend that there must be attorney voir dire is necessary. However, *Smith* vividly illustrates the inequities inherent in a forged compromise of partial attorney conducted voir dire with fixed time limits. Under this approach, plaintiff's counsel was permitted to pose a single, misleading hypothetical question that was used to eliminate a large swath of the jury, ostensibly "for cause." This approach is plainly at odds with federal law, which is that "dismissal is *not* required if the prospective juror demonstrates that he or she can lay aside any preconceived opinions and render a judgment based solely on the evidence presented in court." *United States v. Dixon*, 201 Fed. App'x 674, 675 (11th Cir. 2006); *see also United States v. Rhodes*, 177 F.3d 963, 966 (11th Cir. 1999) (holding that a juror's statements evincing bias did not require the dismissal of the juror because "further examination by the court revealed that [she] could lay aside her [bias] and [treat the defendant] fairly and impartially").

In *Smith*, there was no further examination by the court to determine whether prospective jurors' initial responses to plaintiff's questioning truly evinced bias. Further examination by the court was clearly necessary particularly given the misleading nature of plaintiff's counsel's hypothetical question. As a Florida federal court explained, "it is not proper to propound

hypothetical questions purporting to embody testimony that is intended to be submitted for the purpose of ascertaining from the juror how he or she will vote on such a state of the testimony." *Vilme v. McNeil*, 08-23138-CIV, 2010 WL 430762, at *8 (S.D. Fla. Feb. 5, 2010) (citing *Jackson v. State*, 881 So. 2d 711, 714 (Fla. 3d DCA 2004); *Renney v. State*, 543 So. 2d 420 (Fla. 5th DCA 1989)). Plaintiffs' questioning in *Smith* essentially sought a reverse "commitment" from the jurors: a commitment that the juror would side against the plaintiff, based on general skepticism toward smoking litigation.

Indeed, when closely scrutinized, whether a juror "thinks it is just wrong" that the spouse of a former smoker has the "right" to bring a wrongful death lawsuit is not even relevant: the law gives the spouse that right. The pertinent inquiry is whether the potential juror can be fair, and follow the instructions and law provided by the judge. *See Bell v. United States*, 351 Fed. App'x 357, 359 (11th Cir. 2009) ("Actual bias exists if a juror is not 'capable and willing to decide the case solely on the facts before him.'") (quoting *Rogers v. McMullen*, 673 F.2d 1185, 1190 (11th Cir. 1982)). As Judge Howard has aptly explained:

> [A]s I think we can all agree, what's going to be important is what they [the potential jurors] tell us after they, in candor, acknowledge the bias – **what they tell us when we ask them if they can decide the case based solely on the law and the facts as they learn in this courtroom**.

7/13/12 *Denton* Pretrial Hr'g, at 11 (Ex. 13).

Therefore, a more neutral inquiry by the Court would seek to ascertain whether the jurors could put aside whatever personal feelings or beliefs they may have about the propriety of such suits and decide the case based on the Court's instructions on the law and the facts that they will hear in this trial.

The end result in *Smith* was a truncated and skewed *voir dire* procedure that led to the dismissal of half the panel before the exercise of peremptory strikes. Defense counsel devoted their efforts to deconstructing plaintiff's misleading questioning, because as the court noted, many of the jurors appeared to give contradictory responses. The fact that this procedure was accomplished "in less than three hours" (Pls.' Mot. at 2) says nothing about the quality or fairness of the court's approach.

Conversely, the traditional federal approach (with *voir dire* conducted entirely by the Court) facilitates fair, even-handed, and efficient examination. As noted, it is well-settled that "[d]uring federal *voir dire*, district judges are granted substantial control and may conduct the entire *voir dire* themselves." *Lips*, 350 Fed. App'x at 338. *See also* M.D. Fla. Local Civ. Rule 5.01(b) ("The method of *voir dire* examination and exercise of challenges in selection of the jury shall be as specified by the presiding judge."); 9B Fed. Prac. & Proc. Civ. § 2482 (3d ed.) (explaining that "[t]he court need not allow the attorneys to question jurors if it does not wish to do so" and "judges generally believe that examination of prospective jurors by the court is the preferable practice because it results in great savings of time and improves the character and relevance of the voir dire examination"); *id.* at n.6 ("An empirical study has shown that if the judge conducts the voir dire, juries are selected in fifty-eight percent of the time required by attorneys who do the questioning and that with this method chances for fairness and impartiality are more certain.") (summarizing Levit, Nelson, Ball & Chernick, Expediting Voir dire: An Empirical Study, 1971, 44 So. Cal. L. Rev. 916).

Again, the voir dire examinations by Judges Dalton, Hodges, Conway, Howard and by Magistrate Judge Klindt, easily satisfy the standard of providing "reasonable assurance that the jurors' prejudices could be discovered." *Lips*, 350 Fed. App'x at 339. The *Smith* approach, on the

other hand, encourages the dismissal of jurors for stating "general opinions" a result that is inconsistent with federal law. *See, e.g.*, *United States v. Angel*, 355 F.3d 462, 470 (6th Cir. 2004) (determining that juror's statement during voir dire that she believed the drug laws need to be more strict did not demonstrate an actual bias against the defendant charged with conspiracy to possess and distribute marijuana and cocaine when the statement was only a "general opinion" and juror stated she could judge the case impartially).

Plaintiffs' motion assumes that extensive attorney questioning can ferret out all perceived "bias." However, to prevail on a challenge for cause, a party must "demonstrate that the juror in question exhibited actual bias by showing either an express admission of bias or facts demonstrating such a close connection to the present case that bias must be presumed." *United States v. Chandler*, 996 F.2d 1073, 1102 (11th Cir. 1993); *accord United States v. Freedman*, 279 Fed. App'x 927, 930 (11th Cir. 2008).9 The issue is not whether jurors have generalized opinions that may in some way be related to matters raised in the lawsuit; indeed, in virtually every case, nearly all jurors likely will have some opinions and life experiences that are related to matters raised in the lawsuit. Instead, the issue is whether the juror can be fair and decide the case based on its facts.

Tellingly, Plaintiffs' counsel have acknowledged the need to rehabilitate jurors who may only have expressed "general opinions" about the subject matter. *See* Oct. 9, 2012 *Smith* Trial Tr., at 139 (in opposing defendant's cause challenge, plaintiff's counsel arguing "I didn't get the chance to rehabilitate and ask them if they could listen to the court's instructions"). Federal trial

[9] Not a single juror cited by Plaintiffs as "biased" in their motion has actually been seated in the federal cases tried to date. Pls.' Mot. at 8-16. Notably, Plaintiffs do not quote from or cite to the voir dire responses of the one juror in *Smith* to which Judge Huck denied a plaintiff's cause challenge and who was seated on the jury. *See* Oct. 9, 2012 *Smith* Trial Tr., at 136 (Judge Huck denying plaintiff's cause challenge to prospective Juror 21 because the juror stated "she would keep an open mind").

judges have long been entrusted to administer *voir dire* fairly and evenhandedly, especially in cases garnering media attention and "strong feelings" (Pls.' Mot. at 2) – and the result should be no different here. *See United States v. Bakker*, 925 F.2d 728, 733 (4th Cir. 1991) (in criminal prosecution of famed televangelist Jim Bakker, the court rejected defendant's argument that "the *voir dire* was not thorough enough because the court completed it in one day . . . because '[s]uch quantitative comparisons are unhelpful—the only issue is whether . . . *voir dire* was sufficient to impanel an impartial jury'" and further rejecting defendant's request for attorney conducted *voir dire*, noting that "[i]t is well settled that a trial judge may conduct *voir dire* without allowing counsel to pose questions directly to the potential jurors").

B. Plaintiffs' Citation to *Voir dire* Procedures Used in Florida State Courts Is Inapposite.

Nor is there any merit in Plaintiffs' arguments that this Court must allow attorney *voir dire* to the extent it is employed in state court. *See, e.g.*, Pls.' Mot. at 13-14. As Judge Antoon correctly noted when this issue was raised in *Aycock*, the type of expanded attitudinal questioning proposed by plaintiffs is in no way mandated by federal law:

> The question, though, is not whether they have those concerns. That's probably true in almost every case I try. I would guess that if I ask questions, do you think it's right to sue people for this, that or the other that a substantial percentage would say, no, I don't believe in suing people. I think we're too litigious. Or in criminal cases, it would be particularly dicey.
>
> The ultimate question is, whether they have bias, are they able to put them aside?

Apr. 4, 2012 *Aycock* Hr'g Tr. at 37 (Ex. 14).[10]

[10] Unlike the federal practice, Florida Rule of Civil Procedure 1.431(b) provides "[t]he parties have the right to examine jurors orally on *voir dire* . . . The court may ask questions of the jurors as it deems necessary, but the right of the parties to conduct a reasonable examination of each juror orally shall be preserved." But no similar provision of federal procedure requires counsel participation in voir dire and indeed, as noted above, the traditional federal practice is for the Court to conduct voir dire on its own.

Consistent with the *Gollihue* model, Judge Antoon then rejected the slanted *voir dire* requested by plaintiffs in favor of questions targeted to a prospective jurors' ability to be fair and impartial. *See id.* The prospective jurors in the first fifteen cases were all well aware that they were being asked to hear a case brought by a smoker or the family of a smoker against a tobacco company or companies (without need for the misleading attorney questioning employed in *Smith*); and in each case where the Court conducted *voir dire*, it took care to ensure the jurors could be fair to both sides.[11]

Plaintiffs make much of the fact that Defendants have advocated for more expansive *voir dire* in state court, but again Plaintiffs' argument misses the mark. It is of no moment that in state court – where the governing rule specifically provides for a right to attorney conducted *voir dire* Defendants have followed that procedure. Indeed, under that expanded procedure, *voir dire* has taken an average of two and a half days,[12] compared to the average of three hours required in federal courts.[13] This result would be fundamentally at odds with the efficient approach the Court has indicated it wishes to take with the progeny cases.

---

[11] In their latest motion, Plaintiffs again spend two pages referencing various poll statistics and press headlines reporting some of the excessive verdicts obtained in a few state *Engle* progeny cases -- most of which were later overturned or are still on appeal -- to argue that many potential jurors are biased against tobacco companies. Their point, however, is unclear.

If they are suggesting an adequate *voir dire* is necessary to protect the defendants from such jurors, that would seem to be an argument only the defendants have standing to assert. If they are suggesting they as plaintiffs have not benefitted from seating such biased jurors in federal court, that would not seem to be a very persuasive argument.

[12] For example, in the recent *Buchanan Engle* progeny trial in Tallahassee, the court spent five full days on jury selection.

[13] *See, e.g.*, *Piendle v. R.J. Reynolds Tobacco Co.*, No. 50-2007-CA-020235-AB (Fla. 15th Cir. Ct.) (6 days); *Calloway v. R.J. Reynolds Tobacco Co.*, No. 08-021770 (Fla. 17th Cir. Ct.) (5 days); *Morse v. R.J. Reynolds Tobacco Co.*, No. 08-CA-6848 (Fla. 18th Cir. Ct.) (5 days); *Frazier v. Philip Morris USA, Inc.*, No. 07-44469-CA-31 (Fla. 11th Cir. Ct.) (5 days); *Kaplan v. R.J. Reynolds Tobacco Co.*, No. 08-019469 (Fla. 17th Cir. Ct.) (4 days); *Clay v. R.J. Reynolds Tobacco Co.*, No. 2007-CA-003020 (Fla. 1st Cir. Ct.) (4 days); *Warrick v. R.J. Reynolds Tobacco Co.*, No. 16-2007-CA-011654-QXXX-MA (Fla. 4th Cir. Ct.) (4 days); *Sulcer v. R.J. Reynolds Tobacco Co.*, No. 2008-CA-80000 (Fla. 1st Cir. Ct.) (4 days); *Weingart v. R.J. Reynolds Tobacco Co.*, No. 50-2008-CA-038878 (Fla. 15th Cir. Ct.) (4 days).

C. A Detailed Juror Questionnaire Is Not Necessary For a Fair Trial.

Plaintiffs' propose a questionnaire similar to that used in *Chamberlain*, which was based on the questionnaires used in prior federal progeny case, but also included several additional "attitude" questions. These additional questions were wholly unnecessary and, as Plaintiffs acknowledge, created confusion. Pls. Mot. at 19. While Plaintiff contends that "some jurors . . . were confused on how to express their biases and opinions in the questionnaire," *id.*, the fact is many jurors misread the questionnaire and identified themselves as having doubts about whether they could be fair and impartial – when, in fact, they had no such doubts. The Court and the parties then were obliged to spend time sorting out these false positives as demonstrated by the following examples:

> THE COURT: If you wouldn't mind, could you look at page 4, Question 6 at the top? The question may have been badly worded. Could you read it again and see if you meant to answer it no instead of yes? The way you've answered it, it says that you doubt you could be fair in the case. So could you just read the question and see? Maybe a lot of people have misunderstaood that question because it's not well written. So if you could, just check that, please.
>
> JUROR 34: I can't understand. I'm still – I have trouble.
>
> THE COURT: Just take a look at Question 6 and see if –
>
> JUROR 34: Question 6, okay.
>
> THE COURT: – it may have been a confusing question.
>
> JUROR 34: All right. I'll read it. Oh, I see what I said. Oh I guess I should have said no, I think. Do you have any doubt that you can follow –
>
> THE COURT: Okay, thank you.
>
> JUROR 34: Oh, I see. Right. I put the wrong X, yeah. *Chamberlain* Nov. 4, 2013 Trial Tr. at 150 (Ex. 17).
>
> ***
>
> THE COURT: I can tell you that – and I want to tell you because you're not going to blame me, these folks also reviewed this form with me and its not the best drafted form in the world.

JUROR 3: Sorry.

THE COURT: Look at Number 5. I don't – you answered no. You said you can't impartially find for one side or the other. Did you mean that?

JUROR 3: Oh, sorry. I meant to put yes. Sorry. (*Id.* at 28)

***

THE COURT: Let me ask you, just the first question, if you look at Page 3 at the bottom, you answered no and perhaps you didn't mean that. The question says can you fairly and impartially decide the case. Perhaps you didn't –

JUROR 9: I don't think I understood it correctly.

THE COURT: So it should be yes?

JUROR 9: Okay. (*Id.* at 45-46).

Given the confusion and delay created by the questionnaire, it should come as no surprise that the *voir dire* process in *Chamberlain*, which lasted 5 and 1/2 hours is the longest of any of the 15 cases tried to date. *See* Ex. 2.

While Plaintiffs profess to have made "several edits [to the *Chamberlain* questions] designed to make the questions easier to understand," (Pls' Mot. at 19) the fact is that the additional "attitude" questions are themselves improper. For example, many of the questions either incorrectly conflate opinion with bias, or ask potential jurors to commit themselves to a position without providing sufficient information for them to do so in a meaningful way. Moreover, many of Plaintiffs' edits exacerbate the problem. Revised Question 1, for example, asks whether "[b]efore hearing any evidence in the case, do you have strong feelings about smokers, like plaintiff, suing tobacco companies for their smoking-related illness that could affect your service as a juror." As revised, the question does nothing to clarify the ambiguity inherent the question as originally drafted. Worse yet, it is argumentative insofar as it assumes that Plaintiffs' alleged injuries are smoking-related.

As explained above, the basic questionnaires developed and employed in a majority of the progeny cases tried to date efficiently and effectively addressed the issue of potential bias and led to meaningful follow-up examination by the Court. Under the law of the Eleventh Circuit and this District, there is no need for more. What the law requires is an examination that provides "reasonable assurance that the jurors' prejudices could be discovered." *Lips*, 350 Fed. App'x at 339; *see also Nash*, 910 F.2d at 753 (same). That has been accomplished by the Middle District courts to date. *See United States v. Phibbs*, 999 F.2d 1053, 1071 (6th Cir. 1993) (affirming district court's decision to forgo use of juror questionnaire, noting that "[m]uch of the questionnaire was directed at the personal habits and activities of the panel members (e.g., what books they read, what television shows they watched, etc.)" and "[w]hile such information might have aided defendants in identifying sympathetic jurors, **it was not needed to compose a fair-minded jury**.") (emphasis added).

No doubt Plaintiffs assume their demands for an expanded written questionnaire and attorney voir dire will lead to more jurors being struck, as was done in the *Smith* case. And it is true that in the state progeny trials, larger jury pools have been exhausted without yielding a sufficient number of qualified jurors. *See In re Engle Progeny Cases (Kaplan I)*, No. 08-19469 (Fla. 17th Cir. Ct.), Trial Tr. at 96, 1192-93 (jury pool of more than 200 jurors exhausted without selecting a jury) (Ex. 15); *Gafney v. R.J. Reynolds Tobacco Co.*, No. 2007-CA-02540 (Fla. 15th Cir. Ct.), Trial. Tr. at 3, 81-82 (jury pool of 150 exhausted without selecting a jury) (Ex. 16). However, one of the primary reasons is that the prospective jurors in many state cases are told the trial will last three or more weeks (*See, e.g.*, *Sulcer* Jury Questionnaire, Ex. 17). As a consequence, many more potential jurors are excused for hardship. Federal *Engle* progeny cases, by contrast, have been tried in far less time and thus result in fewer hardship issues.

CONCLUSION

The *voir dire* procedures employed by the Middle District judges in the majority of the federal cases tried to date have been more than sufficient to detect potential bias. There is no reason for the Court to alter a process that has proven to be fair, efficient and economical, in terms of both of court time and juror resources. Plaintiffs' motion for an expanded juror questionnaire and attorney-controlled voir dire should be denied.

Dated: December 20, 2013

Respectfully submitted,

/s/ John F. Yarber
Stephanie E. Parker
Florida Bar No. 0688355
E-mail: separker@jonesday.com
John F. Yarber
Florida Bar No. 0688932
E-mail: jyarber@jonesday.com
JONES DAY
1420 Peachtree Street, N.E., Suite 800
Atlanta, GA 30309-3053
Telephone: (404) 521-3939
Facsimile: (404) 581 8330

Attorneys for Defendant
R.J. Reynolds Tobacco Company

/s/ Theodore V. H. Mayer
Theodore V. H. Mayer*
Email: mayer@hugheshubbard.com
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004-1482
Telephone: (212) 837-6000
Facsimile: (212) 422-4726
* *Admitted Pro Hac Vice*

Attorney for Defendant
Lorillard Tobacco Company

(Filing in the Deshaies and Elkins cases only)