

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss

TRIAL COURT DEPARTMENT

SUPERIOR COURT

DOCKET NO.

JANE FLAVIN, Personal
Representative of the Estate of
JAMES FLAVIN, JR.

Plaintiff,

v.

LORILLARD TOBACCO
COMPANY, GARBER BROS.,
INC., and ALBERT H. NOTINI &
SONS, INC.,

Defendants.

COMPLAINT AND DEMAND FOR JURY TRIAL

Nature of the Action

1. Plaintiff Jane Flavin, as Personal Representative of the Estate of James Flavin, Jr., brings this action for compensatory and punitive damages arising out of the wrongful death of James Flavin, Jr. from cancer on March 27, 2012. James Flavin, Jr. (hereinafter James Flavin) contracted cancer as a result of smoking Newport brand cigarettes from the time he was a teenager until shortly before his death. Newport cigarettes are designed, tested, manufactured, marketed, promoted, distributed and/or sold by Defendant Lorillard

Tobacco Company (“Lorillard”). Newport cigarettes were defective and unreasonably dangerous and should not have been sold to James Flavin at any time.

2. Defendant Lorillard Tobacco Company has known for decades that cigarette smoking causes a variety of potentially fatal diseases and that the nicotine contained in its cigarettes is a highly addictive drug. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 146-307 (D.D.C. 2006). Lorillard has consistently engaged in a public relations campaign to mislead, confuse, and deceive the public, including Mr. Flavin, as to the dangerousness of its cigarettes and the addictive quality of the nicotine contained therein. Since the 1950’s Lorillard, having joined industry trade associations such as the Tobacco Industry Research Committee (“TIRC”), publically pledged to “to aid and assist research into tobacco use and health.” Contrary to such public statements, Lorillard has since that time actually done everything it can to conceal and distort information about the negative health consequences of smoking cigarettes.
3. Lorillard’s own archives show that it has known for decades that nicotine is an addictive drug and that its products are nicotine delivery devices. Lorillard internal documents from the 1960s show that the company had knowledge that the “kick” of a cigarette is “due to the concentration of nicotine in the blood-stream which ... is a product of the quantity of nicotine in the smoke and the speed of transfer of that nicotine from the smoke to the blood-stream.” Defendant Lorillard has also internally researched and acknowledged addiction can be intensified through adjustment and manipulation of the amount of nicotine in cigarettes and the method of nicotine delivery. Lorillard has used this information to manipulate the nicotine delivery of its cigarettes so as to initiate and maximize addiction in smokers such as Mr. Flavin.

4. Defendant Lorillard has also known for decades that most smokers begin smoking as children. Despite this knowledge, and with knowledge that cigarette smoking is hazardous to one's health, Lorillard has often employed marketing techniques designed to attract children and teenagers to smoking. Such techniques include handing out free samples, promotional items, and specially designed advertisements used to appeal to children and adolescents.
5. Defendant Garber Bros., Inc. and Albert H. Notini & Sons, Inc. distributed Newport brand cigarettes to various stores in the Boston, Massachusetts, Belmont, Massachusetts, and Marshfield, Massachusetts areas during the time that James Flavin was purchasing and smoking Newport brand cigarettes. James Flavin primarily purchased his Newport brand cigarettes at various stores in Belmont, Massachusetts, Boston, Massachusetts, and Marshfield, Massachusetts. The Newport brand cigarettes that Garber Bros., Inc. and Albert H. Notini & Sons, Inc. distributed were defective and unreasonably dangerous and should not have been, at any time, sold to James Flavin.
6. Plaintiff Jane Flavin, Personal Representative of the Estate of James Flavin, Jr., seeks compensatory and punitive damages for the wrongful conduct alleged in this Complaint, which proximately caused the conscious pain and suffering and wrongful death of James Flavin.

The Parties

7. Plaintiff, Jane Flavin, is a resident of Belmont, Massachusetts. She is the wife of, and Personal Representative of the Estate of, James Flavin, Jr. She brings this action pursuant to G.L. c. 229, § 2 and G.L. c. 228, § 1.

8. Defendant Lorillard Tobacco Company ("Lorillard") is a North Carolina corporation that conducts business in the Commonwealth of Massachusetts. Lorillard manufactures, advertises, and sells Newport cigarettes throughout the United States, including the Commonwealth of Massachusetts.
9. Garber Bros., Inc. is a Massachusetts corporation with its principal/and or usual place of business at Route 139 & Kay Way, Stoughton, Massachusetts 02072.
10. Albert H. Notini & Sons, Inc. is a Massachusetts corporation with its principal/and or usual place of business at 225 Aiken Street, Lowell, Massachusetts 01854.
11. At all pertinent times, Defendants acted through their duly authorized agents, servants and employees who were then acting in the course and scope of their employment, and in furtherance of the business of Defendants.
12. All Defendants did and continue to do business in the Commonwealth of Massachusetts; made contracts to be performed in whole or in part in the Commonwealth; and/or manufactured, tested, sold, offered for sale, supplied cigarettes, or placed cigarettes in the stream of commerce, or in the course of business, materially participated with others in so doing; and performed such acts as were intended to, and did, result in the sale and distribution in the Commonwealth of cigarettes from which the Defendants derived substantial revenue, directly or indirectly. All Defendants also caused tortious injury by acts or omissions in the Commonwealth, and/or caused tortious injury in the Commonwealth by acts or omissions outside the Commonwealth.

Jurisdiction and Venue

13. This Court has jurisdiction over the subject matter of this action pursuant to G.L. c. 212,

§ 4. This Court has personal jurisdiction over the Defendants pursuant to G.L. c. 223A, §§ 2 and 3.

14. Venue is proper in Middlesex County pursuant to G.L. c. 223, §§ 7 and 8(4).

Factual Background

15. Starting on or about 1957, James Flavin began smoking Lorillard brand Newport cigarettes. Mr. Flavin began smoking before he was fifteen years old and continued to smoke Newports for over 50 years thereafter. At the time Mr. Flavin began smoking cigarettes he was unable to appreciate the health risks and addictive nature of smoking Newport cigarettes. Mr. Flavin frequently purchased his Newports at various locations in Boston, Belmont, and Marshfield Massachusetts.

16. At all times relevant to this Complaint, Lorillard knowingly made material misrepresentations and/or omissions to the public, including James Flavin, about the link between smoking and various diseases, and, in particular, misrepresented that nicotine is not addictive. There is, however, a substantial body of internal documents that shows that Lorillard has been aware for decades of nicotine's addictive properties and just how important nicotine is to cigarette smokers.

17. Lorillard made the above representations despite a substantial body of evidence, including evidence developed by Lorillard and other cigarette manufacturers, indicating that nicotine is not only addictive, but is the reason why people, including James Flavin, smoked. Rather than acknowledging what it has known for years, that the primary purpose of nicotine is to provide a pharmacological effect on the smoker that leads to and sustains addiction, Lorillard has for decades used various misleading tactics to conceal

the true role of nicotine, such as claiming falsely that nicotine is needed in cigarettes for taste. As recently as 1994, then Chairman and CEO of Lorillard, Andrew H. Tisch, testified before the U.S. House of Representatives that it was his belief that “nicotine is not addictive.”

18. Lorillard has purposely manipulated and controlled the tar and nicotine content and delivery methods of its tobacco products, including Newport cigarettes, to create and maintain smokers’ addiction to cigarettes.
19. Lorillard has known and/or should have known for years that Newport cigarettes cause human diseases, including cancer, and contain carcinogenic additives that intensify the dangers of smoking. Lorillard, directly and through its trade associations, concealed and/or failed to disclose to the public and to James Flavin the true facts about the health hazards of smoking Newport cigarettes, including their highly addictive qualities, at the time he began smoking and for many years thereafter. Lorillard’s decades-long concealment of and/or failure to disclose the true facts about smoking, disease, and addiction had devastating consequences for James Flavin. James Flavin, and many other members of the public, were denied the ability to make an informed decision about smoking Newports because information concerning the addictiveness of cigarettes, as well as the associated health consequences of smoking them, were being actively manipulated and concealed by Lorillard.
20. Lorillard directly, and through its trade associations, the Tobacco Institute and the Center for Tobacco Research (the successor in interest to the Tobacco Industry Research Committee) manipulated James Flavin through a campaign of disinformation calculated

to mislead the public about the health risks of smoking and to create doubt in the minds of smokers about the link between smoking and human disease.

21. Public statements from Lorillard and its trade associations, were made with the expectation that consumers, including James Flavin, would rely on such statements in making decisions about whether to start, or to continue, smoking cigarettes.
22. As recently as 2004 Lorillard CEO Martin Orlowsky publically refused to admit the true harm of cigarette smoking. When asked “Why hasn't Lorillard specifically stated publicly that smoking causes any diseases other than ... emphysema, COPD or heart disease?”, Mr. Orlowsky’s response was to deny that there is enough scientific evidence to warrant saying cigarette smoking “does cause” certain human disease, instead asserting “Lorillard's longstanding position, as long as I've been with the company, is that certainly smoking can, and is a *risk factor* for those diseases.” [emphasis added]. In 2006, Federal District Judge Kessler found in *United States v. Philip Morris USA, Inc.*, that Lorillard had still not publically admitted that smoking causes cancer. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 208 (D.D.C. 2006).
23. As a result of Lorillard’s campaign of disinformation, Mr. Flavin became addicted to smoking as a child and became a habitual smoker. Mr. Flavin regularly smoked between two and three packs of Newport cigarettes per day, and was only able to quit shortly before his death. He tried throughout his life, unsuccessfully, to overcome his addiction and quit smoking Newport cigarettes.
24. James Flavin was diagnosed with lung cancer in April 2011 as a result of his history of smoking Newport brand cigarettes. He was diagnosed with this devastating disease after previously fighting head and neck cancer for years. In order to treat his lung cancer, Mr.

Flavin thereafter underwent painful and exhausting radiation treatment and chemotherapy. Towards the end of his life Mr. Flavin's disease often caused him to feel like he was drowning. Instead of spending years enjoying the companionship of his wife, children, and grandchildren in retirement, Mr. Flavin spent the final days of his life in hospice care before dying on March 27, 2012.

Breach of Warranty
(Against All Defendants)

25. Plaintiff restates and incorporates herein the foregoing paragraphs 1-24 of his Complaint.
26. Defendants have been engaged for many years in the business of manufacturing, testing, designing, advertising, marketing, packaging, selling, and/or distributing, and placing into the stream of commerce in and into Massachusetts, cigarettes, including Newport cigarettes.
27. The Newport cigarettes manufactured and sold by Defendants were expected to and did reach James Flavin in substantially the same condition they were in when originally manufactured, distributed, and sold by Defendants.
28. Defendants, as the manufacturers, sellers, marketers and/or distributors of Newport cigarettes, impliedly warranted that such cigarettes were merchantable and fit for the ordinary purposes for which they were intended.
29. Defendants breached this warranty because the Newport cigarettes manufactured, sold, and distributed by Defendants to James Flavin, and other members of the public, were defective and unreasonably dangerous to users and consumers, because such cigarettes were carcinogenic, addictive, and contained dangerous levels of tar, nicotine and other dangerous substances. The foreseeable risks posed by Defendants' Newport cigarettes

could have been reduced or eliminated by Defendants' adoption of a safer reasonable alternative design, as was previously held against Lorillard in the case of *Evans v.*

Lorillard Tobacco Co., Suffolk Superior Docket No. 2004-2840-B, *aff'd in relevant part*, 465 Mass. 411 (2013).

30. At all times relevant to this Complaint, James Flavin used and consumed the Newport cigarettes manufactured, sold, and distributed by Defendants in the manner in which Defendants intended and expected such cigarettes to be used.

31. As a proximate result of Defendants' breach of warranty, James Flavin contracted cancer and died, and Plaintiff is therefore entitled to recover the damages sought in this Complaint.

Violations of G.L. c. 93A, Section 9
(Against All Defendants)

32. Plaintiff restates and incorporates herein the foregoing paragraphs 1-31 of his Complaint.

33. The Defendants have committed unfair and deceptive acts and practices in violation of Massachusetts' Consumer Protection Act, G.L. c. 93A, § 2(a) and regulations promulgated thereunder. These violations include, but are not limited to, Defendants' breach of their implied warranty of merchantability, in violation of G.L. c. 93A, § 2, by manufacturing, selling and/or distributing Newport cigarettes in a defective condition unreasonably dangerous to users and consumers, including James Flavin, because such cigarettes were carcinogenic, addictive, and contained dangerous levels of tar, nicotine, and other substances, and there was a safer reasonable alternative design.

34. Lorillard also violated Massachusetts' Consumer Protection Act, G.L. c. 93A, § 2 by engaging in business practices that were oppressive or otherwise unconscionable.

Lorillard's campaign of public deception described above was calculated to confuse the public as to the dangerousness of cigarettes and the addictiveness of the nicotine contained therein. Such misleading statements and representations were made to increase Lorillard's own profits and without regard for the health and safety of consumers, including James Flavin.

35. By letter dated February 23, 2015, Plaintiff sent a demand for relief to all Defendants, in accordance with G.L. c. 93A, § 9(3). In response, Defendants failed or refused to make a reasonable offer of settlement.
36. As a proximate result of Defendants' unfair and deceptive trade practices, James Flavin developed lung cancer and died, and Plaintiff is entitled, pursuant to G.L. c. 93A, § 9, to recover the damages sought in this Complaint.

Negligence
(Against All Defendants)

37. Plaintiff restates and incorporates herein the foregoing paragraphs 1-36 of his Complaint.
38. Defendants owed James Flavin a duty to exercise reasonable care in the design, development, testing, marketing, promotion, packaging, sale, and/or distribution of Newport cigarettes.
39. Defendants owed James Flavin, and other foreseeable users, a duty to disclose to users of Newport cigarettes the ever growing knowledge that smoking Newport cigarettes can lead to a variety of human diseases.
40. Defendants breached their duty to exercise reasonable care in numerous respects, including but not limited to the following breaches:

- a. Defendants failed to exercise reasonable care in the design, development, testing, marketing, promotion, packaging, sale and/or distribution of Newport cigarettes;
- b. Lorillard failed to exercise reasonable care in manufacturing Newport cigarettes and knew, or should have known, that when used as intended Newport cigarettes would cause human disease. Lorillard also knew, or should have known, that when used as intended by consumers, smoking Newport cigarettes likely leads to addiction, habituation, or dependence;
- c. Lorillard failed to timely and/or ever disclose to Plaintiff, and other foreseeable users of Newport cigarettes, its own scientific research and other scientific research known to Lorillard, which showed that use of cigarettes as intended can likely lead to a variety of human diseases; and
- d. Lorillard failed to exercise reasonable care in marketing Newport cigarettes, including employing marketing tactics that intentionally and/or negligently induced minors, including James Flavin, to smoke Newport cigarettes.

41. As a proximate result of Defendants' negligence, James Flavin contracted cancer and Plaintiff is entitled to recover the damages sought in this Complaint.

Wrongful Death
(Against All Defendants)

42. Plaintiff restates and incorporates herein the foregoing paragraphs 1-41 of his Complaint.

43. The Defendants' wrongful conduct as alleged in this Complaint caused the death of James Flavin.

44. The Defendants' wrongful conduct includes, but is not limited to, the following:

- a. The Defendants designed, developed, tested, manufactured, marketed, packaged, sold and/or distributed Newport cigarettes with carcinogenic and other harmful substances;
- b. The Defendants designed, developed, tested, manufactured, marketed, packaged, sold and/or distributed Newport cigarettes with a level of nicotine sufficient to create and sustain addiction in smokers, including Mr. Flavin;
- c. The Defendants designed, developed, tested, manufactured, marketed, packaged, sold and/or distributed Newport cigarettes with carcinogenic and other harmful substances and an addictive level of nicotine when reasonable alternative designs were feasible and would have reduced and/or eliminated the health dangers, including addiction, of smoking Newport cigarettes;
- d. The Defendants manufactured, sold and/or distributed a product, Newport

cigarettes, in a defective condition unreasonably dangerous to users and consumers, including Mr. Flavin;

- e. The Defendants failed to warn Mr. Flavin and other users of the health dangers, including addiction, inherent in smoking Newport cigarettes when the Defendants knew or reasonably should have known that Newport cigarettes were likely to be dangerous when used in the manner in which Mr. Flavin used them;
 - f. The Defendants failed to warn Mr. Flavin of the health dangers, including addiction, of smoking Newport cigarettes, even when Mr. Flavin had vastly inferior knowledge of such health dangers or when such health dangers were not apparent, and it was reasonably foreseeable that Mr. Flavin could be injured if a warning about such health dangers were not given;
 - g. The Defendants intentionally, willfully and/or recklessly misrepresented and/or failed to disclose to Mr. Flavin that Newport cigarettes were carcinogenic, addictive, contained harmful substances and were otherwise hazardous to human health.
45. As a proximate result of the Defendants' wrongful conduct, Mr. Flavin contracted cancer and died, and pursuant to G.L. c. 229, § 2, the Plaintiff is entitled to recover the damages sought in this Complaint.

Civil Conspiracy
(Against Lorillard)

46. Plaintiff restates and incorporates herein the foregoing paragraphs 1-45 of his Complaint.

47. Lorillard itself, and through its trade associations, acted in concert and joined together with other manufacturers in the tobacco industry, in an unlawful and unfair manner, pursuant to a common design to conceal or omit information regarding the health consequences of cigarettes and their addictiveness, with the intention that consumers, including James Flavin, would rely on this information.

48. Each coconspirator knew, or in the exercise of reasonable care should have known, about the conduct of the others and about the common tortious scheme.

49. Lorillard itself, and through its trade associations, engaged in a myriad of overt acts in furtherance of the conspiracy. Such acts included, but are not limited to:

- a. A meeting between Lorillard and its coconspirators in 1953 to form the Tobacco Institute Research Committee (“T.I.R.C.”), eventually renamed the Council for Tobacco Research (“CTR”), an organization which claimed its purpose was to promote research on cigarette dangers, but which instead was used by Lorillard and its coconspirators to disseminate misleading information about the dangers of smoking;
- b. Meetings over the years of T.I.R.C. and its successor organization C.T.R., where the coconspirators discussed and acted upon their above stated goals;
- c. T.I.R.C. funded research studies which avoided the issue of cancer and addiction, and instead focused on other matters, while giving the impression to the public that the “cancer question” was under “investigation;”
- d. Subsequent creation of the Tobacco Institute, an organization formed for the purpose of providing misleading information concerning the dangers of cigarette use to the media and others, of which Lorillard and its coconspirators were members;
- e. The suppression of and refusal to publish, various research studies carried out by coconspirators which revealed smoking to be both harmful and addictive;
- f. Meetings over the years of the Tobacco Institute, wherein Lorillard and its coconspirators discussed and acted upon their previously stated goals;
- g. Publications, news releases, telephone calls, contacts with the press, the media, the government, and others, by the Tobacco Institute and other coconspirators, consisting of suggestions to the media to present the “other side” of the “health controversy” about cigarettes, and to quote tobacco industry sources when

reporting on scientific developments showing the dangers of cigarette smoking. These suggestions were accompanied by references to the amount of advertising carried in the magazine or newspaper and threats that such advertising would be dropped if the magazine did not comply;

- h. Numerous public statements from 1950-1962 by Lorillard and its coconspirators that falsely criticized scientific publications and reports which showed that lung cancer and other diseases were caused by cigarette smoking;
- i. A 1953 publication by T.I.R.C., consisting of 18 pages, containing false statements about the connection between smoking and lung cancer;
- j. Publication in 1954 by Lorillard and its conspirators, through T.I.R.C., of “A Frank Statement to Cigarette Smokers” (Frank Statement). The Frank Statement promised the public that Lorillard and its coconspirators would do research to reveal the true dangers of cigarette smoking. In fact, Lorillard and its coconspirators already knew at the time the Frank Statement was published, the true dangers of smoking cigarettes;
- k. Statements and publications by Clarence Cook Little, spokesman for T.I.R.C., to the effect that scientific evidence showing the dangers of cigarette smoking were “not proven” or were “merely statistical.” These statements included, but were not limited to, statements made in Atlantic magazine in 1957, which were made with an intent to deceive the public into believing cigarette smoking was safe;
- l. False statements to congress and the press, in the period 1962-1966, 1969, and 1984 minimizing the dangers of cigarette smoking;

- m. A statement by Lorillard's coconspirator R.J. Reynolds in 1964, before a congressional subcommittee, that "[m]any distinguished scientists are of the opinion that it has not been established that smoking causes disease," and claiming a "lack of clinical and laboratory scientific evidence of the relationship between smoking and health";
- n. Publication of an article in 1968, paid for by coconspirators, entitled "To Smoke or Not to Smoke—That Is Still the Question," in TRUE magazine which was designed to appear as a legitimate article by a genuine author. The article was in fact written by a sports writer who was also employed by Hill and Knowlton, the public relations firm behind the creation of T.I.R.C. This article deliberately misstated the known dangers of smoking;
- o. A statement by coconspirator R.J. Reynolds in 1982 that "science to date after much research including over \$100 million funded by our industry, indicates that no causal link [between smoking and human disease] has been shown," and that "there is absolutely no proof that cigarettes are addictive;"
- p. A 1984 national advertising campaign by coconspirator R.J. Reynolds, which asserted that "studies which conclude that smoking causes disease have regularly ignored significant evidence to the contrary;"
- q. A 1985 publication entitled "Of Cigarettes and Science" authored by Lorillard's coconspirator R.J. Reynolds, falsely stating that cigarettes do not cause heart disease, which publication was the subject of an F.T.C. charge of false advertising;

- r. “Research Reports on Tobacco and Health” generated on behalf of the coconspirators by the Tobacco Institute, Inc. and published for many years, which disputed the known health consequences of smoking. These releases reported on the fringe medical theories of the cause of lung cancer, other than cigarettes, in order to assuage the public’s fear regarding the deadly consequences of smoking cigarettes. These theories, as reported by the Tobacco Institute, on behalf of Lorillard and its coconspirators include, but are not limited to: that smoking lowers fatty substances in the lungs, that lung cancer is caused by a certain personality, and that emphysema is an outcome of childhood measles;
 - s. Statements to congress in 1994 by Lorillard and its coconspirators denying the addictiveness and dangerousness of cigarettes; and
 - t. Manufacture of cigarettes by Lorillard and its coconspirators, acting together or individually, with the purpose of controlling and manipulating the nicotine therein, in order to create and sustain addiction in smokers.
50. As a result of the conspiracy, Lorillard is responsible for the tortious and wrongful acts of the other coconspirators.
51. As a direct and proximate result of the Lorillard’s role in the conspiracy to deceive the public about the harmful effects of smoking cigarettes, James Flavin contracted cancer and died.
52. Lorillard is therefore liable in damages to James Flavin, and the Plaintiff is entitled to recover the damages sought in this Complaint.

Prayer for Relief

Plaintiff Jane Flavin, as Personal Representative of the Estate of James Flavin, requests judgment against all Defendants for compensatory and punitive damages for all injuries and losses recoverable under G.L. c. 228, § 1 and G.L. c. 229, § 2, including, but not limited to:

- A) James Flavin's conscious pain and suffering;
- B) James Flavin's medical expenses and reasonable funeral and burial expenses;
- C) The loss to the Plaintiff and other persons entitled to recover of the reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel and advice which they would have received from the decedent had he not died from smoking-related injuries;
- D) Double or treble damages, costs, and attorneys' fees, pursuant to G.L. c. 93A, §9;
- E) All recoverable costs of this action and all legally recoverable interest; and
- F) Any other relief which the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury of all claims so triable.

Respectfully Submitted,

Andrew Rainer, BBO #542067
Meredith K. Lever, BBO #691953

The Public Health Advocacy Institute
360 Huntington Ave #117CU
Boston, MA 02115
(617) 373-2026
Arainer@phaionline.org