

**IN THE CIRCUIT COURT FOR THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

ROBERT A. SUGARMAN, Individually
And as Personal Representative of the
Estate of MARILYN WENDY SESKIN,

CASE NO.: 19-017627 CA 27

Plaintiff,

v.

JOHNSON & JOHNSON AND
LTL MANAGEMENT, LLC,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFF'S BENCH BRIEF ON PUNITIVE DAMAGES

On Friday, the Court posed questions to the parties about the proper procedure for the application of Section 768.73(2). 2/23/2024 Trial Tr. at 2564-67. Defendants filed a brief addressing those questions. *See* Def. JMOL Mot. (Feb. 25, 2024). Plaintiff declined to do the same. Instead, he submitted a bench brief arguing for the *third* time that Section 768.73(2)'s offset provision should not apply to JJCI's successor-in-interest, LTL. The Court has already rejected this argument twice. At summary judgment, this Court concluded that Section 768.73(2) "applies to [JJCI's] successor in interest . . . LTL." 2/5/2024 Hr'g Tr. at 102. And when plaintiff re-raised the same argument again on Friday afternoon, this Court said: "I'm not seeing the argument from the plaintiff." 2/23/2024 Trial Tr. at 2587.

Plaintiff's argument gets no better the third time around. On the one hand, he seeks to hold LTL liable for punitive damages as the successor-in-interest to JJCI. On the other, he argues that LTL cannot invoke the \$900 million that JJCI paid in a prior case under Section 768.73(2). That cannot be right. If a successor-in-interest is liable for the conduct of its predecessor, it can

necessarily invoke the defenses that its predecessor could have asserted. Plaintiff cites no support for his novel, one-sided view of successor liability, and Florida law is just to the contrary.

Florida applies successor liability where a “successor expressly or impliedly assumes obligations of the predecessor.” *Bernard v. Kee Mfg. Co., Inc.*, 409 So. 2d 1047, 1049 (Fla. 1982). In that event, the successor steps into the shoes of the predecessor: It can be held liable if its predecessor would have been liable. *See e.g., Celotex Corp. v. Pickett*, 459 So. 2d 375, 376 (Fla. 1st DCA1984) (a successor corporation “may be held liable for all liabilities of its predecessor corporation”). And it can present all defenses that its predecessor could have presented. *See e.g., L&S Enter., Inc. v. Miami Tile & Terrazzo, Inc.*, 148 So. 2d 299, 302 (Fla. 3d DCA 1963) (“*any defense which would have been available to the [predecessor] would be available to its [successor in interest]*” (emphasis added)).

Plaintiff’s position is that the Florida Legislature ignored all of these principles when it enacted Section 768.73(2). He relies entirely on the fact that Section 768.72(2) uses the word “defendant,” rather than expressly referring to successors-in-interest. Pl. Bench Brief at 5. But the word “defendant”—which is used *throughout* Florida’s punitive damages statutes—necessarily includes a successor in interest. Otherwise, plaintiff’s request for punitive damages against LTL would be null and void from the start.

The Third District’s decision in *Sun International Bahamas, Ltd. v. Wagner*, 758 So. 2d 1190 (Fla. 3d DCA 2000), is instructive on that point. There, the Third District applied the word “defendant” in Section 768.73(1) to a defendant who was a predecessor in title. *Id.* at 1191-92. Plaintiff wants the Court to disregard this binding opinion because the *Sun* court did not specifically mention subsection (2) of Section 768.73. *See* Pl. Bench Brief at 6. That distinction

is meaningless. If plaintiff's reading were correct, the word "defendant" would have different meanings in two subsections of the *same statute*.

Plaintiff's argument makes even less sense when taken to its logical conclusion. If the Court is required to focus on LTL in isolation, then it should follow that LTL's liability for punitive damages must be measured only by its own conduct. Again, plaintiff cannot have it both ways: either LTL is liable for JJCI's conduct and, therefore, entitled to the statutory offset provision, or LTL is not liable for JJCI's conduct and plaintiff would need to establish that LTL's own conduct justifies punitive damages. Plaintiff has presented no such evidence, nor or could he. LTL did not even come into existence until 2021—two years after Dr. Seskin died. 2/20/2024 Trial Tr. at 1694-95; 2/16/2024 Trial Tr. at 1437. LTL does not sell products. 2/20/2024 Trial Tr. at 1695. And plaintiff has presented no evidence that LTL has done anything that would warrant punitive damages, as this Court recognized last Friday. *See* 2/23/2024 Trial Tr. at 2579-80 ("The Court: I have to be candid with you, I don't even know why LTL was ever added into this lawsuit. I mean, yeah, you are saying that they assumed the liability. That is the only reason they could possibly be here. They have done nothing.").

Plaintiff also suggests that LTL has "waived" the offset protection by forming a new company for purposes of liability. Pl. Bench Brief at 6. That assertion is puzzling. LTL expressly *assumed* the liabilities and assets of JJCI. Plaintiff presents no authority for his view that defendants' lawful exercise of a federal right somehow waives a Florida statutory right. If plaintiff wants to seek an award for punitive damages against LTL, he *must* rely on the successor-in-interest relationship between LTL and JJCI—and the offset must also apply. 2/5/2024 Hr'g Tr. at 92 ("If you are holding me liable because we are successor in interest and you are saying we are liable for any acts that were committed by the entity that we have assumed, then we also get the benefit of

any punitive damages award that was awarded against the entity that we basically now stand in their shoes.” (quoting the Court)).

Finally, plaintiff makes a brisk attempt to distinguish the Florida tobacco cases where the setoff provision foreclosed any further claim for punitive damages. Pl’s Bench Brief at 7; *see* Def. JMOL Mot. at 5-7 (citing cases). He says that “J&J has only paid punitive damages for their conduct at issue in this case as opposed to the tobacco companies who had paid numerous punitive damages awards.” Pl. Bench Brief at 7. But Section 768.73(2)(b) does not consider the *number of times* punitive damages were awarded—it requires a court to look at “*the amount* of prior punitive damages awarded.” § 768.73(2)(b), Fla. Stat. (emphasis added). If plaintiff were right, five awards of \$1 million would be more entitled to the offset than one award of \$6 million. And notably, in the tobacco cases, the courts applied Section 768.73(2)’s offset protection to defendants based on punitive damages awards against companies that had been acquired by those defendants over time. *See Weiner* Notice of Filing (Ex. A).

Any punitive damages award would be futile as a matter of law. An award below \$1.6 billion would be erased by the set-off provision. An award above \$1.6 billion would be excessive under both Florida and federal law. *See* 2/23/2024 Trial Tr. at 2589 (the Court explaining that punitive damages award above the offset “would be a Pyrrhic victory because the [Third District Court of Appeals] would send it back so fast”).

CONCLUSION

The Court should grant defendants’ motion for judgment as a matter of law on plaintiff’s punitive damages claim.

Dated: February 27, 2024

Respectfully submitted:

SHOOK, HARDY & BACON L.L.P.

/s/ Hassia T. Diolombi

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 27, 2024, a true and correct copy of the foregoing document was filed electronically through the Florida Courts E-Filing Portal, and served on all counsel of record, including:

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EXHIBIT A

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT, IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

CASE NO.: 10-044698 CA 02

LINDA S. WEINER, as Personal Representative
of the ESTATE OF LAWRENCE M. WEINER,

Plaintiff,

vs.

R. J. REYNOLDS TOBACCO COMPANY, *et al.*,

Defendants.

**DEFENDANT PHILIP MORRIS USA INC.'S NOTICE OF FILING
IN SUPPORT OF DEFENDANTS' RESPONSE IN OPPOSITION
TO PLAINTIFF'S MOTION FOR LEAVE TO FILE THIRD AMENDED
COMPLAINT TO ASSERT A CLAIM FOR PUNITIVE DAMAGES**

Defendant Philip Morris USA Inc. ("PM USA") hereby gives notice of filing certain court records in support of Defendants' Response in Opposition to Plaintiff's Motion for Leave to File Third Amended Complaint to Assert a Claim for Punitive Damages. The records, attached as composite Exhibit A, which include complaints, verdict forms, final judgments, and satisfactions of judgment, reflect that PM USA has paid judgments awarding punitive damages to plaintiffs in the following *Engle* progeny cases:

1. *Ina E. Ahrens, Personal Representative of the Estate of Karl Robert Ahrens, v. R.J. Reynolds Tobacco Company and Philip Morris USA, Inc.*, No. 14-5826 (Fla. 6th Cir. Ct. 2016), \$2,500,000 punitive damages award paid;
2. *Andy R. Allen, Sr., as Personal Representative for the Estate of Patricia L. Allen, v. R.J. Reynolds Tobacco Company and Philip Morris USA, Inc.*, No. 2007-8311 (Fla. 4th Cir. Ct. 2014), \$7,755,415 punitive damages award paid;

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3. *Jorge Alvarez del Real v. Philip Morris USA, Inc.*, No. 07-32909 (Fla. 11th Cir. Ct., 2019), \$150,000 punitive damages award paid;
4. *Phyllis M. Barbose, as Personal Representative for the Estate of John M. Barbose, v. R.J. Reynolds Tobacco Company and Philip Morris USA, Inc.*, No. 2014-3532 (Fla. 6th Cir. Ct. 2015), \$500,000 punitive damages award paid;
5. *Judith Berger¹ v. Philip Morris USA, Inc.*, No. 3:09-14157 (M.D., Fla. 2014), \$20,760,000.14 punitive damages award paid;
6. *Richard Boatright and Deborah Boatright v. Philip Morris USA, Inc., and Liggett Group*, No. 2011-158 (Fla. 10th Cir. Ct. 2014), \$19,700,000 punitive damages award paid;
7. *John A. Brown, as Personal Representative for the Estate of Maria Joyce Brown, v. Philip Morris USA, Inc., and R.J. Reynolds Tobacco Company*, No. 2015-24510 (Fla. 6th Cir. Ct. 2017), \$200,000 punitive damages award paid;
8. *Veda Bryant, Personal Representative of the Estate of Johnny Lee Bryant, v. Philip Morris USA, Inc.*, No. 2015-1691 (Fla. 1st Cir. Ct. 2017), \$225,000 punitive damages award paid;
9. *Pauline Burkhart v. R.J. Reynolds Tobacco Company, Philip Morris USA, Inc. and Lorillard Tobacco Company*, No. 09-10727 (M.D. Fla. 2014), \$750,000 punitive damages award paid;
10. *Robin Cohen, as Personal Representative of the Estate of Nathan Cohen, Deceased, v. Philip Morris USA, Inc. and R.J. Reynolds Tobacco Company*, No. 2007-CV-11515 (19) (Fla. 17th Cir. Ct. 2010), \$10,000,000 punitive damages award paid;
11. *Micah Danielson, as Personal Representative of the Estate of Norman Lamar Danielson, as Surviving Spouse, and on Behalf of the Estate, v. Philip Morris USA, Inc.*, No. 2007-2737 (Fla. 1st Cir. Ct. 2015), \$325,000 punitive damages award paid;
12. *Linda Enochs, Individually, and as Personal Representative of the Estate of Thomas Purdo, v. R.J. Reynolds Tobacco Company and Philip Morris USA, Inc.*, No. 2007-23930 (Fla. 15th Cir. Ct. 2016), \$6,250,000 punitive damages award paid;
13. *John R. Goveia, as Personal Representative for the Estate of Mary F. Goveia, v. R.J. Reynolds Tobacco Company and Philip Morris USA, Inc.*, No. 2008-CA-760 (Fla. 9th Cir. Ct. 2014), \$2,250,000 punitive damages award paid;

¹ Judith Berger died following trial and Bernard Cote, the personal representative of Ms. Berger's estate, was substituted in as the plaintiff.

14. *Theodore Hallgren, Personal Representative of the Estate of Claire Hallgren, v. R.J. Reynolds Tobacco Company and Philip Morris USA, Inc.*, No. 10-761GCS (Fla. 10th Cir. Ct. 2012), \$750,000 punitive damages award paid;
15. *Elaine Hess, as Personal Representative of the Estate of Stuart Hess, v. Philip Morris USA, Inc.*, No. 07-11513 (19) (Fla. 17th Cir. Ct. 2009), \$5,000,000 punitive damages award paid;
16. *Mary Howles v. R.J. Reynolds Tobacco Company and Philip Morris USA, Inc.*, No. 2007-34919 (19) (Fla. 17th Cir. Ct. 2016), \$3,000,000 punitive damages award paid;
17. *Anna Louise Huish, Personal Representative of the Estate of John Elbert Huish, v. R.J. Reynolds Tobacco Company and Philip Morris USA, Inc.*, No. 01-08-CA-3714 (Fla. 8th Cir. Ct. 2011), \$1,500,000 punitive damages award paid;
18. *Elaine Jordan v. Philip Morris USA, Inc.*, No. 2013-8903 (Fla. 4th Cir. Ct. 2015), \$3,205,000 punitive damages award paid;
19. *Kenneth Kerrivan² v. Philip Morris USA, Inc., and R.J. Reynolds Tobacco Company*, No. 3:09-13703 (M.D. Fla 2014), \$15,700,000 punitive damages award paid;
20. *Herbert Landi, as Personal Representative of the Estate of Marion Landi, Deceased, v. R.J. Reynolds Tobacco Company and Philip Morris USA, Inc.*, No. 08-25814 (Fla. 17th Cir. Ct. 2018), \$5,000,000 punitive damages award paid;
21. *Roland Ledoux, as Personal Representative of the Estate of Patricia Mary Ledoux, Deceased, v. R.J. Reynolds Tobacco Company and Philip Morris USA, Inc.*, No. 07-43991 (Fla. 11th Circ. Ct. 2015), \$12,500,000 punitive damages award paid;
22. *Gertrude Marchese, as Personal Representative of the Estate of Salvatore Marchese, v. R.J. Reynolds Tobacco Company and Philip Morris USA, Inc.*, No. 2013-2849 (Fla. 17th Cir. Ct. 2015), \$250,000 punitive damages award paid;
23. *Linda Martin v. Philip Morris USA, Inc.*, No. 07-34267 (Fla. 11th Cir. Ct. 2017), \$1,300,000 punitive damages award paid;
24. *Vicki McKeever, as Personal Representative of the Estate of Theodore McKeever, v. Philip Morris USA, Inc.*, No. 10-37561 (19) (Fla. 17th Cir. Ct. 2015), \$11,625,000 punitive damages award paid;

² Kenneth Kerrivan died following trial, and Michael Dean, the personal representative of Mr. Kerrivan's estate, was substituted in as the plaintiff.

25. *Carmenza Merino v. Philip Morris USA, Inc.*, No. 08-1287-CA (25) (Fla. 11th Cir. Ct. 2015), \$6,500,000 punitive damages award paid;
26. *Lucinda Naugle³ v. Philip Morris USA, Inc.*, No. 2007-36736 (Fla. 17th Cir. Ct. 2013), \$7,500,000 punitive damages award paid;
27. *Mary Faricy Pardue, as Personal Representative of the Estate of John N. Faricy, v. R.J. Reynolds Tobacco Company and Philip Morris USA Inc.*, No. 2014-2010 (Fla. 8th Cir. Ct. 2016), \$6,750,000 punitive damages award paid;
28. *Margaret E. Piendle, Personal Representative of the Estate of Charles William Piendle, v. R.J. Reynolds Tobacco Company and Philip Morris USA, Inc.*, No. 50 2008 CA 38777 (Fla. 15th Cir. Ct. 2010), \$90,000 punitive damages award paid;
29. *Sharon Putney, as Personal Representative of the Estate of Margot Putney, Deceased, for the Benefit of the Estate of Margot Putney; Sharon Putney, Surviving Daughter; Glenn Putney, Surviving Son; and Guion Putney, Surviving Son, v. R.J. Reynolds Tobacco Company; Philip Morris USA, Inc.; and Liggett Group LLC*, No. 2007-CA-36668 (Fla. 17th Cir. Ct. 2010), \$2,500,000 punitive damages award paid;
30. *Charles Santoro, as Successor Personal Representative of the Estate of Grace Santoro,⁴ v. R.J. Reynolds Tobacco Company and Philip Morris USA, Inc.*, No. 2008-25807 (Fla 17th Cir. Ct. 2017), \$100,000 punitive damages award paid;
31. *Cheryl Searcy, as Personal Representative of the Estate of Carol LaSard, v. R.J. Reynolds Tobacco Company and Philip Morris USA, Inc.*, No. 3:09-13723 (M.D. Fla. 2013), \$1,670,000 punitive damages award paid;
32. *Michael Sermons, as Personal Representative of the Estate of Myra Sermons, v. Philip Morris USA, Inc., and R.J. Reynolds Tobacco Company*, No. 16:2008-CA-397 (Fla. 4th Cir. Ct. 2016), \$51,225 punitive damages award paid;
33. *Ellen Tate⁵ v. Philip Morris USA, Inc.*, No. 2007-CV-021723 (19) (Fla. 17th Cir. Ct. 2010), \$16,250,000 punitive damages award paid;

³ Lucinda Naugle died following trial, and James Naugle, the personal representative of Ms. Naugle’s estate, was substituted in as the plaintiff.

⁴ Charles Santoro died following trial, and James Santoro, the successor personal representative of Grace Santoro’s estate, was substituted in as the plaintiff.

⁵ Ellen Tate died following trial, and Allyson Kayton, the personal representative of Ms. Tate’s estate, was substituted in as the plaintiff.

34. *Faye Theis, Personal Representative of the Estate of Edward Frederick Theis, Jr., v. R.J. Reynolds Tobacco Company and Philip Morris USA*, No. 2011-1941 (Fla. 12th Cir. Ct. 2018), \$10,000,000 punitive damages award paid; and
35. *Fontaine Wallace, as Personal Representative of the Estate of Robert E. Wallace, v. R.J. Reynolds Tobacco Company and Philip Morris USA, Inc.*, No. 05:2014-52862 (Fla. 18th Cir. Ct. 2017), \$16,000,000 punitive damages award paid.

Respectfully submitted,

/s/ Frank Cruz-Alvarez

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