

BICKERTON LEE DANG & SULLIVAN

James J. Bickerton 3085
Topa Financial Center, Fort Street Tower
745 Fort Street, Suite 801
Honolulu, Hawaii 96813
Tel 808.599.3811
Email: bickerton@bsds.com

PERKIN & FARIA

John Francis Perkin 1683
Brandee J.K. Faria 6970
Topa Financial Center
700 Bishop Street, Ste. 1111
Honolulu, Hawaii 96813
Telephone: (808) 523-2300
Email: bjkfaria@perkinlaw.com; perkin@perkinlaw.com

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

BRYAN CABBAT, BRETT) CIVIL NO. CV10-00162 SOM-KSC
NAKOAOKALANI BROOKSHIRE)
PREJEAN, and ALEX) FIRST AMENDED COMPLAINT;
REINPRECHT, individually and on) DEMAND FOR JURY TRIAL;
behalf of all others similarly situated) CERTIFICATE OF SERVICE
)
Plaintiffs,)
)
vs.)
)
PHILIP MORRIS USA, INC.,)
)
Defendant.)
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)
)
)

FIRST AMENDED COMPLAINT

Plaintiffs BRYAN CABBAT, BRETT NAKOAOKALANI BROOKSHIRE PREJEAN, and ALEX REINPRECHT (collectively, “Plaintiffs”), by and through their undersigned attorneys, bring this action individually and on behalf of all others similarly situated against defendant PHILIP MORRIS USA, INC. (“Defendant”), and allege, upon information and belief and based on the investigation to date of their counsel, as follows:

PARTIES

1. Plaintiff BRYAN CABBAT is a resident of the United States of America, State of Hawaii, County of Maui.

2. Plaintiff BRETT NAKOAOKALANI BROOKSHIRE PREJEAN (“NAKOA”) is a resident of the United States of America, State of Hawaii, County of Honolulu.

3. Plaintiff ALEX REINPRECHT is a resident of the United States of America, State of Hawaii, County of Honolulu.

4. Defendant PHILIP MORRIS USA, INC., is a Virginia corporation with its principal place of business at 6601 West Broad Street, Richmond, Virginia. Defendant is a wholly owned subsidiary of Altria. At all times relevant hereto, Defendant engaged in the business of designing, manufacturing, promoting,

distributing, and selling Marlboro Lights.

JURISDICTION

5. The Court has subject matter jurisdiction over this action pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), because it is a class action filed pursuant to Fed R. Civ. P. 23, at least one member of the proposed Class is of diverse citizenship from Defendant, there are more than 100 proposed Class members, and the aggregate amount in controversy, excluding interest and costs, exceeds \$5,000,000.

6. Venue is proper within this District under 28 U.S.C. § 1391, because a substantial part of the events giving rise to Plaintiffs' and the other Class members' claims occurred within this District.

NATURE OF THE CASE AND OVERVIEW

7. This case arises out of the unfair and deceptive practices employed by Defendant to induce cigarette smokers to continue smoking in spite of the growing public awareness of a connection between cigarette smoking and serious health problems including cancer, by designing, manufacturing, promoting, marketing and selling Marlboro Lights purporting to be "Lights," having "Lowered Tar and Nicotine," and as being healthier to smoke than regular cigarettes, while knowing that Marlboro Lights were no healthier to smoke than regular cigarettes of the same brand.

8. Plaintiffs and the other Class members (defined below), purchasers of Marlboro Lights in the State of Hawaii, suffered a loss of money, because the cigarettes they purchased were misrepresented by Defendant to be “Lights” and healthier to smoke than regular cigarettes, when in reality Defendant’s “Lights” cigarettes were as or more harmful to smoke than regular cigarettes.

FACTUAL ALLEGATIONS

9. Defendant, and/or its predecessors in name, have been in the business of designing, manufacturing, promoting, marketing, distributing, and selling tobacco products, including cigarettes, in the United States for over one hundred (100) years.

10. Prior to 1971, Defendant was aware that beginning in the 1950s, smokers had become increasingly concerned about health issues related to smoking.

11. Beginning in 1971, Defendant designed and manufactured a brand of cigarettes known as Marlboro Lights, which it promoted, marketed, distributed, and sold throughout the United States, including Hawaii. Each pack of Marlboro Lights bore the descriptor “Lights” and many packs included the phrase “Lowered Tar and Nicotine.”

12. Defendant intentionally marketed Marlboro Lights in this manner with the intention of communicating to consumers that Marlboro Lights were less

harmful or safer to smoke than regular Marlboro cigarettes.

13. Defendant introduced Marlboro Lights to provide smokers who were concerned about their health with a product that could reduce such and thereby allow them to continue to smoke cigarettes.

14. At all relevant times, Defendant sold and packaged Marlboro Lights as “Lights.”

15. Nicotine is the addictive ingredient in tobacco. Tar is the toxic ingredient in tobacco that causes most health problems related to smoking.

16. Evidence shows that consumers buying Marlboro Lights understood that tar and nicotine were the “bad” components in cigarettes and, therefore, lower levels of these components would reduce the negative health effects of the cigarette product.

17. The primary design distinction between Marlboro Lights and its regular cigarette counterpart is increased ventilation. Defendant increased the ventilation in Marlboro Lights by strategically placing rings of vent holes in the filter of each cigarette, such that air is mixed with and dilutes the smoke drawn through the filter.

18. This design distinction of ventilation provides for a lower measurement of tar and nicotine for Marlboro Lights as compared to regular cigarettes when undergoing standardized testing by the Federal Trade Commission’s (“FTC”)

testing apparatus—automated smoking machines used by the tobacco industry to measure tar and nicotine levels in cigarettes.

19. Defendant designed Marlboro Lights to register lower levels of tar and nicotine when tested through the FTC's testing apparatus than were actually delivered to consumers of Marlboro Lights.

20. Defendant controlled the tar and nicotine delivery of Marlboro Lights under FTC machine testing conditions to achieve apparent support for its representations that its Marlboro Lights were "Lights," contained decreased tar and nicotine, and were healthier to smoke than regular cigarettes.

21. At all relevant times, Defendant knew that although the increased ventilation of Marlboro Lights would result in lower FTC machine test values of tar and nicotine, consumers would receive the same delivery of tar and nicotine from smoking Marlboro Lights as from regular cigarettes.

22. Scientific research has shown that smokers of "Lights" cigarettes, such as Marlboro Lights, engage in compensatory smoking behavior due to the addictive nature of nicotine, so as to receive 100% of the tar and nicotine that would be received by the smoker from the regular cigarette. This is known as 100% compensation.

23. Compensatory smoking behavior consists of unconscious acts including, but not limited to: inhaling deeper; taking more frequent puffs and/or larger puffs;

holding the smoke in the lungs for a longer period of time; covering the ventilation holes in the filter with the lips or fingers; and/or smoking more cigarettes, thereby enabling the smoker to unconsciously regulate the amount of nicotine and tar received.

24. Defendant was aware that consumers of its Marlboro Lights often inhaled as much or more nicotine and tar than consumers of regular cigarettes through unconsciously covering filter ventilation holes with their lips or fingers, taking larger or more frequent puffs, and holding smoke in their lungs longer than smokers of regular cigarettes.

25. Defendant conducted extensive research prior to and after launching Marlboro Lights into the market, and knew that smokers would unconsciously adjust their behavior to ensure they receive the same level of tar and nicotine from smoking Marlboro Lights as they would receive from their regular counterparts.

26. Defendant knew that Marlboro Lights did not reduce the delivery of tar or nicotine to the consumer and these cigarettes were not designed to reduce actual delivery of these substances to smokers.

27. Defendant's representations that Marlboro Lights cigarettes were "Lights" and have "lower tar and nicotine" than regular cigarettes were deceptive and misleading.

28. Not only did consumers receive higher levels of tar and nicotine than the

FTC testing apparatus registered, but the smoke produced by Marlboro Lights was more mutagenic (causing genetic and chromosomal damage) per milligram of tar than the smoke of regular cigarettes due to the increased ventilation.

29. Defendant knew, as a result of tests conducted by Defendant more than twenty-five years ago, that increased ventilation—the primary design distinction between Marlboro Lights and their regular cigarette counterparts—increased the specific mutagenicity of cigarette smoke.

30. Defendant also knew, from tests it conducted, that a smoker of Marlboro Lights would receive higher levels of most toxic substances found in cigarette smoke from smoking Marlboro Lights than from smoking their regular cigarette counterparts.

31. Defendant engaged in a course of unfair and/or deceptive business practices in connection with the design, manufacture, distribution, promotion, marketing and sale of Marlboro Lights by:

- a. Falsely and/or misleadingly representing Marlboro Lights as healthier to smoke than regular cigarettes when they were not;
- b. Falsely and/or misleadingly representing Marlboro Lights as “Lights” and/or delivering lowered tar and nicotine than regular cigarettes;
- c. Describing the product as “Lights,” when the so-called lowered tar and nicotine deliveries depended on deceptive changes in cigarette

design and composition that diluted the tar and nicotine content of smoke per puff as measured by the industry standard testing apparatus, but not when used by consumers;

- d. Intentionally manipulating the design and content of Marlboro Lights in order to maximize nicotine delivery to consumers, while falsely and/or deceptively claiming lowered tar and nicotine delivery. These manipulations included, but are not limited to, the modification of tobacco blend, weight, rod length, and circumference; the use of reconstituted tobacco sheets and/or expanded tobacco; and the increase of smoke pH levels by chemical processing and additives, such as ammonia, which resulted in the delivery of greater amounts of tar and nicotine being delivered when smoked under actual conditions than Defendant represented by use of the “Lights” descriptor; and
- e. Employing techniques that intentionally reduced FTC machine-measured levels of tar and nicotine in Marlboro Lights, while actually increasing the harmful biological effects, including mutagenicity, caused by the tar ingested by a consumer per milligram of nicotine.

32. During the Class period, Plaintiff CABBAT regularly purchased packs of Marlboro Lights in the State of Hawaii.

33. Plaintiff NAKOA started purchasing cigarette products in 1986. From

that time until 1988, Plaintiff NAKOA smoked regular cigarettes. In 1988, Plaintiff NAKOA switched to smoking Marlboro Lights. From that time until recently, Plaintiff NAKOA regularly purchased packs of Marlboro Lights in the State of Hawaii. Earlier this year, Plaintiff NAKOA learned that Marlboro Lights were not healthier to smoke than regular cigarettes of the same brand and that smoking them does not result in a person's receiving less tar or nicotine than smoking regular cigarettes.

34. Plaintiff REINPRECHT started purchasing cigarette products approximately 25 years ago. From that time until 1995, Plaintiff REINPRECHT smoked Marlboro Reds, at which time he switched to smoking Marlboro Lights. From 1995 until recently, Plaintiff REINPRECHT regularly purchased packs of Marlboro Lights in the State of Hawaii. Earlier this year, Plaintiff REINPRECHT learned that Defendant's light cigarettes were not healthier to smoke than regular cigarettes of the same brand and that smoking them does not result in a person's receiving less tar or nicotine than smoking regular cigarettes.

FRAUDULENT CONCEALMENT

35. Throughout the Class Period, Defendant effectively, affirmatively, and fraudulently concealed from consumers of Marlboro Lights, including Plaintiffs, its knowing misrepresentations about the nature and effect of smoking Marlboro Lights.

36. Defendant's wrongful conduct was carried out in part through means and methods that were designed and intended to avoid detection, and which, in fact, successfully precluded detection.

37. Defendant has publicly admitted that there is no such thing as a safe cigarette, including its "Lights" cigarettes, and launched an advertisement campaign to educate the public about the risks of smoking through information placed on their website, newspaper inserts, and "onserts" placed in cigarette packages.

38. Plaintiffs could not reasonably have discovered Defendant's misrepresentations and were without knowledge of the conduct by Defendant alleged in this Complaint, or of any facts from which it might reasonably be concluded that Defendant was so acting, or which would have led to the discovery of such actions.

39. Plaintiffs reasonably could not have discovered their causes of action against Defendant, because Defendant's fraudulent concealment of its deceptive conduct was effective.

CLASS ACTION ALLEGATIONS

40. Pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3), Plaintiffs bring this action on behalf of themselves and a proposed Class defined as:

All persons who purchased Defendant's Marlboro Lights cigarettes in Hawaii for personal consumption from the

first date Defendant placed Marlboro Lights cigarettes into the stream of commerce (the "Class").

Excluded from the Class are: (i) Defendant, any entity in which Defendant has a controlling interest or which has a controlling interest in Defendant, and Defendant's legal representatives, predecessors, successors and assigns; (ii) governmental entities; (iii) Defendant's employees, officers, directors, agents, and representatives and their family members; and (iv) the Judge and staff to whom this case is assigned, and any member of the Judge's immediate family.

41. Plaintiffs reserve the right to expand, modify or alter the Class definition, including the time period, in response to information learned during discovery.

42. Members of the Class are so numerous that the individual joinder of all absent Class members is impracticable. While the number of Class members is unknown to Plaintiffs at this time, it is ascertainable by appropriate discovery. Plaintiffs are informed and believe based upon the nature and the trade and commerce involved that the Class includes millions of Class members in Hawaii.

43. Questions of law or fact common to all Class members predominate over any questions that affect only individual Class members. These common questions include, but are not limited to, the following:

- a. Whether Defendant represented Marlboro Lights to be healthier to smoke than regular cigarettes when, in fact, they were not;

- b. Whether Defendant misrepresented the actual amounts of tar and nicotine delivered to smokers of its Marlboro Lights;
- c. Whether Defendant intentionally designed Marlboro Lights to register misleading tar and nicotine measurements on the testing apparatus utilized by the tobacco industry while delivering significantly higher quantities of tar and nicotine to human smokers;
- d. Whether Defendant was unjustly enriched at the expense of Class members; and
- e. Whether the Class has been damaged and, if so, the extent of such damages.

44. Plaintiffs in this proposed class action assert claims typical of those of the other members of the Class. The interests of Plaintiffs are consistent with, and not antagonistic to, those of other members of the Class, and Defendant has no defenses unique to Plaintiffs.

45. Plaintiffs are members of the Class and will fairly and adequately assert and protect the interests of the Class. Additionally, Plaintiffs have retained attorneys who are experienced in class action litigation.

46. The prosecution of separate actions by individual members of the Class would create risk of:

- a. Inconsistent or varying adjudications with respect to individual

members of the Class; and

- b. Adjudication with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication, or substantially impair or impede their ability to protect their interests.

47. The claims of Plaintiffs, and the anticipated defenses raised by Defendant, are typical of the claims or defenses of the other Class members, and the class action mechanism is appropriate for the fair and adequate prosecution of this action.

48. Individual litigation of all claims that could be asserted by Class members would produce a multiplicity of cases that would cause the judicial system to remain congested for years. Class treatment, by contrast, provides manageable judicial treatment calculated to bring a rapid conclusion to all litigation of all claims arising from the conduct of Defendant.

49. A Class action is an appropriate method for the fair and efficient adjudication of this controversy, and Class action treatment is superior to the alternatives. There is no special interest in the members of the Class individually controlling the prosecution of separate actions. The damages sustained by individual Class members will not be large enough to justify individual actions, especially in proportion to the tremendous costs and expenses necessary to

prosecute this action. The expense and burden of individual litigation makes it impossible for members of the Class individually to address the wrongs done to them. Class treatment will permit the adjudication of claims of Class members who could not afford individually to litigate their claims against Defendant. Further, as a result of Defendant's concealment, many Hawaii residents remain unaware that they have been injured and will not be aware of Defendant's fraud, or the extent and nature off their injury, in the absence of this class action. Class treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would entail. No difficulties are likely to be encountered in the management of this class action that would preclude its maintenance as a class action, and no superior alternative exists for the fair and efficient adjudication of this controversy. Furthermore, Defendant transacts substantial business in Hawaii and throughout the United States. Thus, Defendant will not be prejudiced or inconvenienced by the maintenance of this class action in this forum.

**ESTOPPEL FROM PLEADING AND TOLLING OF
APPLICABLE STATUTES OF LIMITATIONS**

50. Defendant is estopped from relying on any statute of limitations by virtue of its acts of fraudulent concealment and the continuing nature of its unlawful conduct.

51. As a result of Defendant's actions, Plaintiffs were unaware and could not reasonably know that Defendant was engaged in the wrongdoing alleged herein.

FIRST CAUSE OF ACTION
(Violation of Hawaii's Deceptive Practices Act, Haw. Rev. Stat. § 480 *et seq.*)

52. Plaintiffs hereby incorporate by reference each of the preceding allegations as though fully set forth herein.

53. Defendant engaged in consumer-oriented, commercial conduct by selling and advertising its Marlboro Lights cigarettes as "Lights" and lower in tar and nicotine and healthier to smoke than regular cigarettes.

54. Defendant misrepresented and omitted material information regarding Marlboro Lights by failing to disclose known risks.

55. Through advertisements and marketing representations featured on Marlboro Lights products, including, *inter alia*, the term "Lights," Defendant intended to and did misrepresent that smokers of Marlboro Lights would receive less nicotine and tar, and a less harmful product, than smokers of regular cigarettes of the same brand.

56. Defendant's misrepresentations and concealment of material facts constitute unfair and unconscionable commercial practices, deception, fraud, and/or the knowing concealment, suppression, or omission of material facts with the intent that consumers, including Plaintiffs and the other Class members, rely on

such concealment, suppression, or omission in connection with the sale and advertisement of Marlboro Lights.

57. Hawaii's Deceptive Practices Act (the "DPA") was enacted to protect consumers from deceptive, fraudulent, unfair, and unconscionable trade and business practices. Defendant violated the DPA by knowingly and falsely representing that Marlboro Lights were healthier to smoke than regular cigarettes when, in fact, Defendant knew they were not.

58. Plaintiffs did not receive the product Defendant represented and the product they paid for—a healthier cigarette that contained less tar and nicotine than regular cigarettes of the same brand—when purchasing Marlboro Lights

59. Defendant engaged in the unfair, unconscionable, and deceptive acts and practices alleged herein in order to sell Marlboro Lights to the public, including Plaintiffs and the other Class members.

60. As a direct and proximate result of Defendant's actions, Plaintiffs and the other Class members suffered damage, for which they are entitled to compensatory damages, equitable and declaratory relief, punitive damages, costs and reasonable attorneys' fees.

SECOND CAUSE OF ACTION
(Unjust Enrichment)

61. Plaintiffs hereby incorporate by reference each of the preceding allegations as though fully set forth herein.

62. After and due to seeing Defendant's representations, Plaintiffs reasonably believed, and Plaintiffs and the Class were reasonably likely to believe, that smoking Defendant's Marlboro Lights cigarettes was less harmful and resulted in the inhalation of less nicotine and tar than smoking regular cigarettes of the same brand.

63. Defendant benefited from and was unjustly enriched by its receipt of monies resulting from Plaintiffs' and the other Class members' purchases of Marlboro Lights.

64. Defendant had knowledge of, voluntarily accepted, and retained these benefits.

65. It would be inequitable, unconscionable, unfair, unlawful, and unjust for Defendant to retain these ill-gotten benefits, and Defendant's receipt of such benefits was to the detriment of Plaintiffs and the other Class members.

66. As a result of Defendants' unjust enrichment, Plaintiff and the Class are entitled to restitution in an amount to be proven at trial.

JURY TRIAL DEMAND

67. Plaintiffs, individually and on behalf of all others similarly situated, hereby demand a trial by jury as to all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of all others similarly situated, pray that the Honorable Court enter an Order:

- (a) Certifying the proposed Class under Federal Rule of Civil Procedure 23(a) and (b)(3) and appointing Plaintiffs and their counsel to represent the Class;
- (b) Finding that Defendant violated Hawaii's Deceptive Practices Act, Haw. Rev. Stat. § 480 *et seq.*, and was unjustly enriched in violation of Hawaii law;
- (c) Awarding actual, compensatory, and consequential damages;
- (d) Awarding restitution to Plaintiffs and the other Class members as provided by law;
- (e) Awarding disgorgement of all monies Defendant unjustly received from the sale of its light cigarettes to Plaintiffs and the Class, as provided by law;
- (f) Awarding exemplary or punitive damages as provided by law;
- (g) Awarding statutory prejudgment interest as provided by law;
- (h) Awarding reasonable attorneys' fees, costs, and expenses;
- (i) Awarding legal and equitable relief under the causes of action stated herein; and

(j) Granting such other relief as this Court may deem just and proper.

Dated: Honolulu, Hawaii, July 30, 2012

Respectfully submitted:



BICKERTON LEE DANG & SULLIVAN

James J. Bickerton (3085)

Topa Financial Center

Fort Street Tower

745 Fort Street, Suite 801

Honolulu, Hawaii 96813

Tel: 808.599.3811

bickerton@bsds.com

PERKIN & FARIA

John Francis Perkin (1683)

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700 Bishop Street, Ste. 1111

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Tel: 808.523.2300

perkin@perkinlaw.com

bjkfaria@perkinlaw.com

BARRETT LAW GROUP, P.A.

Don Barrett (*Pro Hac Vice*)

Brian Herrington (*Pro Hac Vice*)

P.O. Box 927

404 Court Square North

Lexington, MS 39095

Tel: 662.834.2488

DBarrett@barrettlawgroup.com

BHerrington@barrettlawgroup.com

BARNOW AND ASSOCIATES, P.C.

Ben Barnow (*Pro Hac Vice*)

Erich Schork (*Pro Hac Vice*)

One North LaSalle Street, Ste. 4600

Chicago, IL 60602
Tel: 312.621.2000
b.barnow@barnowlaw.com
e.schork@barnowlaw.com

BECNEL LAW FIRM, LLC
Daniel E. Becnel, Jr. (*Pro Hac Vice*)
Matthew B. Moreland (*Pro Hac Vice*)
P.O. Box Drawer H
106 W. 7th Street
Reserve, LA 70084
Tel: 985.536.1186
dbecnel@becnellaw.com
mmoreland@becnellaw.com

WHATLEY KALLAS, LLC
Joe R. Whatley, Jr. (*Pro Hac Vice*)
380 Madison Ave. 23rd floor
New York, NY 10017
Tel: 212.447.7060
jwhatley@whatleykallas.com

PROVOST UMPHREY LAW FIRM L.L.P.
Thomas Walter Umphrey
490 Park Street
Beaumont, TX 77704
Tel: 409.299.5178
wu@provostumphrey.com

WILLIAMS KHERKHER
John Eddie Williams, Jr.
8441 Gulf Freeway, Suite 600
Houston, TX 77017
Tel: 713.230.2200
jwilliams@williamskherkher.com

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

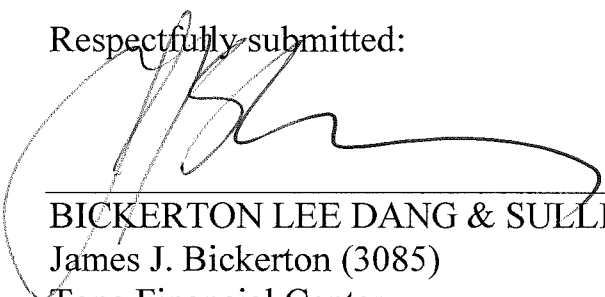
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)	
Defendant.)	
_____)	

DEMAND FOR JURY TRIAL

Plaintiffs, by and through their attorneys, Bickerton Lee Dang & Sullivan,
hereby demand trial by jury on all issues triable herein.

Dated: Honolulu, Hawaii, July 30, 2012

Respectfully submitted:



BICKERTON LEE DANG & SULLIVAN
James J. Bickerton (3085)
Topa Financial Center
Fort Street Tower
745 Fort Street, Suite 801
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Tel: 808.599.3811
bickerton@bsds.com

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRYAN CABBAT, BRETT)	CIVIL NO. CV10-00162 SOM-KSC
NAKOAOKALANI BROOKSHIRE)	(Other Non-Vehicle Tort)
PREJEAN, and ALEX)	
REINPRECHT, individually and on)	CERTIFICATE OF SERVICE
belalf of all others similarly situated)	
)	
Plaintiffs,)	
)	
vs.)	
)	
PHILIP MORRIS USA, INC.,)	
)	
Defendant.)	
)	

CERTIFICATE OF SERVICE

I hereby certify that, on the dates and by the methods of service noted below,
a true and correct copy of the foregoing was served on the following at their last
known addresses:

Served Electronically through CM/ECF:

Patricia M. Napier	<u>pnapier@goodsill.com</u>
Thomas Benedict	<u>tbenedict@goodsill.com</u>
Randall C. Whattoff	<u>rwhattoff@goodsill.com</u>
Reed Gillmor Bowman	<u>rbowman@damicolaw.net</u> , <u>reedbowman@yahoo.com</u>
John C. Massaro	<u>John.Massaro@aporter.com</u>
David E. Kouba	<u>David.Kouba@aporter.com</u>

Philip H. Curtis
Ronald C. Redcay

Philip.Curtis@aporter.com
Ronald.Redcay@aporter.com

DATED: Honolulu, Hawaii, July 30, 2012.



JAMES J. BICKERTON
Attorney for Plaintiff