STATE OF VERMONT
CHITTENDEN SUPERIOR COURT

DOCKET NUMBER: S1087-05 CnC

State of Vermont VS R.J. Reynolds Tobacco Co.

ENTRY REGARDING MOTION

TITLE OF MOTION: Defendant's Motion for Summary Judgment

DATE MOTION FILED: 5/30/08
ADDITIONAL MEMO: 7/28/08 Reply in Support

RESPONSE FILED:

~~Julie Brill, Esq.~~	NONE
Barney L. Brannen, Esq.	7/09/08 Pltf's opposition (Exhibits in accordian file)
Robert Shaughnessy, Esq.	NONE
Richard Cooper, Esq.	NONE

_____ GRANTED COMPLIANCE BY _____

X DENIED

_____ SCHEDULED FOR HEARING ON: _____ AT _____ ;TIME ALLOTTED _____

_____ OTHER

See Decision & Order this date

Dennis R. Pearson 8/19/08

JUDGE ~~MATTHEW I. KATZ~~ DATE

COPIES SENT TO:

Julie Brill, Esq.
Barney L. Brannen, Esq.
Robert B. Hemley, Esq.
Robert Shaughnessy, Esq.
Richard Cooper, Esq.
Grant G. Moy, Jr., Esq.
Rupal Shah Palanki, Esq.
Nathan C. Doty
William E. Latham, II, Esq.
Christopher A. Kreiner, Esq.
Amer Ahmed, Esq.

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

STATE OF VERMONT	)	
	)	Chittenden Superior Court
v.	)	Docket No. S1087-05 CnC
	)	
R. J. REYNOLDS TOBACCO CO.	)	

Decision and Entry Order Re: (A) RJRT's Motion for Summary Judgment And (B) Motions *In Limine*

In 1996, Defendant R. J. Reynolds Tobacco Company (RJRT) began test-marketing its new Eclipse cigarette. Later, as RJRT began marketing Eclipse more broadly, it allegedly began making certain "health claims" about the Eclipse cigarette in advertisements, statements to the media, and on an Eclipse website, in Vermont, and elsewhere. The State of Vermont now asserts, in this case, that RJRT's so-called health claims regarding Eclipse (1) violate a provision in both the 1998 Master Settlement Agreement (MSA) and related Consent Decree that prohibits RJRT (as one of the participating cigarette manufacturers)[1] from making material misrepresentations of fact regarding the health consequences of using tobacco products, Complaint, *see* Counts III-IV; and (2) also violate Vermont's Consumer Fraud Act ("CFA"), *see* Complaint, Counts I-II. RJRT has recently filed a motion for summary judgment arguing, among other things, that the State cannot prove that all, or even most of the health claims are misrepresentations for purposes of the MSA and Consent Decree, and that the Consumer Fraud Act claims are expressly pre-empted by the Federal Cigarette Labeling and Advertising Act. RJRT has also filed nine (9) substantial motions *in limine* seeking to bar presentation of a large part, if not most of the State's intended expert witness evidence; the State has filed one motion *in limine* attempting to keep out RJRT's expected evidence on three (3) relatively discrete issues.

A hearing on all motions was held on August 5, 2008, in advance of a plenary trial on the merits, without a jury, scheduled to commence on Monday, October 5, 2008. For the following reasons, RJRT's summary judgment motion is **denied**. All of the motions *in limine* still at issue are also mostly **denied**,[2] except for the one RJRT motion (# 5) concerning so-called prior "bad acts," VREv 404(b), which is deferred in light of the court's determination to bifurcate, and delay hearings on all remedy, civil penalty, injunctive relief, and/or punitive damage issues until the liability issues are decided. The primary, and over-arching duty of the trial court in this type of complex case,

[1] *See generally, e.g., State v. Phillip Morris USA, Inc., et al.,* 2008 VT 11 (February 1, 2008).
[2] There are a very few exceptions, *see* Part B, *infra*. The State has agreed not present evidence regarding "glass fiber" inhalation, and RJRT has withdrawn that motion *in limine* (# 6).

replete with numerous legal questions as to which there is substantial room for legitimate difference of opinion, and presenting many opportunities for the nuanced application of those legal issues to highly contested factual and evidentiary scenarios where the credibility and persuasiveness of numerous expert witnesses may in large part be dispositive,[3] is to allow each party a reasonable opportunity to create the necessary record against which some higher, appellate tribunal will ultimately decide the controlling issues, and the eventual outcome.

(A) Summary Judgment

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. *See* VRCP 56(c)(3). In determining whether a genuine issue of fact exists, the nonmoving party receives the benefit of all reasonable doubts and inferences; however, assertions to the contrary must be supported by citations to specific evidence sufficient to create a genuine issue of material fact. *See, e.g., Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). The parties' extensive briefing reflects that few, if any, of the essential facts in this case are truly undisputed. However, relatively few of those facts are material to the major issues raised in RJRT's summary judgment motion, which are largely, if not wholly legal in nature. Even where all of the material facts are not genuinely disputed, however, summary judgment cannot be granted if the moving party is not entitled to prevail as a matter of law. *See, e.g., White v. Quechee Lakes Landowners' Assn.*, 170 Vt. 25, 28, 34 (1999).

RJRT substantially agrees that it has made several statements generally to the effect that one who smokes the Eclipse cigarette rather than a traditional cigarette will experience a lower risk of developing several, though not all, smoking-related diseases.[4] These RJRT describes as its "less risk" claims. In some of the other disputed statements, RJRT made claims to the effect that an independent panel of scientific experts determined that Eclipse presents less risk, or that the panel approved of RJRT's advertising claim that Eclipse presents less risk. RJRT argues that it made these claims, and was entitled to do so, because in good faith it believes that they are accurate[5] and because,

---

[3] *But cf. generally* "Experts Hired to Shed Light Can Leave U.S. Courts in Dark," New York Times, § A, pp. A1, A16 (August 12, 2008) (American judicial practice of allowing litigants to choose, and control experts, coming under increasing scrutiny).

[4] RJRT claims that presently it is not making any advertising, or promotional claims regarding the health effects of smoking Eclipse cigarettes, and is no longer selling the product at all, in Vermont. While RJRT asserts this as an independent basis for dismissal of the State's claims, the court declines to consider that request at this time. *See* "Other Issues," Part A(4), *infra.*

[5] Somewhat related to this assertion is RJRT's argument that this suit must be dismissed as to several of the challenged statements – primarily, those made by its executives in interviews, or

based on the available scientific evidence, they are indeed accurate, or at least can be "substantiated" by that scientific evidence.

If nothing else, it is clear that the details of the science that does, or does not support RJRT's health claims is a matter of great dispute to which much of the trial in this case will be devoted. For summary judgment purposes, simply to understand the general nature of the scientific dispute between the State and RJRT, it is enough to know that RJRT essentially contends that the science shows that an Eclipse cigarette produces smaller amounts of many disease-causing chemical by-products, and that it is scientifically reasonable to then assert that those smaller amounts of disease-causing agents *a fortiori* present a smaller risk to the smoker of developing smoking-related diseases. RJRT basically asserts that the Eclipse cigarette does this by heating tobacco to form an aerosol which mimics tobacco smoke, rather than burning tobacco resulting in actual smoke. The State disputes RJRT's claims about the composition of the chemicals produced by Eclipse and the concentration of disease-causing agents actually inhaled by Eclipse smokers, and further claims that the science does not support, or "substantiate" the inference about the reduced health effects of using Eclipse cigarettes.

(1) *The Master Settlement Agreement and the Consent Decree*

Both the 1998 MSA and the Consent Decree prohibit RJRT from making any "material misrepresentation of fact regarding the health consequences of using any Tobacco Product, including any tobacco additives, filters, paper or other ingredients." MSA § III(r); Consent Decree § V(I). This is one provision among many in that landmark, nationwide settlement that limits the advertising and promotional activities of participating manufacturers.

RJRT argues that the State cannot prove that the less risk claims in this case are misrepresentations for purposes of the MSA and Consent Decree. To do so, argues RJRT, the State would have to prove that the available science demonstrates that the less risk claims are indeed false. The State, argues RJRT, is only prepared, and able to present evidence that the health claims regarding Eclipse are "unsubstantiated," but not that they are actually false. In other words, the claims could well be unsubstantiated, or even incapable of substantiation, but still true. To be clear, RJRT argues that the misrepresentation prohibition in the MSA/Consent Decree requires the State to come forward with scientific evidence absolutely disproving the Eclipse health claims, i.e., affirmatively proving that using Eclipse cigarettes does present an equal or greater risk of disease than smoking traditional cigarettes.

---

on the website – because imposing liability on RJRT as to those statements would violate its First Amendment rights to speak about issues of "public concern." Again, the court does not address that point at this pre-trial stage. *See* "Other Issues," Part A(4), *infra*.

According to RJRT, in the specialized consumer fraud and federal trade context – the subject of the State's first challenge and cause of action, Count I – a health claim may be actionable as deceptive unless it can be reasonably substantiated.[6] Outside of that specialized context, however – the subject of the State's second, or alternative challenge and last two causes of action, Count III and IV – RJRT contends a misrepresentation of fact is not actionable unless it is affirmatively and actually false, not merely unsubstantiated. According to RJRT, this interpretation of the anti-misrepresentation clause in the MSA/Consent Decree is consistent with case law that has developed under 15 U.S.C. § 1125(a)(1) of the Lanham Act, 15 U.S.C. §§ 1051–1141; the common law of "misrepresentation"; a Black's Law Dictionary definition of misrepresentation; and an "ordinary usage," or common dictionary definition of misrepresentation.

The legal standards for interpretation of contracts and agreements, such as the MSA, are well-established:

> In interpreting the language of the [agreement], as with any contract, our goal is to give effect to the intent of the parties. State v. Philip Morris USA, Inc., 2008 VT 11, ¶ 13, ___ Vt. ___, 945 A.2d 877. [Courts] presume that the parties' intent is reflected in the plain language of the [agreement] when that language is clear. In re Adelphia Bus. Solutions of Vt., Inc., 2004 VT 82, ¶ 7, 177 Vt. 136, 861 A.2d 1078.

Northern Security Insurance Co. v. Mitec Electronics, Ltd., 2008 VT 96, ¶ 28 (August 1, 2008). The court must look at, and consider the entirety of the document (and any/all related, contemporaneous documents), and the overall context and "circumstances surrounding the making of the contract," to ascertain whether there is any ambiguity, and if not, what was the clear understanding and intention of the parties as expressed in those controlling document(s). *Id.*, ¶ 24; *O'Brien Bros. Partnership, LLP v. Wioletta Plociennik*, 2007 VT 105, ¶s 9, 15, ___ A.2d ___ (9/28/07).

Although the language used here is not exactly clear, or plain – as the court mused at oral argument, it appears to be an instance of purposeful ambiguity – RJRT's interpretation of the misrepresentation prohibition in the

---

[6] Under Count II, alleging an "unfairness" violation of the CFA, the court understands this claim to primarily relate to the "general population effects" issue, i.e., whether the Eclipse statements would induce a non-smoker to begin smoking, or an existing smoker to delay, or abandon efforts to stop smoking (as opposed to the more narrow message claimed by RJRT – i.e., if you are a smoker, and choose to smoke, Eclipse presents "less risk" of smoking-related disease). *Cf.* RJRT Motion *in limine* # 8 (seeking to exclude most, if not all such evidence). While this claim does indeed present a distinctive wrinkle, at bottom the State would still have to prove, first, that the "less risk" health claims were deceptive, and so the controlling issue(s) at this stage of the proceedings is/are ultimately the same.

MSA and the Consent Decree is simply not reasonable.[7] With regard to other cited authorities meant to inform the court's construction of the relevant language, RJRT's position is either demonstrably incorrect, or based on a false dichotomy between the availability of scientific substantiation for health claims, and the absolute, or literal truth or falsity of the claim regardless of how deceptively the claim is arguably stated.

RJRT's interpretation of the anti-misrepresentation provision would limit that prohibition only to circumstances in which a settling state could prove that a tobacco manufacturer's health claim is *literally and provably false as expressly framed by the manufacturer*, regardless of its import, effect, or implications. RJRT's narrow, and cramped interpretation of this provision would suggest, then, that the parties to the MSA intended to shield manufacturers from liability for baseless (but not disprovable) health claims—in advertisements, and other promotional materials intended for the general public—so long as the settling states do not have available, or cannot develop, the science needed to debunk those baseless health claims. Plainly, this would contort a prohibition into an invitation to cloak substantive health claims, no matter how unsupported or fantastic, in misleading language that cannot, in the precise manner literally stated, be proven false with currently available science. It is an unreasonable result that is wholly inconsistent with the circumstances surrounding the nationwide tobacco settlement and the overall context and other provisions of the MSA and Consent Decree. If all the parties to the 1998 nationwide settlement had intended such a result, they could have expressly bargained for it, and would have specifically included the necessary language in the MSA and Decree. *See, e.g., In Re Verderber,* 173 Vt. 612, 616 (2002)(mem.) (context and anticipated results inform the court's understanding of parties' intent).

Although the MSA and the Consent Decree do not articulate, or define the prohibition against misrepresentation (which consists of only two sentences in its entirety) in any detail, RJRT's interpretation would render it an extraordinary exception to the myriad other contract provisions in the settlement that do limit the tobacco manufacturers' advertising and marketing activities. *Cf., e.g., State v. Phillip Morris, supra,* 2008 VT ¶ 18 ("nonsensical interpretations of contracts . . . are disfavored") (cit. omitted). In context, the language of the MSA and the Consent Decree simply do not support RJRT's narrow, legalistic, and overly-technical interpretation.

Relevant cases under the Lanham Act also do not limit the concept of misrepresentation to literal falsity, or render the concept of scientific "substantiation" inapplicable as a matter of law. The relevant provision of the

[7] As noted elsewhere herein, this court's determination of the controlling legal issues will not be the last word, or decide the final outcome of this case; that is especially so where contract interpretation is a matter of law, to be reassessed *de novo* on appeal.

Lanham Act states:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, *false or misleading description of fact, or false or misleading representation of fact*, which—
>
> > (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
> > (B) *in commercial advertising or promotion, misrepresents the nature, characteristics, qualities*, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1) (emphasis added). It has long been held that § 1125(a)(1) "requires neither proof of literal or obvious falsehood, nor of intent to deceive." *Proctor & Gamble Company v. Chesebrough-Pond's Inc.*, 747 F.2d 114, 119 (2d Cir. 1984) (citations omitted). Indeed, § 1125(a) "embraces 'innuendo, indirect intimations, and ambiguous suggestions' evidenced by the consuming public's misapprehension of the hard facts underlying an advertisement." *Proctor & Gamble*, 747 F.2d at 114 (quoting *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272, 277 (2d Cir. 1981) (quoting *American Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 165 (2d Cir. 1978))).

With regard to substantiation specifically, the point in relevant Lanham Act cases is not that substantiation is *per se* irrelevant to misrepresentation, but merely that substantiation only becomes an issue depending on how the reasonable consumer would understand the advertisement.[8] If the Lanham Act plaintiff does not show that a reasonable consumer would expect the claim to have substantiation, then the existence of substantiation is not a meaningful issue. In other words, an advertising claim is not automatically false or deceptive for lack of substantiation, if the reasonable consumer would not expect the claim to have substantiation. *See Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 229 (3d Cir. 1990). Of course, the

[8] This formulation then dovetails with, or at least circles back to the same essential standard for liability under the Vermont CFA, i.e., the likely effect of the statement on the average, reasonable consumer. *See, e.g., Inkel v. Pride Chevrolet-Pontiac, Inc.*, 2008 VT 6, ¶ 10 (January 8, 2008); *Jordan v. Nissan North America*, 2004 VT 27, ¶ 8, 176 Vt. 465, 469-70.

reverse is also true; if the statement is one where substantiation would be reasonably expected, the lack thereof is actionable as both a Lanham Act and/or FTC Act misrepresentation.[9]

Alternatively, the misrepresentation that must be false for purposes of the common law of fraud may be either express or implied. *Briggs v. Carol Cars, Inc.*, 553 N.E.2d 930, 933 (Mass. 1990) (citing Restatement (Second) of Torts § 539); *DiPietro v. DiPietro*, 460 N.E.2d 657, 662 (Ohio Ct. App. 1983); *Universal By-Products, Inc. v. City of Modesto*, 117 Cal. Rptr. 525, 529 (Cal. Ct. App. 1974); Restatement (Second) of Torts § 529 (misrepresentation by half-truth). Misrepresentation in this context is not limited to the literal, or absolute falsity of the statement as peculiarly crafted by the speaker. If, for instance, a representation implies that health claims have some actual medical or scientific basis, the question under the Restatement, and other common law sources would again turn to the existence of reasonable substantiation for those claims.

Third, the current edition of Black's Law Dictionary defines misrepresentation as follows:

> **misrepresentation**, n. 1. The act of making a false *or misleading* assertion about something, usu. with the intent to deceive. • *The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion* . . . . 2. The assertion so made; an assertion that does not accord with the facts. — Also termed false representation; (redundantly) false misrepresentation. Cf. REPRESENTATION (1). — **misrepresent**, vb.
>
> > "A misrepresentation, being a false assertion of fact, commonly takes the form of spoken or written words. *Whether a statement is false depends on the meaning of the words in all the circumstances, including what may fairly be inferred from them. An assertion may also be inferred from conduct other than words. Concealment or even non-disclosure may have the effect of a misrepresentation* . . . . [A]n assertion need not be fraudulent to be a misrepresentation. Thus a statement intended to be truthful may be a misrepresentation because of ignorance or carelessness, as when the word 'not' is inadvertently omitted or when inaccurate language is used. But a misrepresentation that is not fraudulent has no consequences . . . unless it is material." Restatement

[9] *See, e.g.*, "Airborne, FTC Reach Settlement," Adweek, at http://www.adweek.com/aw/content_display/news/agency (August 14, 2008) (makers of Airborne agree to pay up to $30 million in fines and/or refunds to settle FTC complaint, over alleged lack of scientific substantiation for health claims related to whether product reduces risk of becoming sick while traveling).

(Second) of Contracts § 159 cmt. a (1979).

Black's Law Dictionary 1022 (8th ed. 2004) (original emphasis removed; new emphasis added). Again, the "literal falsity" or "literal misrepresentation" construct urged by RJRT finds no support here.

Finally, an ordinary dictionary definition also reveals that misrepresentation, in general usage, is also a more flexible concept than that urged by RJRT. The online edition of the Merriam-Webster dictionary defines "misrepresentation," in pertinent part, as "a false *or misleading* representation." *See* Merriam-Webster Online, http://www.merriam-webster.com/dictionary/misrepresentation (last visited August 15, 2008).

The court concludes that the prohibition against material misrepresentations of fact in the MSA and Consent Decree applies to, and arguably makes it a violation to utter false *or misleading* statements about tobacco smoking health consequences, whether express or implied. A statement that implies that a health claim can be substantiated, or is of such a nature that a reasonable person would otherwise expect it to have some medical or scientific basis, may be a misrepresentation actionable under the MSA and Consent Decree if it is proven that the expected substantiation does not exist, or is insufficient or inadequate.

The State is generally entitled to present its case on the evidence, both with regard to the contextualized meaning of the disputed advertisements and the character of any other allegedly false or misleading statements, and with regard to the existence (or not) of reasonable substantiation supporting RJRT's health claims regarding Eclipse. Trial shall in any event proceed on Counts III and IV, and whether the State can prove any "material misrepresentation of fact regarding the health consequences of using any Tobacco Product, including any tobacco additives, filters, paper or other ingredients." *See* MSA § III(r); Consent Decree § V(I).

(2) *Relief related to any breach of the Consent Decree*

RJRT also argues that even if the State could show a breach of the MSA and/or Consent Decree, it nevertheless would not be entitled to any relief. Given the current circumstances of this case, the court declines to address the extent of available relief prior to any determination of potential liability under the MSA and/or Decree. At the very least, even if the State cannot prove that it suffered any damages, or injury from the alleged violations; and even if RJRT is not currently marketing Eclipse in Vermont, the court itself has an interest in the enforcement of its own orders. Once the parties chose to have the MSA incorporated into, and made independently enforceable as a court-ordered Consent Decree, all parties (including RJRT) necessarily ceded continuing

jurisdiction to the court, and made themselves subject to the court's inquiry into whether there was compliance with, or violation of the court's order.

(3) *Pre-emption of Count I, the Consumer Fraud Act claims*[10]

RJRT argues that the State's claims under the Vermont CFA, 9 V.S.A. §§ 2451–2480n, are pre-empted, as a matter of law, by the express pre-emption provision of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331–1341 (FCLAA).[11] Among other things, the FCLAA requires manufacturers to include certain warnings about smoking on packaging and in advertising, 15 U.S.C. § 1333; bars electronic advertising on any medium within the jurisdiction of the Federal Communications Commission, *id.* § 1335; and explicitly ensures that the Federal Trade Commission retains its authority over "unfair or deceptive acts or practices in the advertising of cigarettes," *id.* § 1336. *See generally* 15 U.S.C. §§ 41–58 (Federal Trade Commission Act).

With regard to pre-emption, the Act says this:

> (a) Additional statements
>
> No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) State regulations
>
> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334. Section 1334(b) is at issue in this case. The United States Supreme Court has addressed § 1334(b) twice, *see Cipollone v. Liggett Group Inc.*, 505 U.S. 504 (1992), and *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525

---

[10] The State argues that RJRT's affirmative defense of pre-emption is waived because RJRT failed to affirmatively plead it, at the outset, under Rule 8(c). Conceptually, the court does not fully understand how this issue, plainly related to subject matter jurisdiction, could be waived at all, but nonetheless the case law cited by the State is what it is. However, "the waiver rule is not applied automatically and as a practical matter there are numerous exceptions to it." 5 Wright & Miller, Federal Practice and Procedure: Civil 2d § 1278, at 491. Here, the pre-emption defense is legal, not factual, in nature, and was timely raised in a pre-trial motion. There has been no surprise or prejudice. If the defense had to be affirmatively pleaded to avoid a waiver, RJRT would have resort to a Rule 15 motion to amend. Fairness plainly would counsel in favor of allowing such an amendment so that the defense could be determined on its merits. Moreover, it is clear that pre-emption is an overriding issue of substantial importance. Given all these circumstances, the court declines to find any waiver of the pre-emption issue.

[11] RJRT acknowledges that the duties and obligations imposed by the MSA and Consent Decree are voluntary undertakings that are not pre-empted by 15 U.S.C. § 1334(b).

(2001).[12]

In *Cipollone*, the Court considered whether § 1334(b) pre-empted several State common law damages claims (such as design defect, failure to warn, and misrepresentation) that had been brought against tobacco manufacturers following the lung cancer death of a long-term smoker. The question generated three opinions, none with majority support: a plurality opinion, written by Justice Stevens, in which the Court ruled that some claims were pre-empted and some were not; a dissent, written by Justice Blackmun, who detected no legislative intent to pre-empt State law claims at all; and a dissent, written by Justice Scalia, who concluded that pre-emption under § 1334(b) was complete as to all claims. The plurality's analysis crucially depends on its controversial interpretation of the "based on smoking and health" language of 15 U.S.C. § 1334(b). Justice Blackmun criticized the plurality for, in his view, manipulating the level of generality of its analysis to produce a "crazy quilt" of pre-empted and non-preempted claims. *Cippollone*, 505 U.S. at 542 (Blackmun, J., dissenting). Agreeing with this criticism, Justice Scalia found that the plurality's analysis lacked basic consistency. *Id.* at 552–53 (Scalia, J., dissenting). Justice Scalia also agreed with Justice Blackmun's unease at whether lower courts would be able to sensibly apply the plurality's analysis: "I can only speculate as to the difficulty lower courts will encounter in attempting to implement today's decision." *Id.* at 543–44 (Blackmun, J., dissenting); *id.* at 555 (Scalia, J., dissenting) (quoting Justice Blackmun). The *Cipollone* plurality attempted to deflect the criticism as follows: "our ambition here is not theoretical elegance, but rather a fair understanding of congressional purpose." *Id.* at 529 n.27. In any event, however difficult its *ratio decidendi* may be to explain (or state), lower courts have largely embraced the *Cipollone* plurality opinion as the controlling rubric. *See Brown v. Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 389 (5th Cir. 2007) (applying *Cipollone* and noting that it "is also widely followed in other circuits").

In *Reilly*, the Court subsequently considered, among other things, whether § 1334(b) preempted "comprehensive" regulations adopted by the attorney general of Massachusetts, in the consumer fraud context, expressly and specifically controlling several aspects of the advertising and sale of cigarettes. With only passing references to *Cipollone*, a majority concluded that all such regulations were pre-empted, and specifically rejected the argument that the regulations were mere "location" requirements (similar to zoning requirements that presumably would not be pre-empted) and not pre-empted content requirements. *Reilly*, 533 U.S. at 549–50. The *Reilly* majority nowhere

[12] The Supreme Court recently granted *certiorari*, 128 S.Ct. 1119 (2008), in *Good v. Altria Group Inc.*, 501 F.3d 29 (1st Cir. 2007), which also addresses 15 U.S.C. § 1334(b) in the context of "lights" cigarette advertising. Whether or how a Supreme Court decision in *Good* may materially affect the issues in this case is simply an unknown at this point. Obviously, a dispositive, and clearly applicable decision in *Good* may become an issue later in the life of this case, whether during trial proceedings or on appeal.

overtly distinguished, or otherwise took the opportunity to clarify, the *Cipollone* plurality's stated analysis.

In this case, the State essentially argues that the court should apply the *Cipollone* plurality's analysis to conclude that the statutory CFA claims are different from the "failure-to-warn" and "warning-neutralization" claims determined to be pre-empted in *Cipollone*, and more analogous to the fraudulent misrepresentation claim—based on a "duty not to make false statements of material fact"—determined *not* to be pre-empted in *Cipollone.* Not unexpectedly, RJRT argues that the Court should apply the *Reilly* majority's analysis to conclude that all CFA claims are completely pre-empted as nothing more than veiled attempts at regulating (by litigation) its marketing, advertising, and other promotional activities for Eclipse. RJRT argues that the *Cipollone* plurality opinion is not binding because it is a plurality opinion; that its pre-emption analysis has been effectively superseded by subsequent case law and more current developments in pre-emption law; and that even if this court considers it controlling, *Cipollone,* if correctly applied, nevertheless suggests that the CFA claims in this case are pre-empted.

The parties' competing analysis of § 1334(b), *Cipollone*, and *Reilly* are thorough, certainly voluminous, and leave few stones (and even minor pebbles) unturned. Even with the benefit of that briefing, however, the court declines to engage in any protracted analysis of *Cipollone* and *Reilly,* and does not believe that doing so would shed any additional light on the statute, either case, or how higher courts might decide this or future cases under 15 U.S.C. § 1334(b). At the end of the day, this court's opinion on whether the CFA claims are pre-empted will matter not a whit. The decisive issue confronting the court at this juncture is thus primarily a pragmatic one: whether the consumer fraud claims should remain in the case for purposes of trial, and the presentation of all relevant and material evidence, so that each party has a full and fair opportunity to create the record it believes is necessary for any further proceedings.[13] Inasmuch as the same universe of evidence will be presented (and vigorously contested) at trial with respect to the State's claims under the MSA and Consent Decree, there is little practical downside risk, and considerable upside benefit in terms of efficient judicial management, to keeping the CFA claims in the case.

The *Cipollone* plurality's analysis is well established in the available case law and, for better or worse, the court chooses to follow it here. Under *Cipollone*, the focus is on the "legal duty" underlying the State law claims. *Cipollone*, 505 U.S. at 523–24. If that duty "constitutes" a requirement or

[13] It is fairly clear to the court that a ruling either way on the pre-emption issue would have almost no effect on the scope of the evidence that the parties will present at trial, under Counts III and IV, given the discussion *supra*. Counsel for both sides seem to have acknowledged as much, on several occasions, both *sua sponte* and when pressed by the court.

prohibition subject to 15 U.S.C. § 1334(b), then the claim is pre-empted. *Cipollone*, 505 U.S. at 524. In *Cipollone*, the failure-to-warn claim was pre-empted to the extent that it depended on a showing that the manufacturers' "advertising or promotions should have included additional, or more clearly stated, warnings." *Id.* The warning-neutralization claim, one of the two fraudulent misrepresentation claims, was pre-empted on the same basis. *Id.* at 527–28. The other fraudulent misrepresentation claim was not pre-empted. That claim alleged that the manufacturers had made either false representations of material fact or had concealed material facts. *Id.* at 528. "Such claims are predicated not on a duty 'based on smoking and health' but rather on a more general obligation[,] the duty not to deceive." *Id.* at 528–29. In this context, the Court expressly concluded "that Congress intended the phrase 'relating to smoking and health' [in § 1334(b)]. . . to be construed narrowly, so as not to proscribe the regulation of deceptive advertising." *Cipollone*, 505 U.S. at 529.

The fundamental principle illustrated by *Reilly* appears to be that express regulations that are "targeted" at controlling cigarette advertising are pre-empted by § 1334(b) even if they do not "involve health-related content." *Reilly*, 533 U.S. at 547. The "based on smoking and health" language of the pre-emption provision may be narrow but it is not that narrow. "[T]o the extent that Congress contemplated additional *targeted* regulation of cigarette advertising, it vested that authority in the FTC." *Id.* at 548 (emphasis added). The general "duty not to deceive" of *Cipollone* was simply not at issue in *Reilly*.

This case is not a common law damages action, as was *Cipollone*, and it is not based on regulations, targeted or otherwise, specifically controlling tobacco manufacturers' advertising, as in *Reilly*. A number of superficial distinctions can be drawn between this case and either *Cipollone* or *Reilly*. However, the State's fundamental consumer fraud claim, similar to its claim under the MSA and Consent Decree, is that RJRT's advertising has been misleading, false, and deceptive, and that RJRT should be responsible for its advertising claims in the same manner as any other "seller" under the consumer fraud statutes would be. The court is unable to conclude, in any principled manner, that, at least as a general matter, a private plaintiff should be able to bring such a claim in the form of an allegation of common law fraud, as in *Cipollone*, but that the State cannot bring essentially the same claim based on allegations of statutory consumer fraud. Certainly, the Supreme Court will have more to say about 15 U.S.C. § 1334(b), and cases subsequent to *Reilly* may yet clarify *Cipollone*, or supersede it altogether. Based on what has been said so far, however, the court concludes that, under *Cipollone*, the State should be able to present its case at trial on the consumer fraud claims as alleged in its Complaint.[14]

[14] The parties did not squarely present the question of whether the substance or form of injunctive relief, as an incident of consumer fraud liability, could stray into pre-empted

The court is not persuaded that the Supreme Court's most recent pre-emption analysis, in *Riegel v. Medtronic, Inc.*, 128 S.Ct. 999 (2008), suggests a different outcome. In *Riegel*, the final step of the majority's pre-emption analysis came down to whether the common law claims were "requirements" for purposes of the pre-emption statute. *Id.* at 1007–08. The Court then concluded: "*Absent other indication,* reference to a State's 'requirements' includes its common-law duties." *Id.* at 1008 (emphasis added). In *Riegel*, there was "nothing to contradict this normal meaning." *Id.* In *Cipollone*, plainly, there was something to contradict that "normal meaning" to a limited extent, at least as the plurality saw it: the specific language of § 1334(b), the assessment of "congressional purpose," and the history and setting of the statute and then-current regulatory environment.

Much of RJRT's briefing, at base, echoes the criticism shared by both dissents, to quite different ends, in *Cipollone* itself: that the plurality's analysis is inexorably "incoherent." *See* RJRT's Reply Memorandum, at 13 (filed July 28, 2008). Having concluded that *Cipollone's* plurality analysis will be taken as the controlling premise and treated as binding, however, higher principles require the court to apply that analytical template as best it can, in the most intellectually honest fashion it can muster; the court cannot simply reject it as nonsense, or force some hollow interpretation, or ascribe some meaningless distinction, just to avoid *Cipollone's* current precedential effect.

(4) *Other Issues*

RJRT also argues there are other reasons why it cannot be liable as to certain of the disputed statements.[15] Some such statements, RJRT argues, are non-actionable "puffery"; some are actionable only on a theory of implied misrepresentation, which requires "extrinsic evidence" (e.g., consumer surveys taken, presented, and explained by experts) of how a reasonable consumer would interpret the statement(s);[16] some are "in fact" true, and/or

---

territory under *Reilly*, and the court will not address that issue now; it will remain to be decided if liability is found, and the possibility of, or need for injunctive relief is then considered. The parties also did not specifically address, for summary judgment purposes other than pre-emption, any claims that the State might be asserting under the "unfairness" prong of the consumer fraud statute, *see* Count II, and the court takes no position on the merits of any such claim at this time.

[15] RJRT has in this category specifically identified Statements C, H, I, J, and K, as set forth in ¶ 11 of the Complaint, and in subsequent discovery documents or exhibits. (This designation approach is apparently accepted by the State.) It is not necessary here to lay out the specifics of each such statement.

[16] The court does not decide here whether RJRT's legal position is correct, that such extrinsic evidence is absolutely necessary, with regard to either the CFA or MSA/Consent Decree claims. The State asserts that it will present such evidence in any event; RJRT claims the proposed expert will not in fact so testify. The court prefers to hear the witness himself, in a trial setting, and decide this point for itself.

unquestionably substantiated (as a matter of undisputed evidence, or as a matter of linguistics); a few never directly entered, or were made in Vermont as part of actual marketing or advertising (although they were available to Vermonters on the RJRT and/or Eclipse websites); and some are arguably protected by the First Amendment. As noted, and now emphasized repeatedly, the trial, and the presentation of evidence, is largely going to be unaffected by the court's various rulings today; given the time, expense and effort to get to this point, and considering what will in any event be incurred, or expended at trial even on the claims and issues which are inarguably presented, it appears that little additional (relatively speaking, of course) effort will be required to address these additional issues and claims. The potential risk of prejudice, inefficient marshalling of resources, and ultimate unfairness to either party is much greater from summary exclusion, than from over-inclusion.

The court declines to rule summarily at this time on these discrete claims and issues, which appear to be based at least in part on ultimately disputed facts and strongly contested evidence, and to some extent on inferences of considerable factual and evidentiary subtlety that would be better parsed in the context of all of the evidence. Summary judgment, rendered on paper only and without the benefit of live testimony elicited through careful questioning, is a crudely applied tool in these circumstances. RJRT is not entitled as a matter of law to pre-trial dismissal of those particular claims, based on Statements C, H, I, J and K. VRCP 56(c)(3).

(B) Motions *In Limine*

Most persuasive to the court, in assessing the numerous motions *in limine* filed by the parties (although, as noted, 90% by RJRT), is that neither side has expressly sought, or framed their efforts to bar the other side's expert (and other) evidence as a *Daubert* challenge, and have instead limited their stated objections in terms of inadequate qualifications, relevancy, materiality, confusion, cumulative/waste of time, and/or unreasonable prejudice, all under VREv 401, 402, 403, and/or 702-703. And yet, the voluminous attachments to each motion, and the lengthy and detailed arguments (both on paper, and orally at the hearing) strongly suggest that disagreement over the content, and substance of the expected testimony is indeed the primary motivation for the motions *in limine*. In other words, these motions appear to the court to be *Daubert* motions in all but name. However, our Supreme Court has recently warned that *Daubert* is not to be used strategically, pre-trial, and that expert testimony which is otherwise minimally admissible should be allowed so that the trier-of-fact can then assess its content and substance in light of all the evidence for weight, credibility, and persuasiveness. *See 985 Associates, Ltd. v. Daewoo Electronics America, Inc.,* 2008 VT 14, ¶s 10-12, 14-16 (February 8, 2008). To the extent that legitimate *Daubert* issues do exist, or might arise, trial management and judicial efficiency concerns all militate in favor of

combining those concerns with the trial on the merits, so that witnesses and testimony need be presented only once.

The evidence, and expert testimony proposed by the State (as well as two of the areas of RJRT's evidence challenged by the State) is/are all generally relevant, and material given the broad definitions of those terms in VREv 401 and 402; if ultimately credited by the court, the evidence and testimony would tend to make one (or more) of the various contentions in this case more, or less probable. As with many, if not most pre-trial motions *in limine* which are principally based on more subjective evaluation of the proposed evidence, rather than harder, more black-and-white criteria,[17] the risk of prejudice and improper exclusion is actually highest just before the start of trial, before the court has achieved sufficient familiarity with the issues, and other evidence to make a truly informed judgment as to confusion, whether the evidence really is cumulative or a waste of time, or possible prejudice. Neither party has unequivocally demonstrated that the evidence and testimony it opposes is so clearly inadmissible, on these stated grounds, that the court should potentially err in its favor before trial even starts. The objections under VREv 401, 402, and/or 403 are all generally **denied**, without prejudice.

There are, however, a few exceptions to the broad statement just made, which either require a more specific assessment by the court, or indeed require exclusion of some discrete areas of testimony. RJRT in particular (and not surprisingly) focuses much of its attention on the expert who appears to be the State's primary medical/scientific witness, Dr. Peter Shields. RJRT concedes that Dr. Shields will testify extensively in any event, on issues such as cancer-related effects of smoking; what RJRT objects to, *inter alia,* is Dr. Shield's expected testimony on the cardiovascular and non-cancerous pulmonary effects of smoking, and about the issue of machine testing of cigarettes (*see infra*). As to these particular areas, RJRT argues that Dr. Shield's qualifications, and credentials have not been sufficiently established, on paper, in advance of trial. The necessary qualifications to present expert testimony are to be broadly, if not expansively considered, and any alleged deficiencies almost invariably go to weight and persuasiveness, not admissibility, except in the most glaring, and obvious circumstances. *Cf., e.g., 985 Associates v. Daewoo Electronics, supra,* 2008 VT 14, ¶ 15. So long as the testimony itself makes clear the expert's limitations, it is a matter of weight, and not admissibility. *See, e.g., Cappiallo v. Northrup,* 150 Vt. 317, 319-20 (1988)(Allen, Ch. J.). The issue of Dr. Shield's expert qualifications on these testimonial subjects is close enough, on paper, that the court is unable to say as a matter of law that his testimony must be excluded pre-trial, without the State having the opportunity to present its witness and have him explain his own qualifications, training and experience, in his own words, in a live trial setting.

---

[17] *Cf., e.g.,* VREv 408 (exclusion of settlement offers), or VREv 501-509 (exclusion of privileged evidence).

Dr. Shields will not, however, be permitted to offer any testimony as to RJRT's alleged "intent" in making any of the challenged statements about Eclipse,[18] or the "legal validity" of its health claims. Those discrete areas are, from Dr. Shield's perspective, beyond his medical/scientific expertise (no matter how broadly construed), entirely speculative, or would invade the ultimate fact-finding and decision-making province of the court itself. RJRT's motion *in limine* # 1 is **granted in part**, as to those specific items.

RJRT's motion *in limine* # 4, to exclude all evidence of certain IOM-LSRO Committee reports, and the State's motion *in limine* to prevent RJRT from presenting evidence on standards and methods used by the Vermont Department of Health and/or Agency of natural Resources in promulgating certain health standards or rules, each raise the same essential issue: whether the court should hear about other examples of how scientists deal with health risks generally, health effects of allegedly "toxic" chemicals that are taken into the body, and other health-related issues.[19] The IOM-LSRO Committee reports objected to by RJRT deal specifically with tobacco effects, and so cut closer to the bone in this case than the volatile organics and mercury contamination evidence objected to by the State, but the critical idea behind offering this evidence is effectively the same. The court will not allow, or take any of this evidence for the actual "truth" of any of the conclusions reached, or stated in any of these areas, but rather take this evidence solely for the limited purpose of, and to the extent it may assist the court in understanding the "scientific method" generally as it applies to evaluating health risks. RJRT's motion *in limine* # 4, to exclude all evidence of certain IOM-LSRO Committee reports, and parts 1 and 2 of the State's motion *in limine* (filed July 9, 2008), are **denied**, subject to the limitations stated above.

Along the same lines, however, part 3 of the State's motion *in limine* is well-taken. Legislative fact-finding, and statements made in statutory preambles purporting to set forth public policy in support thereof, are notoriously bereft, for the most part, of scientific rigor, and would not even arguably assist the court in understanding other examples of how the "scientific method" is used and applied. Alternatively, or in addition, the precise subject matter of this proffered evidence – data cited by the Legislature in enacting 20 V.S.A. § 2756 requiring reduced-ignition-propensity cigarettes, and the steps subsequently taken by the Vermont Department of Public Safety to implement that statute – is irrelevant, and immaterial here. All of that evidence concerns fire safety issues, not health-related or medical concerns

[18] Under the Vermont CFA, e.g., the intent of the statement's maker is irrelevant, and not a required element. *See, e.g., Jordan v. Nissan N.A., supra,* 2004 VT 27, ¶ 5, 176 Vt. at 468.

[19] To the extent each party argues that the other's evidence is cumulative or a waste of time, or is simply not contested (the court views that last assertion quite skeptically; everything of any real import in this case is vigorously disputed, at some level), these contentions effectively cancel each other out.

over the actual inhalation of tobacco smoke (or smoke-like substitutes). Part 3 of the State's motion *in limine* (filed July 9, 2008), is **granted**.

The evidence regarding the use of smoking machines to test the effects of tobacco smoke on human health, is perhaps the key issue in the case, as many (if not all) of RJRT's "health claims" regarding Eclipse appear to hinge wholly, or at least in part on the scientific conclusions drawn (or derivable) from such tests. The results of those machine tests, and the conclusions reached by RJRT's "panel of experts" from those results, apparently constitute the core of the "substantiation" on which RJRT relies. It is absolutely imperative that the court be able to reach some objective understanding of the smoking machine/cigarette testing issues. *But see* fn. 3, *supra.* Perhaps Dr. Shields will turn out not to have the necessary credentials and experience to elaborate on those issues, or perhaps his testimony, although permitted, will not be helpful, or persuasive. But clearly, the use of smoking machines is a contested issue,[20] and the court will take such admissible evidence as the parties are able to adduce on that topic. RJRT's motion *in limine* # 7 is **denied**.

With respect to RJRT's motion *in limine* to preclude evidence of "other wrongs" or allegedly "bad acts" previously committed by RJRT under VREv 404(b), those issues, and that evidence are irrelevant unless and until the court concludes that RJRT does face some liability, either under the Vermont CFA, or for violation of the MSA/Consent Decree. It would serve no useful purpose to decide the admissibility objections now advanced by RJRT before any such determination.

ENTRY ORDER

1. For the foregoing reasons, RJRT's motion for summary judgment (filed May 30, 2008) is **DENIED**.

2. RJRT's motions *in limine* (filed July 9, 2008) are **denied**, except that motion # 1 is **granted in part** as set forth above, and motion # 5 is deferred until further order, and additional proceedings (if any).

3. The State's motion *in limine* (filed July 9, 2008) is **denied** as to parts 1 and 2, but **granted** as to part 3.

---

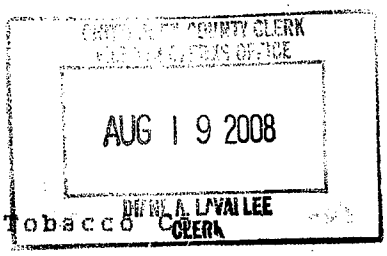
[20] *See* Federal Trade Commission, "Proposal to Rescind FTC Guidance Concerning the Current Cigarette Test Method," [Billing Code: 6750-01S]. RJRT points out that comments on this notice from, and proposal by the FTC were not due until August 12, 2008 (absent any extension), and advances many other arguments why the FTC action may not even be enacted, as proposed, or even so, would be irrelevant here. The court notes the FTC proposal only to the extent it certainly illustrates that testing cigarettes by machine, for human health consequences, is at the very least a legitimately disputed issue, and obviously material here.

4. All issues and claims regarding the scope of any remedies, or other relief which the State might request on any finding of liability, either under the Vermont CFA, or for violation of the MSA/Consent Decree, are hereby **severed**, and reserved for further proceedings, if any. VRCP 42(b). No evidence whose primary purpose, or relevancy pertains to such issues, shall be presented at the plenary trial to commence October 5, 2008, on liability issues only.

IT IS SO ORDERED, at Burlington, Vermont this **19th** day of August 2008.

Dennis R. Pearson, Presiding Judge

STATE OF VERMONT
CHITTENDEN SUPERIOR COURT



DOCKET NUMBER: S1087-05 CnC

State of Vermont VS R.J. Reynolds Tobacco Co.

ENTRY REGARDING MOTION

TITLE OF MOTION: Defendant's Motion for Admission of Amer S. Ahmed Pro Hac Vice

DATE MOTION FILED: 7/28/08

RESPONSE FILED:

Julie Brill, Esq.	7/31/08 State's Assent to Motion
Barney L. Brannen, Esq.	7/31/08 State's Assent to Motion
Robert Shaughnessy, Esq.	NONE
Richard Cooper, Esq.	NONE

X GRANTED COMPLIANCE BY _____

_____ DENIED

_____ SCHEDULED FOR HEARING ON: _____ AT _____; TIME ALLOTTED _____

_____ OTHER

Dennis R. Pearson 8/19/08

JUDGE ~~MATTHEW I. KATZ~~ DATE

Dennis R. Pearson

COPIES SENT TO:

Julie Brill, Esq.
Barney L. Brannen, Esq.
Robert B. Hemley, Esq.
Robert Shaughnessy, Esq.
Richard Cooper, Esq.
Grant G. Moy, Jr., Esq.
Rupal Shah Palanki, Esq.
Nathan C. Doty
William E. Latham, II, Esq.
Christopher A. Kreiner, Esq.
Amer Ahmed, Esq.