SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

JEVON GERALD, as lawful Successor of the ESTATE OF LUCIEN EVANS ENGLAND, SR., **Plaintiff,** **vs.** **R.J. REYNOLDS TOBACCO COMPANY, as successor by merger to LORILLARD TOBACCO COMPANY AND LORILLARD, INC.,** **Defendant.**	**CASE NO. ST-10-CV-631**
CHRISTIAN BROWN, as the Executor of the ESTATE OF PATRICE HALE BROWN, **Plaintiff,** **vs.** **R.J. REYNOLDS TOBACCO COMPANY, as successor by merger to LORILLARD TOBACCO COMPANY AND LORILLARD, INC.,** **Defendant.**	**CASE NO. ST-10-CV-692**

MEMORANDUM OPINION

Pending before the Court is Plaintiffs' June 6, 2016, Motion to Consolidate Cases for Trial. Because the relevant factors, on balance, favor consolidation, the Court will grant Plaintiffs' motion.

RELEVANT FACTS AND PROCEDURAL HISTORY

This tobacco liability litigation arises from Complaints filed by Lucien Evans England, Sr., and Patrice Hale Brown on November 10, 2010, and December 6, 2010, against Lorillard Tobacco

Company, Lorillard, Inc. (collectively "Lorillard"), and other Defendants.[1] The original Plaintiffs (collectively "Decedents") having died during the course of litigation,[2] their children now pursue their interests, namely, Jevon Gerald on behalf of Lucien Evans England, Sr. and Christian Brown on behalf of Patrice Hale Brown.[3] The interests of Lorillard are now represented by its successor by merger, Defendant R.J. Reynolds Tobacco Company ("Reynolds").[4]

This case was briefly removed to the United States District Court of the Virgin Islands, during which time Lorillard filed Answers to the Complaints in the federal court proceedings.[5] The cases were remanded to the Superior Court on September 19, 2011, and on August 7, 2014, the Court permitted pre-trial consolidation of both Plaintiffs' cases.

Plaintiffs have sought to amend their Complaints several times during the course of these proceedings.[6] The most recent amendments were made after the Court granted Plaintiffs leave to

[1] England filed a First Amended Complaint on December 6, 2010 (amended as of right within 21 days of service of the initial Complaint, which was filed on November 10, 2010), *Gerald v. R.J. Reynolds Tobacco Company ("Gerald")*, Case No. ST-10-CV-631.

[2] Pl. Gerald's November 9, 2015, Am. Compl. ¶ 8 (England died on November 30, 2012); Pl. Brown's November 9, 2015, Am. Compl. ¶ (Decedent Brown died on November 22, 2011).

[3] *See* January 24, 2013, Order (*Gerald*) (granting the motion of England's son and named executor, Jevon Gerald, to continue the litigation as England's personal representative); April 2, 2012, Order, *Brown v. R.J. Reynolds Tobacco ("Brown")*, Case No. ST-10-CV-692 (granting the motion of Brown's son to substitute parties as the lawful successor of Brown's Estate).

[4] *See* Pl. Gerald's November 9, 2015, Am. Compl.; Pl. Brown's November 9, 2015, Am. Compl.

[5] *See England v. Lorillard, Inc.*, Civil No. 2011-007, 3:11-cv-00007-CVG-RM (Def. Lorillard Tobacco Company's January 10, 2011, Answer, ¶ 240; Def. Lorillard, Inc. January 10, 2011, Answer, ¶ 240). While the matter was pending in the federal court, Plaintiff England sought leave to amend the Complaint on March 7, 2011, upon which the District Court did not rule.

[6] *See* Pl. Brown's November 10, 2010, Compl.; Pl. England's December 6, 2010, First Am. Compl.; February 23, 2012, Order (*Gerald*) (granting England leave to amend the Complaint); Pl. England's February 27, 2012, Am. Compl.; Pl. Gerald's February 6, 2013, Mot. for Leave to File Am. Compl. for Wrongful Death; April 22, 2013, Order (*Gerald*) (granting Gerald leave to file Amended Complaint). With respect to *Brown*, Plaintiff sought leave to amend the Complaint in a manner similar to the amendments in *Gerald*, but Plaintiff Brown's motions were never ruled upon by the Court and thus the proposed Amended Complaints never became the operative pleadings in this case. *See* Pl. Brown's June 7, 2012 & May 30, 2014, Mots. for Leave to Amend Compl. *Brown* was not assigned to undersigned until August 7, 2014, when *Brown* and *Gerald* were consolidated for pre-trial purposes.

amend by Order entered on November 16, 2015,[7] which remain the operative pleadings to date. On June 3, 2016, Reynolds moved to dismiss some of the counts alleged in the Amended Complaints, which the Court granted in part as to Plaintiffs' claim for negligent performance of a voluntary undertaking and dismissed Count II of the Amended Complaints with prejudice.[8] Following this ruling, Plaintiffs assert in the Amended Complaints individual counts for strict products liability (Count I), negligence (Count III), breach of implied warranty of merchantability (Count IV), fraudulent concealment and misrepresentation (Count V), civil conspiracy (Count VI), and wrongful death and/or survival (VII).[9] Reynolds has moved for summary judgment in both cases, which motions remain pending and will be decided by the Court subsequently.[10]

On June 6, 2016, Plaintiffs filed this Motion to Consolidate Cases for Trial. Reynolds filed a timely Opposition on July 22, 2016, to which Plaintiffs timely replied on August 9, 2016.[11] After reviewing these briefs, the Court entered an Order on January 13, 2017, directing the parties to meet and confer in order to assess and specifically identify the undisputed common issues of law and fact relevant to the jury trials of these cases and to submit a written report. The parties timely filed their joint report on consolidation issues on February 22, 2017,[12] where they asserted that "there are no legal or factual trial issues that the [p]arties jointly agree [are] … undisputedly

[7] *See* December 21, 2015, Mem. Op. & Order; April 26, 2016, Mem. Op. & Order.
[8] *See* July 5, 2017, Mem. Op. & Order.
[9] *See* Pl. Gerald's November 9, 2015, Second Amended Complaint for Wrongful Death and/or Survival Claims in *Gerald*, ("Pl. Gerald's November 9, 2015, Am. Compl."); Pl. Brown's November 9, 2015, Amended Wrongful Death and/or Survival Complaint in *Brown* ("Pl. Brown's November 9, 2015, Am. Compl.").
[10] *See* Def.'s December 5, 2016, Mots. for Summ. J.
[11] June 20, 2016, Order (extending Reynolds' deadline to respond to Plaintiffs' motion to July 22, 2016, and Plaintiffs deadline to reply to August 10, 2016).
[12] February 22, 2017, Order (extending the deadline within which the parties were to submit their joint report on consolidation issues by February 22, 2017).

'common' to [the] ... trials" in *Brown* and *Gerald*.[13] Finally, Plaintiffs aver that Reynolds has requested oral argument on their Motion to Consolidate Cases for Trial and filed an Opposition to Reynolds' request on June 19, 2017.

Jury selections in these actions are scheduled to commence on July 31, 2017.[14]

STANDARD

When considering motions to consolidate, the Superior Court applies V.I. R. Civ. P. 42(a),[15] which provides:

> If actions before the court involve a common question of law or fact, the court may:
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> (1) join for hearing or trial any or all matters at issue in the actions;
> (2) consolidate the actions; or
> (3) issue any other orders to avoid unnecessary cost or delay.
>
> ...

According to the Supreme Court of the Virgin Islands, "consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another."[16]

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[13] February 22, 2017, Joint Complaint with Court Order of January 10, 2017, to File a Written Report, p 2.
[14] June 1, 2016, Order.
[15] On April 3, 2017, the Supreme Court of the Virgin Islands adopted the Virgin Islands Rules of Civil Procedure which went into effect on March 31, 2017. *See In re: Adoption of the VI Rules of Civil Procedure*, Promulgation No. 2017-001, 2017 V.I. Supreme LEXIS 22 (V.I. Apr. 3, 2017). Prior to the adoption of the Virgin Islands Rules of Civil Procedure, the Superior Court looked to the standard governing motions to consolidate cases under Rule 42 of the Federal Rules of Civil Procedure. *Ayala v. Lockheed Martin Corp.*, 2017 V.I. LEXIS 39, *22 (V.I. Super. Ct. Mar. 3, 2017) ("Consolidation of cases in the Superior Court is governed by Federal Rule of Civil Procedure 42, as applied through Superior Court Rule 7, 'because there is no local rule, statute, or precedent from th[e Supreme] Court addressing the same subject matter'") (citing *Appleton v. Harrigan*, 61 V.I. 262, 271 n.10 (V.I. 2014)). Because V.I. R. CIV. P. 42 is identical to FED. R. CIV. P. 42, the prior standard governing the consolidation of cases, as well as relevant case law, remains applicable since "applying the newly promulgated Virgin Islands Rules of Civil Procedure would not be infeasible and would not work an injustice notwithstanding that the [new procedural] rules were promulgated while this case was pending." *C.f. Hawkins v. Greiner*, 2017 V.I. LEXIS 65, *3 n. 3 (V.I. Super. Ct. Apr. 27, 2017) (citing V.I. R. CIV. P. 1-1(c)(2)(A) and (B)).
[16] *Tremcorp Holdings, Inc. v. Harris*, 65 V.I. 364, 370-71 (V.I. 2016) (holding "separately-filed cases consolidated by the Superior Court do not lose their individual character" for purposes of appeal) (quoting *Johnson v. Manhattan Ry.*

The Court has broad discretion to grant or deny consolidation.[17] "When exercising this discretion, a court should weigh the benefits of judicial economy against the potential for new delays, expense, confusion or prejudice."[18] "A motion to consolidate may be denied if the common issue is not a principal one, if it will cause delay in one of the cases, or if it will lead to confusion or prejudice in the trial of a case."[19] Therefore, "[i]n determining whether to consolidate cases, the Court should balance the savings to the judicial system against the possible inconvenience, delay, or prejudice to the parties."[20] "Rule 42(a) does not require that the cases be identical, merely that there be a common question of law or fact."[21] However, "[w]hile the existence of common issues is a prerequisite for consolidation, their mere presence does not compel consolidation."[22]

ANALYSIS

Plaintiffs move for consolidation of the cases for trial "due to a multiplicity of common questions of law and fact" in that the defendant is the same in both cases, the parties are represented by the same counsel, the causes of action are identical, the cigarette brand at issue in both cases is Newport, both Plaintiffs will submit substantially similar evidence to prove defendant's wrongful conduct, and nine of Plaintiffs' ten expert witnesses are expected to testify in the trial of both

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Co., 289 U.S. 479, 496-97, 53 S. Ct. 721, 77 L. Ed. 1331 (1933)); *Accord Ayala*, 2017 V.I. LEXIS 39, at *16 (citing *Tremcorp*, 65 V.I. at 370-71); *but see Tremcorp*, 65 V.I. at 369 (noting that a minority of courts view consolidation as cases having lost 'their separate identity and become a single action'") (citations omitted).

[17] 9A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE — CIVIL § 2382, 26 (3d ed. 2008); *See also Stewart v. Whitecap Inv. Corp.*, 2013 U.S. Dist. LEXIS 48025, at *5 (D.V.I. Apr. 3, 2013) (citations omitted) (citing *Borough of Olyphant v. PPL Corp.*, 153 Fed. Appx. 80, 82 (3d Cir. 2005)).

[18] *Fahie v. Ferguson*, 2017 V.I. LEXIS 33, *3 (V.I. Super. Ct. Feb. 23, 2017) (citing *Liberty Lincoln Mercury v. Ford Mktg. Corp.*, 149 F.R.D. 65, 80 (D.N.J. 1993)).

[19] *Id.* (citing *Liberty Lincoln Mercury*, 149 F.R.D. at 80); *See Stewart*, 2013 U.S. Dist. LEXIS 48025, at *5-6 (discussing the factors that weigh in favor and against consolidation) (citing *Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186, 193 (4th Cir. 1982)) (other citations omitted).

[20] *Fahie*, 2017 V.I. LEXIS 33, at *3-4 (citing *Arnold*, 681 F.2d at 193).

[21] *Id.* at *4 (citing *Saudi Basic Industries Corp. v. Exxonmobil Corp.*, 194 F.Supp.2d 378, 416 (D.N.J. 2002)).

[22] *Stewart*, 2013 U.S. Dist. LEXIS 48025, at *5 (citations omitted).

cases.[23] In opposition, Reynolds argues that consolidation for trial is inappropriate because there is a "substantial likelihood of juror confusion and prejudice" since individual issues predominate over any common question of law or fact.[24] Specifically, Reynolds contends that "plaintiff-specific issues" regarding, *inter alia*, each Plaintiff's unique factual history, medical causation, and damages, preclude consolidation of these cases for trial.[25]

At the outset, the Court must address Reynolds' request for oral argument on Plaintiffs' motion. In response to a request for oral argument, "the court may set the motion for hearing or decide it based upon the submission(s)."[26] Considering the Court is satisfied that that the briefs submitted by the parties adequately address the parties' positions and the legal issues involved in this motion, the Court declines to entertain oral argument on Plaintiffs' motion.[27]

As to the merits of Plaintiffs' motion, the Court first finds that the *Brown* and *England* cases are eligible for consolidation because both cases clearly involve common issues of law and fact since they substantially relate to the same subject matter. In terms of the Amended Complaints, some overlapping questions of law and fact include, *inter alia*, that Plaintiffs seek the same relief, namely damages for injuries sustained by Decedents as a result of their consumption of Lorillard's product, Newport cigarettes; Plaintiffs allege that Decedents began smoking during the same period, the early 1960s, and "became addicted to them when they were children"; and Plaintiffs

[23] Pls.' Mot. to Consolidate, pp. 1, 3-5.
[24] Def.'s Opp'n to Pls.' Mot. to Consolidate, p. 4.
[25] *See generally* Def.'s Opp'n to Pls.' Mot. to Consolidate.
[26] V.I. R. CIV. P. 6-1(g). Prior to the adoption of the Virgin Islands Rules of Civil Procedure, requests for oral argument were governed by Super. Ct. R. 36(a), which provided that "[o]ral argument may be requested by the movant on any motion[.]" *People of the V.I. v. Armstrong*, 64 V.I. 528, 538 n.7 (V.I. 2016) (citing SUPER. CT. R. 36(a)). The Court will apply V.I. R. CIV. P. 6-1(g) since the substance of the rules have not changed and therefore applying the new rule would not be infeasible or work an injustice. V.I. R. CIV. P. 1-1(c)(2)(B).
[27] There is no requirement that the Court entertain oral argument. *See Armstrong*, 64 V.I. at 538 n.7 (noting the distinction between an evidentiary hearing to resolve factual disputes and oral argument).

assert the same wrongful conduct by Lorillard in manufacturing, distributing, and selling Newport cigarettes to Decedents; and Plaintiffs advance the same theories of liability against Lorillard under the same Virgin Islands law.[28] As a result of these common issues, much of the expert testimony and documentary evidence submitted by Plaintiffs will be relevant in both cases. For example, expert testimony and evidence will overlap with respect to Plaintiffs' strict liability claims on the issue of Newport's purported design defect, which involves questions concerning the foreseeable risks of harm posed by Newport cigarettes, whether the risk of harm could have been could have been reduced or avoided by the adoption of a reasonable alternative design, and whether the omission of the alternative design rendered the product not reasonably safe,[29] while Plaintiffs' claims for breach of the implied warranty of merchantability involve common issues regarding whether Newport cigarettes were merchantable and fit for the ordinary purposes for which they were intended.[30]

Reynolds argues that "consolidation will create no efficiency for the Court of the parties" because each Decedent's "smoking history, awareness of the health risks of smoking, and quit attempts, as well as the course and cause of their respective diseases[,] will be the subject of both fact and expert testimony[.]"[31] The Court recognizes that testimony and evidence will be presented by the parties with respect to these individual issues, particularly those relevant to each Decedent's unique background and medical history, which the jury will have to separately consider when

[28] Pls.' Mot. to Consolidate, p. 4; *Compare* Pl. Gerald's November 9, 2015, Am. Compl. *with* Pl. Brown's November 9, 2015, Am. Compl.
[29] *See Davis v. Hovensa, LLC*, 63 V.I. 475, 489 (Super. Ct. 2015) (conducting the requisite analysis mandated in *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011) and adopting the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) as the soundest rule for the Virgin Islands for design defect cases).
[30] *See* 11A V.I.C. § 2-314.
[31] Def.'s Opp'n to Pls.' Mot. to Consolidate, p. 1.

applying the applicable Virgin Islands law to each case. However, this does not negate the fact that trying the overlapping issues in one proceeding will save the Court time, effort, and resources. Likewise, Plaintiffs have indicated that consolidation would be very beneficial to them in that the Plaintiffs are able to share the cost and burden associated with securing the presence of their common expert witnesses and presenting the overlapping evidence at a single trial.[32] Further, Plaintiffs assert, and the Court agrees, that "the Court and the parties will be spared an estimated two weeks of extra time in trial" if the cases are consolidated.[33] While Reynolds argues "consolidation will create no efficiency for the Court or the parties" and any promotion of judicial economy will be negligible,[34] the considerable amount of overlapping evidence in these cases suggests otherwise.

Notwithstanding, because "[t]he benefits of efficiency can never be purchased at the cost of fairness[,]"[35] the Court must balance the convenience to Plaintiffs and the Court and the judicial economy gained from consolidation against the risk of an unfair outcome that may result from jury confusion and prejudice to Reynolds. Reynolds contends that the "individual, Plaintiff-specific issues makes [sic] juror confusion and resulting prejudice to Reynolds a virtual certainty" because "the jury would be exposed to evidence relevant to one matter that might prejudice Reynolds in the other matter ... [and] presented with considerably more information, likely leading to

[32] *See* Pls.' Mot. to Consolidate, p. 12; Pls.' Reply, pp. 2, 7.
[33] Pls.' Mot. to Consolidate, p. 12.
[34] Def.'s Opp'n to Pls.' Mot. to Consolidate, pp. 1-2. Reynolds attempts to discredit the benefits of consolidation by arguing if "the appellate court determines that consolidation was erroneous, each case will have to start over again with individual trails—a tremendous waste of judicial resources." Def.'s Opp'n to Pls.' Mot. to Consolidate, p. 17. The Court will not abide Reynolds' threat of appeal. The Court's ruling will be based on the balancing of factors that weigh in favor and against consolidation in these proceedings. Denial of Plaintiffs' motion based on Reynolds' threat of appeal is not justified and would vitiate the Court's broad power to grant or deny consolidation, as well as the applicable standard of review that ensures procedural uniformity and fairness in proceedings before this Court.
[35] *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993).

confusion in deciding Plaintiff-specific issues."[36] Plaintiffs counter that "[t]here is no reason that the jury cannot be properly instructed where evidence pertains only to one of the cases[,]" such as through limiting instructions issued by the Court, but Reynolds objects, arguing such precautions are "often ineffective in preventing jury confusion and prejudice."[37]

In arguing consolidation is improper where the individual issues predominate, Reynolds repeatedly cites *Hasman v. G.D. Searle & Co.*,[38] where the court denied plaintiffs' motion to consolidate three cases involving injuries sustained from intrauterine devices.[39] In denying the motion, the court in *Hasman* reasoned that "[a]lthough each plaintiff may suffer from [pelvic inflammatory disease] possibly as a result of the use of defendant's product, the nature and extent of the injuries differs significantly … [because t]he three cases involve separate and unique medical, social, and sexual histories peculiar to each woman and her sexual partners. … [as well as] different warnings, different warranties and perhaps defects, and different inserting physicians."[40] However, other courts have distinguished *Hasman* and found consolidation proper where "the issue turns on a [single] product and its effect and does not involve a third party such as a sexual partner" and common questions of law are posed regarding the defendant's "duty and the reasonableness of its warnings."[41] Here, the latter scenario is more akin to the circumstances in *Brown* and *Gerald*, which do not involve third parties, but instead concern the same product and

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[36] Def.'s Opp'n to Pls.' Mot. to Consolidate, pp. 17-18.
[37] Pls.' Mot. to Consolidate, p. 7; Def.'s Opp'n to Pls.' Mot. to Consolidate, p. 18.
[38] 106 F.R.D. 459, 460-61 (E.D. Mich. 1985).
[39] *Id.* at 460-61.
[40] *Id.*
[41] *Lewis v. Intermedics Intraocular*, 1998 U.S. Dist. LEXIS 4138, at *6 (E.D. La. Mar. 24, 1998) (citing *Kershaw v. Sterling Drug, Inc.*, 415 F.2d 1009 (5th Cir. 1969)).

its effect on Decedents as a result of the same purportedly wrongful conduct by Lorillard, whose liability depends on an application of the same Virgin Islands law.

With respect to Reynolds' concern regarding the jury's exposure to evidence relevant to one case, but prejudicial to Reynolds in the other, Reynolds points to Plaintiff Gerald's allegation that England "began smoking at the age of nine because Lorillard placed free samples of cigarettes on the door knobs of apartments, [which] has no relevance to the *Brown* case" since Plaintiff Brown does not allege sampling by Lorillard and Decedent Brown "did not start smoking until she was sixteen."[42] Admittedly, these facts are unique to each case, but this difference is not particularly complex or confusing. Ultimately, Reynolds' concern relates to the jury's ability to distinguish between the Decedents' factual backgrounds. However, the potentially prejudicial effect can be ameliorated by a well-administered consolidation in that:

> [A] ... court can greatly assist a jury in comprehending complex evidence through the use of intelligent management devices. Such management devices include organizing evidence by topic, using charts and visual aids, allowing note-taking by jurors, furnishing the jury with notebooks and albums of pertinent exhibits structured in a manner to help it master complex materials, interim explanations by the judge on issues of law and fact and on the limited use of evidence, interim addresses to the jury by counsel, and questionnaires and special verdict forms to help the jury approach deliberations in a well-organized fashion.[43]

Likewise, these devices will diminish the likelihood of jury confusion "in deciding Plaintiff-specific issues" that could result from the presentation of large quantities of information.

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[42] Def.'s Opp'n to Pls.' Mot. to Consolidate, p. 18.
[43] *Consorti v. Armstrong World Indus.*, 72 F.3d 1003, 1006 (2d Cir. 1995), *vacated on other grounds*, 518 U.S. 1031, 116 S. Ct. 2576 (1996) (internal citations omitted); *See e.g.*, *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990) ("When considering consolidation, a court should also note that the risks of prejudice and confusion may be reduced by the use of cautionary instructions to the jury and verdict sheets outlining the claims of each plaintiff") (citations omitted); *Todd-Stenberg v. Dalkon Shield Claimants Tr.*, 48 Cal. App. 4th 976, 980-81, 56 Cal. Rptr. 2d 16, 18 (Cal. Ct. App. 1996).

On this note, Reynolds further opines that "[t]he potential for jury confusion and prejudice is especially great in tobacco cases" because "it would be unrealistic to expect … [the jury] to separate the appropriate evidence for each Plaintiff and exclude from their deliberations any evidence applicable solely to one Plaintiff, despite any instructions from the Court to do so."[44] Reynolds' argument rests on the conclusion of the United States District Court for the Western District of Wisconsin in *Insolia v. Philip Morris, Inc.*[45] that "[i]t is unlikely that a jury could keep track of which plaintiff smoked which brand and for low long while also retaining a coherent grasp of the minutiae associated with addiction, medical causation and legal causation."[46] However, as Plaintiffs point out, Reynolds' reliance on *Insolia* is misplaced.[47] First, *Insolia* did not involve consolidation under Rule 42(a), but rather the permissive joinder of three plaintiffs in one action under Fed. R. Civ. P. 20.[48] Unlike permissive joinder under Fed. R. Civ. P. 20, which requires that each plaintiff's or defendant's right to relief "arise out of the same transaction, occurrence or series of transactions," "the existence of a common question by itself is enough to permit consolidation under Rule 42(a), even if the claims arise out of independent transactions."[49] The court in *Insolia* only severed plaintiffs' claims into three separate actions after concluding that "plaintiffs' claims do not arise from the same transaction or series of transactions, as they must in order to satisfy Rule 20."[50] Second, *Insolia* involved claims against "five tobacco companies who … manufactured

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[44] Def.'s Opp'n to Pls.' Mot. to Consolidate, p. 19.
[45] 186 F.R.D. 547 (W.D. Wis. 1999).
[46] *Id.* at 551.
[47] Pls. Reply, p. 5.
[48] *Insolia*, 186 F.R.D. at 549, 548-551 (citations omitted);
[49] WRIGHT & MILLER, *supra* n. 17 § 2382, 16; *Compare* FED. R. CIV. P. 20 *with* FED. R. CIV. P. 42(a).
[50] *Insolia*, 186 F.R.D. at 550.

hundreds of brands of cigarettes."[51] Because "[p]laintiffs began smoking at different ages; ... bought different brands throughout their years as smokers; and ... quit for different reasons and under different circumstances[,]" the court found "the only thread holding these disparate factual scenarios together is the allegation of an industry-wide conspiracy."[52]

The circumstances at issue in *Insolia* are markedly different than those involved here, where Plaintiffs' claims pertain to only one brand of cigarettes, Newport, and are asserted against only one cigarette manufacturer, Lorillard. The Court recognizes that Decedents quit smoking at different times and that Reynolds contends Decedent Brown switched to a different brand of cigarette in 1976.[53] But, these differences must be considered in light of the simplicity that follows from the claims involving only one product and one defendant, thus making the jury's task of tracking and retaining information regarding the individual issues more manageable.

With respect to the risk of unfairness that stems from the jury determining the issue of compensatory damages based on cumulative facts presented at trial as opposed to considering the individual issues as they pertain to each case, the Court again finds that this problem can be avoided through the implementation of precautions, as described above. As the United States Court of Appeals for the Second Circuit has noted:

> When cases are properly chosen for consolidation and well administered, ... increases in efficiency also *improve* the quality of the justice rendered. ... One of the most persistent and troublesome problems in the administration of justice in our civil jury system is the unpredictable relationship between different juries' awards, particularly for intangibles such as pain and suffering. It of course should be the goal of the overall administration of such litigation that more seriously injured plaintiffs receive higher compensation than those less seriously injured. However,

[51] *Id.* at 550-51.
[52] *Id.*
[53] Pl. Brown's November 9, 2015, Am. Compl. ¶ 33; Def.'s Opp'n to Pls.' Mot. to Consolidate, p. 10 & Ex. D (excerpts from the transcript of the videotaped deposition of Patrice Hale Brown taken on July 20, 2011).

> when each case is tried before a different jury, the relationship between the size of one judgment for intangibles and another will be largely happenstance. ... When numerous claims are tried before a single jury, that jury will recognize that an important part of its chore is to scale the relative seriousness of the various plaintiffs' injuries and to see to it that their respective awards are consistent with that scaling.[54]

As Reynolds points out, additional risks are posed by the jury's determination of punitive damages in consolidated cases.[55] In contrast to compensatory damages, which "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct[,] … punitive damages serve a broader function [in that] … they are aimed at deterrence and retribution."[56] Because punitive damages awards implicate the Due Process Clause of the Fourteenth Amendment's[57] prohibition against "the imposition of grossly excessive or arbitrary punishments on a tortfeasor[,]" the Court must take proper precautions to ensure constitutional validity of punitive damages awards.[58] These constitutional limitations, include, *inter alia*, that the jury render the punitive damages award in terms of the "harm , or potential harm, to the plaintiff" and forbid the use of punitive damages awards "to punish a defendant for

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[54] *Consorti*, F.3d at 1007 (internal citations omitted).
[55] Def.'s Opp'n to Pls.' Mot. to Consolidate, p. 20.
[56] *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S. Ct. 1513, 1519 (2003) (internal and other citations omitted).
[57] *Francis v. People of the V.I.*, 57 V.I. 201, 215 n. 9 (V.I. 2012) ("[T]he Due Process Clause of the Fourteenth Amendment [is] applicable to the Virgin Islands pursuant to section 3 of the Revised Organic Act") (citing The Revised Organic Act of 1954, § 3, 48 U.S.C. § 1561, *reprinted in* V.I. Code Ann., Historical Documents, Organic Acts, and U.S. Constitution at 86 (1995) (preceding V.I. Code Ann. tit. 1)).
[58] *State Farm*, 538 U.S. at 416-19; *See Antilles Sch., Inc. v. Lembach*, 64 V.I. 400, 437-38 (V.I. 2016) ("[A] jury's verdict [may] … be altered by a judge only if it is not supported by sufficient evidence in the record, or if a reduction is compelled under the United States Constitution") (citing *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432, 114 S. Ct. 2331, 129 L. Ed. 2d 336 (1994) (holding state courts must establish a procedural mechanism to challenge a jury verdict as unconstitutionally excessive)). The United States Supreme Court has "instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm*, 538 U.S. at 418 (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996)).

injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation."[59] The United States Supreme Court has indicated that the constitutional limitations inherent in punitive damages awards are safeguarded through proper jury instructions that assure "the jury will ask the right question, not the wrong one."[60] The Court fails to see how proper guidance and instructions to the jury regarding the individuality of punitive damages awards in *Gerald* and *Brown* will be any less effective in ensuring that Reynolds' due process rights are protected.

In light of the foregoing, the Court finds that the risk of jury confusion and resulting prejudice to Reynolds can be adequately minimized by the use of management devices and precautions such that the potential disadvantages of a consolidated trial will not vitiate Reynolds' right to a fair trial or compromise the fairness of these proceedings.

[59] *Philip Morris USA v. Williams*, 549 U.S. 346, 353, 127 S. Ct. 1057, 1063 (2007) (internal and other citations omitted); *but see id.* at 355 ("Evidence of actual harm to nonparties" can be used to demonstrate the reprehensibility of the defendant's conduct, but "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties").
[60] *Id.*

CONCLUSION

Considering the analysis above, the Court concludes that the disadvantages to Reynolds in consolidating *Gerald* and *Brown* for trial do not outweigh the advantages because proper precautions will diminish the risk of jury confusion and resulting prejudice to Reynolds. On balance, the factors of convenience, judicial economy, and a lack of delay in either case weigh strongly in favor of consolidation. Consequently, the Court will grant Plaintiffs' Motion to Consolidate Cases for Trial.

An Order consistent with this Memorandum Opinion shall follow.

Dated: July 10, 2017

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Estrella George
Clerk of Court

by:
Lori Boynes-Tyson
Court Clerk Supervisor 7/10/17