IN THE 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., Defendants.	**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., Defendants.	**CASE NO.** ST-10-CV-692

MEMORANDUM OPINION AND ORDER

Pending before the Court are several defense motions to prohibit or limit the testimony of various expert witnesses identified by Plaintiffs. The Court will address each in turn.[1]

STANDARD

In *Antilles School, Inc., v. Lembach*,[2] the Virgin Islands Supreme Court held that the standard expressed in *Daubert v. Merrill Dow Pharms., Inc.*,[3] governs the admission of expert

[1] In preliminarily ruling on the topics raised in the motions before it, the Court does not offer an opinion regarding the appropriateness of any particular question or the admissibility of any particular piece of evidence at trial other than as specifically indicated herein.

[2] 64 V.I. 400 (V.I. 2016).

[3] 509 U.S. 579 (1993).

testimony in the Virgin Islands. That standard has most recently been embodied in Virgin Islands the Rule of Evidence 702, which provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

To be admissible, expert testimony must satisfy three major requirements: (1) the expert must be qualified, (2) the expert's opinion must be derived from a reliable process or technique, and (3) the testimony must assist the trier of fact, that is, it must "fit" the facts of the case.[4] *Daubert* requires the Court to act as a "gatekeeper" to determine whether the theory underlying an expert's testimony is reliable.[5]

The United States Supreme Court has described the *Daubert* test as "flexible",[6] and the Virgin Islands Supreme Court has characterized the *Daubert* standard as a "liberal one", construing Rule 702 broadly in favor of the admission of expert testimony.[7] Similarly, V.I. R. Evid. 401 and 402 reflect a preference for the admission of relevant evidence subject only to limited exceptions. The Court's gatekeeping function is not intended to serve as a replacement for the adversary system,[8] and *Daubert* noted that, "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking" admissible evidence that may be of questionable weight.[9]

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[4] *In re: Catalyst Litigation*, 55 V.I. 30 (V.I.Super. 2010).
[5] *Daubert*, 509 U.S. at 597.
[6] *Kumho Tire Co., Ltd., v. Carmichael*, 526 U.S. 137, 141-42 (1999).
[7] *See V.I. Waste Mgmt. Auth. v. Bovoni Investments, LLC, et al.*, 61 V.I. 355, at n. 14 (V.I. 2014).
[8] Fed. R. Evid. 702, Advisory Committee Notes.
[9] *Daubert*, 509 U.S. at 595.

The burden is on the proponent of the expert's testimony to establish the admissibility requirements have been met by a preponderance of the evidence,[10] and the decision on whether to admit or exclude expert testimony lies within the discretion of the Court.[11] While the Supreme Court has expressed a preference for evidentiary hearings on *Daubert* issues, the determination of whether to conduct a hearing also lies within the discretion of the Court, and a hearing is required only if the Court decides that limitation or exclusion of the expert testimony is appropriate.[12]

Adam M. Shapiro

R. J. Reynolds Tobacco Company seeks to prohibit Dr. Adam M. Shapiro from testifying that Patrice Hale Brown had lung cancer caused by cigarettes, asserting that Shapiro is not qualified to render the opinion and that his opinion will not assist the jury because it is not supported by reliable methodology.

Defendant claims that in order to offer an opinion on causation, Shapiro must be an expert in "lung cancer causation," claiming that Shapiro has admitted a lack of that expertise and is not a pulmonologist, oncologist, radiologist, or pathologist. Defendant argues that generalized medical experience is not in and of itself a reliable methodology, and that Shapiro treated Brown on only two occasions over a two-month period, after which he referred Brown to a specialist in cardiothoracic surgery for treatment. Reynolds points out that Shapiro did not diagnose Brown's lung cancer, that his records do not suggest the cause of Brown's disease, and that Shapiro's opinion is based solely upon (1) his assumption that most people with small cell carcinoma have a history of smoking, and (2) his failure to observe in his 30 years of practice a case of small cell carcinoma in anyone who did not have a history of smoking.

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[10] *Daubert*, 509 U.S. at 593, n. 10.
[11] *People of the Virgin Islands v. Donastorg*, 54 V.I. 22 (V.I. Super. 2010).
[12] *Samuel v. United Corp.*, 64 V.I. 512, 526 (V.I. 2016).

Brown submits that Shapiro's qualifications as a duly licensed physician make him competent to render an opinion that Brown's lung cancer was caused by smoking, "subject to cross-examination and conflicting evidence." Plaintiff argues that Shapiro's is well qualified, utilized appropriate and accepted methodology, and rendered an opinion that will assist the trier of fact, asserting that Reynolds' interpretation of the qualification requirement is overly rigid and defies logic.

Shapiro, one of Brown's treating physicians, is licensed in 5 States, the District of Columbia, and the Virgin Islands and is a head and neck oncologic surgeon specializing in otolaryngology, facial plastic and reconstructive surgery, and sleep medicine. He is a Diplomate of the National Board of Medical Examiners and the American Board of Otolaryngology, is board certified in sleep medicine, has been certified as an Aviation Medical Examiner and a Senior Aviation Medical Examiner by the Federal Aviation Administration, and is a commercial pilot. After majoring in biochemistry at Cornell, he graduated from medical school at George Washington University in 1986, completed a general surgery internship and a residency in Otolaryngology at Albany (New York) Medical Center Hospital, and studied under a Facial Plastic and Reconstructive Surgery Fellowship at Shadyside Hospital in Pittsburgh. Between 1986 and 2002, he held teaching positions at Albany Medical College, the University of Miami, Georgetown University, George Washington University Medical Center, Fairfax (Virginia) Hospital, and Mount Vernon Hospital in Alexandria, Virginia, and was a faculty member or lecturer at several other seminars or courses. He has had numerous hospital staff appointments, extensive laboratory experience, including as the director of a CLIA certified laboratory, and several research awards and grants. His is the author of numerous publications and has made several video presentations.

In determining Shapiro's qualifications, the Court finds especially significant Shapiro's certification as a Diplomate with the National Board of Medical Examiners and his certifications

as an Aviation Medical Examiner and a Senior Aviation Medical Examiner by the Federal Aviation Administration, all of which would require extensive specialized knowledge, skill, and training in the diagnosis of medical conditions and disease. Moreover, as an ear, nose, and throat specialist, Shapiro has clearly received relevant training in the diagnosis and treatment of diseases of the respiratory system, of which the nose and throat are a part. At his deposition Shapiro testified that he has seen approximately 50 confirmed cases of small cell lung carcinoma and has treated about a thousand laryngeal cancer patients. Consequently, it does not appear that Shapiro's opinion is outside the area of his expertise. The Court finds that Shapiro has extensive scientific, technical, and specialized medical training and knowledge such that he is qualified to render an opinion, to a reasonable degree of medical certainty, on the likely cause of his patient's lung cancer and that the opinion will help the trier of fact to understand the evidence and determine a fact at issue.

Plaintiff points out that, while ruling out other causes, Shapiro used the method of differential diagnosis, which the Superior Court has accepted as an acceptable basis for expert opinion,[13] in reaching his conclusion that Brown's almost 40-year smoking history was the most likely cause of her lung cancer. Although the Court is not tasked with weighing the evidence, nor does it do so here, at a minimum Shapiro's conclusion does not strain credulity. While Reynolds argues that a treating physician is not thereby competent to testify regarding medical causation, an assertion with which the Court agrees, the Court need not reach that issue because that is the not the sole basis for Shapiro's opinion. Nonetheless, it appears to the Court that a treating physician's determination of the cause of the diseases of those under his care is the *sin qua non* of the doctor-patient relationship.

[13] *Catalyst Litigation*, 55 V.I. at 43.

While an explicit diagnosis of the cause of Brown's cancer may not be found in Shapiro's records, his referral of Brown to a specialist for surgery and the ultimate confirmation of the cancer diagnosis is significant circumstantial evidence that the course of treatment Shapiro undertook was appropriate and based on adequate data. Additionally, Shapiro's experience as the Director of a CLIA certified laboratory suggests that Shapiro has received sound training in appropriate scientific methodology and that Shapiro's disgnosis was informed by the methodology on which he was trained in rendering his opinion. The Court concludes that the specific components of a differential diagnosis, the duration of Shapiro's treatment of Brown, and the alleged lack of support in Shapiro's records for Shapiro's diagnosis may form a solid basis for cross-examination, but all go to the weight and not the admissibility of the opinion.

Finally, because medical causation is a core issue in this case, Shapiro's opinion as Brown's treating physician will be of assistance to the jury as trier of fact. For these reasons, Reynolds' motion to prohibit the testimony of Dr. Shapiro is denied.

Anthony Biglan

Reynolds moves to preclude Dr. Anthony Biglan from offering opinions that the marketing or advertising of Newport cigarettes influenced Lucien England and Patrice Brown to start or continue smoking or that the marketing of that product had an influence upon their smoking behavior. Defendant claims that Biglan is not qualified to render the opinions and that his opinions are not supported by reliable methodology, such that the opinions do not assist the trier of fact. Defendant's chief complaints with Biglan's testimony are that he is not a marketing expert and did not conduct independent company document research but instead relied upon the research and opinions of others in reaching his conclusions. Reynolds also claims Biglan did not employ a reliable methodology, and seizes upon a statement in Biglan's deposition that there is no "method

[he] could employ or that is generally accepted...to determine whether cigarette marketing has influence a specific individual" to conclude that Biglan's own testimony requires his exclusion.

Plaintiffs counter that Biglan is "eminently qualified", noting Biglan's extensive research in child and adolescent behavior focusing on the prevention of tobacco use and other high-risk behaviors. Plaintiffs indicate Biglan will testify regarding "the factors that influence young people to begin and continue smoking and discuss the specific ways in which the marketing of Newport cigarettes influenced Lucien England and Patrice Hale Brown to become addicted to Newport and to continue smoking them." Discussing Biglan's methodology, Plaintiffs posit that Biglan's report is "based on verifiable facts derived from research of primary and secondary source in formation, including Defendant's own internal, company documents". Indicating that the report contains over 50 citations to industry documents and other materials and includes over 70 references to scholarly articles, journals, and government reports, some of which are his own peer-reviewed work, Plaintiffs dispute Reynolds' contention that Biglan is merely parroting the work of Dr. K. Michael Cummings.

Biglan's initial report reveals that, after obtaining a Ph.D. in social and organizational psychology from the University of Illinois and undergoing post-doctorate training in clinical psychology at the University of Washington, as well as an internship in clinical psychology at the University of Wisconsin, Biglan has spent the past 33 years conducting research on child and adolescent behavior with a focus on the prevention of tobacco use and related your problem behaviors. Having published over 150 papers and a book, and contributing to another, in his field, Biglan served on the Behavioral Change Expert Panel advising the Office of Drug Control Policy and has received 19 research grants from the National Institutes of Health, nine of which related, at least in part, on tobacco use and prevention.

The Court is not persuaded that Biglan must be an expert in the field of marketing, have a marketing degree, publish peer-reviewed research on marketing, or serve as a reviewer for a scholarly journal devoted to marketing, as Reynolds contends, to present the opinions contained in his reports. The Court finds Biglan's training, including advanced degrees in social and organizational psychology, and 33 years of experience significant because his opinions ultimately relate not to marketing itself, but to the psychological impact of that marketing on young persons, the field upon which his research has focused throughout his career.

In a footnote to its Reply, Reynolds reveals that Biglan has previously been recognized as an expert in *psychological and preventative science*. The Court finds that the opinions contained in Biglan's reports - the factors that influenced England, Brown, and other young people to begin and continue smoking and subsequently become addicted - are consistent with that qualification. The fact that those opinions are based in part on studies and verified industry documents reflecting the marketing practices of Defendant does not alter Biglan's qualifications to offer opinions regarding the effect of those marketing practices.

As to Biglan's asserted lack of a coherent methodology, Defendant posits that Biglan did not conduct independent company document research but relied upon minimal testimony of England and Brown, the research and opinions of others "cherry-picked" by Plaintiffs' counsel, and the research of Dr. Cummings in reaching his conclusions. Information gleaned from the sworn testimony of the decedents is obviously an important resource in forming opinions specifically related to their smoking habits and exposure to the Defendant's marketing. Review of industry literature is a well-recognized method that has long been accepted in the courts of the Virgin Islands, for example, when admitting "state of the art" testimony in toxic tort cases. The fact that Biglan may not have conducted a comprehensive review of each and every document and study related to the tobacco industry is of no moment when he is not discussing the "state of

marketing", but is relying on the research of others in that field to draw conclusions regarding the psychological impact of that marketing on young people, the field on which his life's work has focused. And, Defendants have failed to detail how Biglan's reliance on the work of Dr. Cummings is somehow inappropriate or objectionable. Reynolds is free to raise whatever inadequacies in Biglan's qualifications and methodology it perceives on cross-examination, but those matters go to weight, not admissibility. The motion to prohibit Dr. Biglan's testimony is denied.

Samuel Lee Hughes

Reynolds moves to prevent Dr. Samuel Lee Hughes from providing testimony regarding England's addiction to nicotine and smoking as the cause of England's cancers. Defendant argues that Hughes became involved in England's treatment after England's laryngeal cancer had been cured, seven years after England had quit smoking and was already being treated for his bladder cancer. As with Plaintiff's other expert witness, Defendant attacks both Hughes' qualifications and methodology.

Defendant describes Hughes a doctor who treats patients after they have been diagnosed. With regard to Hughes' opinion that England was addicted to cigarettes, Reynolds asserts that Hughes' only experience with addiction was as a resident in a drug rehabilitation facility and that Hughes is not a rehabilitation expert, is not a board certified psychologist, and bases his opinion solely on England's long history of smoking. Defendant grounds its inadequate methodology argument on Hughes' asserted failure to consider risk factors such as alcohol use, human papilloma virus, poor oral hygiene, and exposure to carcinogenic chemicals. Defendant draws parallels between Hughes' opinion and that of Dr. Robert Ingham in *Etienne v. United Corp*,[14]

[14] 44 V.I. 113, 120-21 (Terr. 2001).

asserting that, because Hughes is not a specialist in addiction, he cannot opine that England was addicted to cigarettes. And, calling Hughes' reasoning "circular", Reynolds claims Hughes' opinion lacks a scientific methodology and fails to analyze England's smoking history.

Turning to Hughes' testimony that cigarette smoking caused England's cancers, Reynolds points to Hughes' lack of training in otolaryngology, urology, pathology, or oncology and lack of research in cancer causation. Describing an illustrative example employed by Hughes as Hughes' methodology, and noting Hughes' inability at his deposition to cite literature supporting his opinion, Reynolds again refers to Hughes' failure to rule out other contributing factors in positing that Hughes' opinion does not qualify as an admissible differential diagnosis.

Plaintiffs counter that Hughes, the Director of the Charlotte Kimelman Cancer Institute, is "the foremost doctor regarding cancer in the Virgin Islands", is widely experienced in the diagnosis and treatment of cancers, including laryngeal and bladder cancer, and is part of a team of physicians who jointly diagnose cancer and provide treatment. Plaintiff characterizes Reynolds' argument as fatally flawed, asserting that the mere fact that there may be many theoretically possible causes of a particular cancer does not mean that one performing a differential diagnosis must rule out every remote, unlikely cause to form an accurate diagnosis regarding a particular cancer. Plaintiff then addresses each of Defendant's criticisms of Hughes report.

Hughes is a board certified radiation oncologist, licensed in the Virgin Islands, New Jersey, and Pennsylvania. After obtaining a medical degree from the University of Missouri, he received an M.B.A. from New York University, completed 5 years of residencies at Chester Hill Hospital and Thomas Jefferson University Hospital in Philadelphia, and received continuing training on an almost annual basis ever since. His professional experience includes being the clinical director of the Department of Radiation Oncology at Cooper University Hospital and the medical director at the Meadville Cancer Unit in Meadville, Pennsylvania. Hughes' curriculum vitae lists almost two

full pages of cancer–related clinical research, and numerous honors and distinctions, publications, and presentations.

The deposition testimony attached as an exhibit to Reynolds' motion reveals that Hughes' opinion regarding the cause of England's cancer was formed while Hughes was treating England. Hughes testified that in the course of treatment he may be called upon to diagnose new conditions that may arise, including cancers of the skin, masses in the breast, infections in the mouth, and diabetes. After indicating that bladder cancers are very rare in nonsmokers, Hughes' report reflects that his opinion, drawn to a reasonable degree of medical certainty, that both of England's cancers were caused by his long history of smoking, was the "only reasonable conclusion" of Hughes' differential diagnosis. The report exhibits a thorough knowledge of England's medical and smoking history, as well as England's attempts to quit smoking, finding that England's family history is not indicative of one who has a high risk of malignancy in the absence of smoking. Against this background, the Court does not find that offering opinions on addiction and the cause of England's cancers is outside the area of Hughes' expertise, as Reynolds argues. The Court concludes from Hughes' long history of treating some 2,000 cancer patients and from his demonstrated familiarity with the condition of his patient England that Hughes has the requisite qualifications to opine regarding the most likely cause of England's cancers and England's tobacco addiction.

Looking at Hughes' methodology, Plaintiff notes that Reynolds presents no evidence that England was exposed to carcinogenic chemicals in the Tutu Valley aquifer, had a consistent history of consuming five alcoholic drinks per day, had poor oral hygiene, or had contracted the HPV. In the Curt's estimation, Hughes' asserted failure to rule out these speculative causes as the source of his cancers does not constitute a basis for exclusion of his opinion. In order for Hughes to be required to rule out these factors, they must be plausible alternative causes. Plaintiff is

ultimately correct that the specific components of a differential diagnosis go to weight and not admissibility, and the defense is free to cross-examine Hughes concerning these alleged deficiencies in his report and to present its own witnesses to suggest an alternate cause of England's cancers. But, the motion to prohibit Hughes from offering his opinion is denied.

James D. Nelson

Similarly, Defendant asks the Court to limit the testimony of Dr. James D. Nelson by prohibiting him from offering opinions that Brown was addicted to cigarettes and that smoking cigarettes caused her cancer, again asserting that Nelson is not qualified to render these opinins and did not employ appropriate methodology. As with Hughes, Reynolds claims that Nelson is not an addiction expert, is not a board certified psychologist or psychologist, and bases his opinion solely on Brown's stated history of smoking, which Defendant labels inaccurate. Defendant characterizes Nelson's addiction experience as limited to addressing the symptoms of his patients' addictions rather than diagnosing those addictions. Concerning causation, the defense points out that Nelson is not an oncologist or pathologist, has little experience with small cell lung carcinoma, and did not diagnose or treat Brown.

As with Dr. Hughes, Defendant compares Nelson's opinion on addiction to that of Dr. Ingham in *Etienne,* asserting that, because Nelson is not a specialist in addiction, he cannot opine that Brown was addicted to cigarettes. Reynolds also argues that Nelson failed to confirm the smoking history presented by Brown, failed to utilize the Diagnostic and Statistical Manual, and analyzed no data. Reynolds claims Nelson merely applied his subjective belief or unsupported speculation. Regarding causation, Defendant argues that Nelson is not an expert in cancer causation, a pathologist, or an oncologist, does not possess specialized expertise in cancer causation, and is therefore not qualified to offer a causation opinion.

Plaintiff describes Nelson as a neurologist and pain management doctor who has previously been recognized as an expert on nicotine addiction in a cigarette smoking and lung cancer case in federal district court in Puerto Rico.[15] As with Hughes, Plaintiff asserts that Reynolds arguments are based on mere hypothetical possibilities and thus go to weight and not admissibility. Brown indicates that Nelson relied on the diagnosis of Brown's treating physicians, and not the reports of Defendant's experts, in reaching his conclusions. Regarding Nelson's methodology, Brown again states that, as a treating physician, Nelson can base his opinion on differential diagnosis and the individual components of that diagnosis are not subject to exclusion.[16]

Nelson is board certified in neurology, internal medicine, and sleep medicine. After graduating from the Howard University College of Medicine in 1975, Nelson completed a residency in internal medicine at District of Columbia General Hospital from 1975 through 1977 and a residency in neurology from 1977 to 1980 at McGill University's Department of Neurology, where he also received post-graduate training in neurology. He has been in private practice in the Virgin Islands for 28 years and, before that, for another nine years in Los Angeles California, where he worked as a staff member at drug rehabilitation hospitals performing neurology consultations and participating in weekly treatment rounds. Nelson also served as Senior Registrar in Neurology at the Riyadh Armed Forces Hospital in Saudi Arabia and has been an emergency room physician in three different hospitals.

Although Defendant attached several pages of Nelson's deposition transcript to its motion and reply, neither counsel has supplied the Court with a copy of Nelson's written report. Until the Court is given the opportunity to review the written opinion upon which Nelson proposes to testify, the Court must reserve its decision regarding Reynolds motion.

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[15] *Cruz Vargas v. R.J. Reynolds Tobacco Co.*, 218 F.Supp.2d 109, 118 (D.P.R. 2002), *affd.* 348 F.3d 271 (1st Cir. 2003).
[16] Citing *Catalyst Litigation*, at 33-34.

Robert Johnson

Defendant has moved to exclude the testimony of Plaintiffs' forensic economist Robert Johnson on the grounds that he is not qualified and that his opinions are unreliable, irrelevant, and unduly prejudicial. According to Defendant, Johnson does not have an advanced degree in economics and is not a forensic economist, but instead devotes all of his time to consulting and testifying in litigation. Reynolds asserts that, in addition to the financial condition of Reynolds, Johnson has inappropriately opined regarding that of Lorillard, Inc., which is not a party to this litigation, and does not apply economic modeling, compute Reynolds' net worth, or quantify Reynolds' ability to pay a punitive damage award, concluding merely that it is "a sound company" based only on his training, knowledge, and experience.

Defendant points out that Johnson has only an undergraduate degree in economics and a general M.B.A., with no continuing education in economics since 1973, no research or teaching experience in forensic economics, and no peer-reviewed publications in the field. Reynolds claims Johnson relies on no generally accepted methodology in forming his opinions and cannot adequately explain why he selected the metrics included in his report. And, Reynolds submits that Johnson's testimony is not relevant, because it does not concern Reynolds' net worth and includes data for Lorillard, Inc., and is not helpful to the jury, because it involves only the collection of publicly available data and simple arithmetic. As a result, Defendant also asserts the prejudicial effect of Johnson's testimony would outweigh its probative value.

Plaintiffs respond by referencing Johnson's long history of providing economic damages and net worth testimony since 2001, including in previous tobacco cases, and submit that the very same arguments presented by Reynolds regarding Johnson have been rejected by other courts. Plaintiffs argue that *Daubert* does not require education in a particular field, but instead looks to knowledge, skill, experience, training, or education, and that disputes over credentials go to the

weight to be afforded testimony by the trier of fact rather than admissibility. According to Plaintiffs, Johnson's testimony is "based on facts derived from research of primary and publicly available source information, primarily the reports filed by Reynolds American with the United States Securities and Exchange Commission," which facts Reynolds does not challenge as inaccurate. Addressing usefulness to the jury, Plaintiffs rely on United States Supreme Court precedent, reject Reynolds' interpretation of *Cover v. Island Cars of St. Croix*,[17] and claim that there is no requirement in the Virgin Islands that new worth be the only metric by which a defendant's ability to pay can be assessed.

In 1973 Robert W. Johnson received an MBA from Stanford University Graduate School of Business after majoring in economics at Baruch College. His 45-year work history includes years as a securities analyst, a director of marketing, a director of corporate acquisition policy, an assistant to a comptroller, a senior economic consultant, and the president of two companies specializing in providing expert witness testimony regarding damages. He has authored seven publications, mostly on structured settlements, and has been recognized as an expert at the federal and state level in at least 10 states. The 15-page summary of cases in which he has given expert testimony details 146 trials and hundreds more depositions in the four and a half years prior to his deposition here. His testimony in many of those cases involved providing opinions concerning the net worth or financial condition of large corporations, including tobacco companies. Most significantly, Johnson has been recognized as an expert on punitive damages in the Virgin Islands on several previous occasions. Reviewing this background as a whole, the Court cannot conclude that Johnson's lack of a particular advanced degree or failure to have specific ongoing continuing education disqualifies Johnson from providing expert financial testimony. Johnson has

[17] 18 V.I. 156 (Terr. 1982).

"specialized knowledge, skill, experience, training, or education" sufficient to qualify him as an expert on Reynolds' financial condition.

Regarding his methodology, while Defendant claims that Johnson has admitted he cannot determine Reynolds' net worth, Johnson's testimony reflects that the absence of specific information at the time of his report prevented him from making that determination. Nor does the Court conclude that Johnson's failure to use the magic words "net worth" reflects a lack of fit for his testimony. While net worth is the routinely used measure for punitive damages, the case law supports the conclusion that other factors may also be considered. Further, an expert need not present his testimony in the form of an opinion,[18] but may instead give an exposition of relevant scientific or other principles permitting the trier of fact to draw its own inference from the evidence presented.[19] The Court also finds unpersuasive Defendant's argument that the use of publicly available data reported to the SEC, the accuracy of which Defendant does not challenge, in assessing the financial condition of Defendant is not a reliable methodology. The fact that Johnson does not "show his work" to the satisfaction of Reynolds does not demonstrate an absence of reliability in his economic calculations based on concededly accurate data. Further, because Reynolds is being sued in its capacity as the successor in interest to Lorillard, Inc., at first blush it appears to the Court that analysis of Lorillard's financial condition is at least minimally relevant and would assist the jury in determining damages.

The Court intends to guard against any potential prejudicial effect on the jury of Johnson's testimony regarding Reynolds' ability to pay a punitive damage award by bifurcating that portion of the trial, permitting Plaintiff to offer testimony as to the measure of punitive damages only after the jury has determined liability in Defendant and expressed a conclusion that an award of punitive

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[18] V.I.R. Evid. 702 ("may testify in the form of an opinion or otherwise").
[19] *Moore v. United States*, 394 F.2d 818 (5th Cir. 1968), *cert. den.*, 393 U.S. 1030 (1969).

damages is appropriate. Moreover, the Court will require Plaintiff to demonstrate the specific relevance of testimony concerning the financial condition of Lorillard, Inc., before permitting Johnson to offer that testimony.

Robert N. Proctor

Finally, Reynolds asks to prohibit Plaintiffs' expert historian, Dr. Robert N. Proctor, from testifying about any aspects of cigarette design, including (1) the alleged psychological effects of various cigarette designs and design features, including the use of ammonia, menthol, and other additives or ingredients; (2) the acceptability to consumers of alternative designs; (3) the availability and technological feasibility of alternative designs, including his own design "proposals"; and (4) the relative safety of alternative or commercially used designs. In addition, Defendant seeks to prohibit Proctor from offering any testimony regarding causal inference and the interpretation of epidemiologic studies. Once again employing a three-pronged attack on Proctor's opinion, Reynolds asserts that, although arguably qualified as a historian, Proctor lacks the knowledge, skill, experience, training, or education required to qualify him as an expert on cigarette design, marketing, or epidemiology, that his opinions are not supported by a scientifically reliable methodology, and that his opinions will not assist the jury.

As support for its argument, Defendant states that Proctor has never been involved in the manufacture or assembly of cigarettes, has never taken a course on cigarette design, has never designed a cigarette himself, has never published a peer-reviewed article on consumer acceptable or commercially feasible cigarette designs, and has never been asked to help design a safer cigarette. According to Reynolds, Proctor is not an expert in any relevant medical or scientific field, doesn't have an advanced degree in chemistry, physics, biology, toxicology, or pharmacology, lacks the qualifications to offer testimony regarding the relationship between cigarette design and consumer choice, doesn't hold a degree in marketing or advertising, and

hasn't testified as an expert in those fields. Turning to Proctor's lack of qualifications regarding epidemiology or causal inference, Reynolds points to Proctor's lack of training in epidemiology, lack of a basic understanding of epidemiological principles, inability to assess the statistical bias of an epidemiological study, and lack of expertise in the discipline of causal inference.

As with every other expert identified by Plaintiffs, Defendant also argues that Proctor's testimony is not the product of a reliable methodology because it is not based on sufficient facts or data, the product of reliable principles and methods, nor reflective of the reliable application of principles and methods to the facts. Characterizing Proctor's methodology as "reading what others have written," Reynolds asserts that Proctor hasn't conducted independent scientific studies or experiments and has considered only a small fraction of the universe of information available to him in reaching his conclusions.

Plaintiffs respond that Proctor has testified in over 80 tobacco trials in the United States, is the world's foremost tobacco historian, and is the "arch-nemesis" of tobacco companies because their "fraud and conspiracy are central to every smoking related injury case." Plaintiffs assert that the primary point of Proctor's testimony is that corporate documents prove that the tobacco industry designed cigarettes to create and sustain addiction in smokers, indicating that Proctor's report explains that he intends to offer testimony on the history of cigarettes and tobacco industry statements and conduct with regard to safety of its products, including cigarette marketing and design, and comments on the history of changing popular and medical understanding of tobacco harms. Regarding his testimony in specific areas of which Reynolds complains, Plaintiffs assert that Proctor has relied on his research of primary and secondary source information and will testify based upon that research.

Although Proctor has published and lectured about cigarette design, cigarette chemistry, the history of tobacco advertising, tobacco marketing, the history of the tobacco industry, and the

history of the diseases caused by smoking, Plaintiff posits that Proctor will testify as a historian, and not as an epidemiologist, cigarette designer, or expert in any of the other fields Reynolds identifies, such that Proctor need not qualify as an expert in those areas. Plaintiffs describe Reynolds' arguments about Proctor's lack of qualifications in other fields as a smokescreen, arguing that Proctor is testifying not as an engineer or epidemiologist, but as a historian expressing, for example, what historical documents show about Defendant's designs and knowledge of health hazards.

Plaintiffs aver that Proctor has followed the "universally accepted" methodology of a historian in reviewing historical documents in the context of their times and reaching conclusions based on the entire historical record, arguing that Proctor's reliance on industry documents is validated by the contents of the documents themselves. Plaintiffs state that Proctor has testified in numerous cases concerning cigarette design, including ammonia, additives, pH, and "inhalability", suggesting that the Court should, at a minimum, deny the motion without prejudice to a contemporaneous objection to a specific question.

Finally, Plaintiffs contend Proctor's testimony is relevant because he will testify that Defendant's scientists found and advised Defendant concerning the dangers of cigarettes, after which Defendant and others in the industry denied and hid those findings. Plaintiffs submit that evidence presented through Proctor will assist the jury in understanding and determining "core issues" like reliance, negligence, alternative design, comparative fault, and damages.

Dr. Robert N. Proctor has a B.S. in biology from Indiana University, received a Masters and PhD. from Harvard in the History of Science, and is currently a professor in that field at Stanford. His *curriculum vitae* reflects that he has published extensively on the history of the growth of knowledge of the link between tobacco and cancer in peer-reviewed journals and has lectured before numerous medical societies. His work has been recognized through grants and

fellowships from the National Institutes of Health, the National Science Foundation, the National Endowment for the Humanities and other prestigious organizations, he was a Fulbright Senior Fellow and a Fellow of the American Academy of Arts and Sciences, and was a Senior Scientific Reviewer for the 2014 Report of the United States Surgeon General on Smoking and Health. He has qualified as an expert in numerous federal, state, and international courts, and Proctor's resume lists over a hundred instances in which he has qualified as an expert witness, as well as several pages of publications and books he has authored on related subjects. Even Defendant recognizes that Proctor has reviewed tens of thousands of industry documents and appends to its motion several transcripts demonstrating that Proctor has offered testimony against Reynolds and other tobacco companies in several lawsuits in various jurisdictions. The Court concludes that Proctor is eminently qualified to offer opinions on the history of the tobacco industry as reflected in industry documents. Even were additional qualifications required for Proctor to offer testimony regarding such topics as cigarette design, which the Court does not find, Proctor has a degree in, and has taught, biology, has studied and taught chemistry, has reviewed scientific articles and publications, and has published books and some peer-reviewed articles addressing cigarette design, including Defendant's use of ammonia technology in cigarettes. He also has experience in the other areas of which Reynolds complains.

The Court's review of Proctor's description of his methodology in the trial testimony submitted as Exhibit 15 to Plaintiffs' Omnibus Opposition demonstrates that his approach employs sufficient historical and scientific rigor to permit the admission of his testimony. The Virgin Islands Supreme Court has recognized that industry standards are relevant and admissible evidence because they are probative of the standard of care.[20] The examination of historical industry

[20] *Antilles School, Inc., v. Lembach,* 64 V.I.at 425-26 ("Numerous courts have held that an expert witness's methodology is not unreliable simply because the witness uses generalities rather than citing to specific provisions.")

documents by an eminently qualified historian is similarly an acceptable and reliable methodology for use in establishing the industry's awareness of the risks of cigarette smoking and the designs and effects of its products.

Reynolds claims that Plaintiffs defend Proctor's credentials as a historian but not as a scientist, asserting that Proctor's testimony goes beyond that of a historian into the list of topics Reynolds identifies. But Proctor need not be an expert in each discrete area to testify what the historical literature and corporate documents reflect regarding those topics. It is entirely appropriate for an expert to rely, for example, on the epidemiologic assessments of others whose work has been subject to peer review in supporting his opinions. The Court is persuaded that the academic and scientific recognition afforded Proctor attests to the reliability of his methodology. And the Court concludes that his testimony will assist the jury in determining issues of negligence, knowledge, causation, and damages. Consequently, the request to exclude the testimony of Robert N. Proctor is denied.

DATED: June 12, 2018.

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

ATTEST: Estrella H. George
Clerk of the Court ____/____/____

by: _____
Lori Boynes-Tyson
Court Clerk Supervisor 6/12/18