FOR PUBLICATION

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., Defendants.	CASE NO. ST-10-CV-692

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DUNSTON, Judge.

MEMORANDUM OPINION
(Filed: August 29, 2017)

Pending before the Court are Defendant's December 5, 2016, Motions for Summary Judgment. For the following reasons, Defendant's Motion for Summary Judgment in *Brown v. R.J. Reynolds Tobacco Company*, Case No. ST-10-CV-692, will be denied, while Defendant's Motion for Summary Judgment in *Gerald v. R.J. Reynolds Tobacco Company*, Case No. ST-10-CV-631, will be granted in part and denied in part.

RELEVANT PROCEDURAL AND FACTUAL 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]

[1] England filed a First Amended Complaint on December 6, 2010. *See* Pl.'s December 6, 2010, First. Am. Compl., *Gerald v. R.J. Reynolds Tobacco Company ("Gerald")*, Case No. ST-10-CV-631. It appears that the first copy of the Complaint served on Defendants was England's December 6, 2010, First Amended Complaint. *Id.* The operative complaints to date in *Gerald* and *Brown v. R.J. Reynolds Tobacco ("Brown")*, Case No. ST-10-CV-692, were filed on November 9, 2015. *See* Pl. Gerald's November 9, 2015, Second Amended Complaint for Wrongful Death and/or Survival Claims ("Pl. Gerald's November 9, 2015, Am. Compl."); Pl. Brown's November 9, 2015, Amended Wrongful Death and/or Survival Complaint ("Pl. Brown's November 9, 2015, Am. Compl.").
[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)* (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.

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 also moved to consolidate the cases for trial, which the Court granted in a Memorandum Opinion and Order entered on July 10, 2017.[6]

Plaintiffs have sought to amend their Complaints several times during the course of these proceedings.[7] The most recent amendments were made after the Court granted Plaintiffs leave to amend by Order entered on November 16, 2015,[8] 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.[9] 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),

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[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* Pls.' June 6, 2016, Mot. to Consolidate Cases for Trial; July 10, 2017, Mem. Op. & Order.

[7] *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.

[8] *See* December 21, 2015, Mem. Op. & Order; April 26, 2016, Mem. Op. & Order.

[9] *See* July 5, 2017, Mem. Op. & Order.

and wrongful death and/or survival (VII).[10] Answers were filed by Reynolds and Lorillard, LLC in *Gerald* and *Brown* on July 12, 2017, and July 13, 2017, respectively.[11]

Motions for Summary Judgment were filed by Reynolds in both cases on December 5, 2016. On February 7, 2017, Plaintiffs filed timely Oppositions and a Joint Appendix in support thereof, to which Reynolds timely replied on March 14, 2017.[12]

Jury selection in these actions is scheduled to commence on January 18, 2018.

STANDARD

Motions for summary judgment filed in the Superior Court are governed by Rule 56 of the Virgin Islands Rules of Civil Procedure.[13] Under Rule 56, the Court must "grant summary

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

[11] By Order entered on July 5, 2017, Reynolds was directed to file it Answers by July 12, 2017. *See* July 5, 2017, Order. On July 12, 2017, Answers were filed by Reynolds and Lorillard, LLC in *Gerald* and Reynolds moved for a one-day extension of time to file its Answers in *Brown*. *See* Def. Reynolds' & Lorillard, LLC's July 12, 2017, Answers (*Gerald*); Def.'s July 12, 2017, Mot. for Leave to Extend Deadline to File Answers. Reynolds and Lorillard, LLC submitted Answers in *Brown* on July 13, 2017. *See* Def. Reynolds' & Lorillard, LLC's July 13, 2017, Answers (*Brown*). By Order entered on July 13, 2017, the Court granted Reynolds' Motion for Leave to Extend Deadline to File Answers in *Brown*, and deemed the Answers filed as of July 13, 2017. *See* July 13, 2017, Order.

[12] Plaintiffs were directed to file their Oppositions to Reynold's Motions for Summary Judgment by February 7, 2017 and Reynolds was directed to reply by March 14, 2017. *See* February 2, 2017, Order. The date stamp on Plaintiff's Opposition to Defendant's Motion for Summary Judgment in *Brown* is February 8, 2017, while Plaintiff's Opposition in *Gerald* reflects a date stamp of February 7, 2017, as does Plaintiff's Joint Appendix. In Plaintiff's Opposition in *Gerald*, Plaintiff states that Plaintiff in *Brown* "is filing his Opposition to that Motion [for Summary Judgment] herewith" and that "Plaintiffs in both cases are together filing a Joint Appendix which contains the evidentiary materials on which they rely in support of their respective Oppositions." Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 1 n. 1. While the Court's electronic docket does not specify the exact date the Opposition in *Brown* was filed, the certificate of service in Plaintiff's Opposition in *Brown* indicates that copies of the Opposition were circulated to defense counsel on February 7, 2017. *See* Pl. Brown's Opp'n to Def.'s Mot. for Summ. Reynolds has not objected to the timeliness of Plaintiff's Opposition in *Brown*. Considering this, the Court will treat the Opposition in *Brown* as timely despite the discrepancy regarding the date stamp. *See Destin v. People of the V.I.*, 64 V.I. 465, 468 n.1 (V.I. 2016) (If the opposing party does not move to strike the response as untimely, "it waive[s] any objection to its timeliness" and the Superior Court has discretion to consider the untimely response) (citing *Joseph v. People*, 60 V.I. 338, 347 n. 7 (V.I. 2013) (other citation omitted).

[13] 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). The standard governing motions for summary judgment prior to the adoption of the Virgin Islands Rules of Civil Procedure was largely derived from the principles set forth under Rule 56 of the Federal Rules of Civil Procedure. *See United Corp. v. Hamed*, 64 V.I. 297, 309-10 (V.I. 2016); *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008). Because V.I. R. CIV. P. 56 resembles its federal counterpart,

judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[14] "A factual dispute is deemed genuine if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party'"[15] and a fact is material only where it "might affect the outcome of the suit under the governing law[.]"[16]

"[T]he party moving for summary judgment possesses the initial burden of identifying evidence indicating that there is an absence of any issue of material fact."[17] "If the moving party does so, 'the burden shifts to the non-moving party to present 'affirmative evidence' from which a jury might reasonably return a verdict in his favor.'"[18] However, "[i]f a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial."[19]

"[I]n considering whether there are any disputed issues of material fact[,] … [t]he court must credit all reasonable inferences from the evidence on record in favor of the nonmoving party"[20] and "must take the non-moving party's conflicting allegations as true if supported by

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FED. R. CIV. P. 56, the standard governing motions for summary judgment prior to the adoption of the Virgin Islands Rules of Civil Procedure 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." *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)).

[14] V.I. R. CIV. P. 56(a); *See Walters v. Walters*, 60 V.I. 768, 794 (V.I. 2014) ("Generally, summary judgment should be granted after an adequate period for discovery has passed if the record reflects that: (1) there are no genuine issues, (2) as to any material fact, and (3) the moving party is entitled to judgment as a matter of law") (citations omitted).

[15] *Greene v. V.I. Water and Power Co.*, 65 V.I. 67, 2016 V.I. LEXIS 109, *6 (V.I. Super. Ct. 2016) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L Ed.2d 202 (1986)); *See United Corp.*, 64 V.I. at 309 ("Summary judgment is a drastic remedy, and should be granted only when the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact that must be decided by a jury") (citation and internal quotation marks omitted).

[16] *Williams*, 50 V.I. at 194 (citation omitted).

[17] *United Corp.*, 64 V.I. at 309 (citing *Martin v. Martin*, 54 V.I. 379, 391 (V.I. 2010)) (internal quotation marks omitted).

[18] *Hawkins*, 2017 V.I. LEXIS 65, at *4 (citing *Chapman v. Cornwall*, 58 V.I. 431, 436 (V.I. 2013)).

[19] *United Corp.*, 64 V.I. at 309-10 (citing *Martin*, 54 V.I. at 391) (internal quotation marks omitted).

[20] *Walters*, 60 V.I. at 794 (citing *Burd v. Antilles Yachting Servs.*, 57 V.I. 354, 358 (V.I. 2012)).

proper proofs."[21] Further, the Court "should not weigh the evidence, make credibility determinations, or draw 'legitimate inferences' from the facts when ruling upon summary judgment motions because these are the functions of the jury."[22] "The Court's role in deciding a motion for summary judgment is not to determine truth, but rather to determine whether a factual dispute exists that warrants trial on the merits."[23] Because "[s]ummary judgment is a drastic remedy," the Court must deny summary judgment "where such a factual dispute exists."[24]

ANALYSIS

I. Issues common to Reynolds' Motions for Summary Judgment in *Gerald* and *Brown*.

A. Federal preemption.

Reynolds argues that Plaintiffs' claims premised on Newport cigarettes containing a design defect and Lorillard's purported failure to provide adequate warnings regarding dangers of cigarette smoking after July 1, 1969, are preempted by federal law.[25] The Supremacy Clause of the Constitution of the United States provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[26] "Therefore, when the federal government enacts laws within

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[21] *Simpson v. Golden Resorts, LLLP*, 56 V.I. 597, 605 (V.I. 2012) (citations and internal quotation marks omitted).
[22] *Williams*, 50 V.I. at 197 (citing *Anderson*, 477 U.S. at 255).
[23] *Hawkins*, 2017 V.I. LEXIS 65, at *4 (citing *Williams*, 50 V.I. at 195)).
[24] *Id.* (citing *United Corp.*, 64 V.I. at 309); *See Sealey-Christian v. Sunny Isle Shopping Center*, 52 V.I. 410, 423 (V.I. 2009).
[25] Def.'s Mot. for Summ. J. (*Gerald*), pp. 22-23, 27-28; Def.'s Mot. for Summ. J. (*Brown*), pp. 15-17, 22-23.
[26] U.S. CONST. art. VI, cl. 2.

its enumerated powers, these laws are 'supreme' to state laws."[27] The relevant federal statutes at issue here are: (1) the Federal Cigarette Labeling and Advertising Act, codified as amended at 15 U.S.C.S. §§ 1331-1341 ("Labeling Act"), which was first enacted in 1965 ("1965 Act")[28] and amended in 1969 ("1969 Act")[29] and 1984;[30] and (2) the Family Smoking Prevention and Tobacco Control Act of 2009 ("FSPTCA").[31] Although the Virgin Islands is a U.S. territory rather than a "state," these federal statutes provide that the Virgin Islands is considered in the same manner as "the several States."[32] Thus, Virgin Islands law is susceptible to federal preemption by the aforementioned federal statutes.[33]

According to the United States Supreme Court:

> [The Court's] inquiry into the scope of a statute's pre-emptive effect is guided by the rule that "'[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case."[34] Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose.[35] If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still

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[27] *Alleyne v. Diageo USVI, Inc.*, 63 V.I. 384, 391-92 (Super. Ct. 2015) (citing *Free v. Bland*, 369 U.S. 663, 666, 82 S. Ct. 1089, 8 L. Ed. 2d 180 (1962) ("[A]ny state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield")).
[28] Pub. L. No. 89-92, 79 Stat. 282 (1965).
[29] The 1965 Act was amended with the enactment of the Public Health Cigarette Smoking Act of 1969. Pub. L. No. 91-222, 84 Stat. 87 (1970).
[30] The 1969 Act was amended with the enactment of the Comprehensive Smoking Education Act. Pub. L. No. 98-474, § 2, 98 Stat. 2200, 2200 (1984).
[31] Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended in scattered sections of 21 U.S.C.).
[32] *See* 15 U.S.C.S. § 1332(3) (The term 'United States,' when used in a geographical sense, includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, and Johnston Island. The term "State" includes any political division of any State"); Pub. L. No. 91-222, 84 Stat. 87 § 3(3) (1969 Act) (same); Pub. L. No. 89-92, 79 Stat. 282, § 3(3) (1965 Act) (same); 21 U.S.C. § 387 ("The terms 'State' and 'Territory' shall have the meanings given to such terms in section 201 [21 U.S.C. § 321]"); 21 U.S.C.S. § 321(a)(1) ("The term 'State', except as used in the last sentence of section 702(a) [21 USCS § 372(a)], means any State or Territory of the United States, the District of Columbia, and the Commonwealth of Puerto Rico").
[33] *Accord Alleyne*, 63 V.I. at 392.
[34] *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76, 129 S. Ct. 538, 543 (2008) (citing *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (quoting *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103, 84 S. Ct. 219, 11 L. Ed. 2d 179 (1963))).
[35] *Id.* (citing *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977)).

> remains.[36] Pre-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law.[37]

Thus, "[f]ederal law can preempt state law in three ways: (1) express preemption, (2) field preemption, and (3) conflict preemption."[38]

Here, Reynolds contends that Plaintiffs' claims are precluded by express and conflict preemption. Express preemption occurs when Congress explicitly, through statutory language, states its intent to displace state law.[39] On the other hand, conflict preemption nullifies state law inasmuch as it conflicts with federal law, either where compliance with both laws is impossible or where state law erects an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[40]

Specifically, Reynolds argues that Plaintiffs' claims for strict products liability, negligence, breach of the implied warranty of merchantability, fraudulent concealment, and civil conspiracy are expressly preempted by the Labeling Act to the extent that the claims are based on Plaintiffs' allegations that "the cigarettes Decedent[s] smoked after July 1, 1969 were defective for lack of an adequate warning, or that additional or different information about the health risks or addictiveness of cigarettes should have been disclosed after July 1, 1969[.]"[41] Additionally, Reynolds contends that conflict preemption precludes Plaintiffs' claims premised on a design

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[36] *Id.*
[37] *Id.* at 76-77 (citing *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995)); *See Santiago v. V.I. Hous. Auth.*, 57 V.I. 256 (V.I. 2012) (applying the principles of federal preemption).
[38] *Alleyne*, V.I. at 392 (quoting *Farina v. Nokia, Inc.*, 625 F.3d 97, 115 (3d Cir. 2010)) (internal quotation marks omitted).
[39] *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992).
[40] *Farina v. Nokia, Inc.*, 625 F.3d 97, 115 (3d Cir. 2010) (citing *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985)).
[41] Def.'s Mot. for Summ. J. (*Gerald*), pp. 27-28; *See* Def.'s Mot. for Summ. J. (*Brown*), p. 22.

defect, namely those for strict products liability, negligence, and breach of the implied warranty of merchantability, because the imposition of tort liability "based on the non-unique characteristics of cigarettes [and that] ... cigarettes may present inherent risks" would effectively constitute a ban on cigarettes in contravention of "Congress' intent that cigarettes remain legal."[42] In opposition, Plaintiffs assert that they "do not seek to impose categorical liability on all cigarettes[,]" arguing that Congress' enactment of the savings provision in the FSPTCA, namely 21 U.S.C. § 387p(b), makes clear that "design defect claims under state law are not preempted by federal law[,]" "pre-1969 failure to warn claims" arising under state law are not preempted by the Labeling Act, and that the Labeling Act's requirement that cigarette packages contain warnings after 1969 does "not operate to preempt state court lawsuit based on express warranty, intentional fraud and misrepresentation."[43]

In assessing express or implied preemption, the Court must begin by first recognizing that:

> [I]n all pre-emption cases, and particularly in those in which Congress has "legislated ... in a field which the States have traditionally occupied," ... [the Court] "starts with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[44]

In this circumstance, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'"[45] When

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[42] Def.'s Mot. for Summ. J. (*Gerald*), pp. 22-23; *See* Def.'s Mot. for Summ. J. (*Brown*), pp. 15-17.
[43] Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., pp. 28-30; *See* Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., pp. 16-18.
[44] *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009) (quoting *Lohr*, 518 U.S. at 485) (second alteration in original); *Accord Altria Grp.*, 555 U.S. at 77 (citing *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)).
[45] *Altria Grp.*, 555 U.S. at 77 (citing *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449, 125 S. Ct. 1788, 161 L. Ed. 2d 687 (2005))

addressing federal statutes governing tobacco products, courts have recognized advertising and the regulation of the health and safety of their citizens as fields traditionally occupied by the States.[46] Therefore, the presumption against preemption applies here.

"'Congressional intent is the principal resource to be used in defining the scope and extent of an express preemption clause,' and courts look to the clause's 'text and context' as well as its 'purpose and history' in this endeavor."[47] This inquiry is also relevant to the Court's determination of conflict preemption, where, as here, the issue lies in whether the state law creates "an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[48] The history and purpose of the relevant federal statutes governing tobacco products has been described as follows:

> Congress first addressed the health effects of cigarettes with the enactment of the [Labeling Act] in 1965. The Act's express purpose is twofold: (1) to inform the public that smoking cigarettes is a health hazard, and (2) to protect the tobacco industry from the burdens of complying with contradictory state regulations regarding the labels and advertisements of their products. To accomplish this purpose, the [1965 Act] both mandated warnings on cigarette packages and expressly preempted state laws that would impose different or additional labeling or advertising requirements.
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> In 1969, Congress amended the [1965 Act] with the Public Health Cigarette Smoking Act of 1969 (1969 Act) … . The 1969 Act tightened regulations by strengthening warning labels and banning radio and television advertising of

[46] *Cipollone v. Liggett Grp.*, 505 U.S. 504, 518, 112 S. Ct. 2608, 2618 (1992) (plurality opinion) (construing provisions of the 1965 Act "in light of the presumption against the pre-emption of state police power regulations"); *See Altria Grp.*, 555 U.S. at 77 ("Because 'federal law is said to bar state action in [a] fiel[d] of traditional state regulation,' namely, advertising, we 'wor[k] on the assumption that the historic police powers of the States [a]re not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress'") (citing *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541-42, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001); *Richardson v. R.J. Reynolds Tobacco Co.*, 578 F. Supp. 2d 1073, 1075 (E.D. Wis. 2008) ("In areas where states have traditionally regulated, such as the health and safety of their citizens, I assume that 'a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest'") (citing *Bates*, 544 U.S. at 449).
[47] *Franklin Cal. Tax-Free Tr. v. Puerto Rico*, 85 F. Supp. 3d 577, 596 (D.P.R. 2015) (citing *Brown v. United Airlines, Inc.*, 720 F.3d 60, 63 (1st Cir. 2013)).
[48] *Hillsborough County*, 471 U.S. at 713.

> cigarettes. The 1969 Act also modified the federal preemption provision. The legislative history indicates that the reason for the modification was to clarify that "preemption is intended to include not only action by State statute but by all other administrative actions or local ordinances." The Senate Report further notes that "[t]he State preemption of regulation or prohibition with respect to cigarette advertising is narrowly phrased to preempt only state action based on smoking and health. It would in no way affect the power of any State … with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or similar police regulations. It is limited entirely to State or local requirements or prohibitions in the advertising of cigarettes."
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> The [Labeling Act] was amended again in 1984 when Congress passed the Comprehensive Smoking Education Act with the stated purpose of "making Americans more aware of any adverse health effects of smoking, to assure the timely and widespread dissemination of research findings and to enable individuals to make informed decisions about smoking." The Comprehensive Smoking Education Act amended cigarette labeling requirements and compelled the Secretary of Health and Human Services to research and report on the effects of cigarette smoking.
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> In 2009, the FSPTCA was signed into law. The FSPTCA accomplished a number of things, but most importantly, it gave the FDA authority to regulate tobacco products. 21 U.S.C. § 387a (2012). The FDA's authority is not unlimited, however. Among other things, the FDA may not ban tobacco products. *Id.* § 387g(d)(3). Importantly, the FSPTCA also included a savings clause that preserved certain state powers related to tobacco regulation. *See id.* § 387p(a).[49]

The United States Supreme Court has addressed the preemptive effect of the Labeling Act.[50] The 1965 Act only preempted "positive [regulatory] enactments by … [state legislatures and federal agencies]"[51] "that would impose different or additional labeling or advertising requirements" on cigarette packages than that required by the 1965 Act,[52] but did not preempt

[49] *R.J. Reynolds Tobacco Co. v. Marotta*, 214 So. 3d 590, 596-97 (Fla. 2017) (internal and other citations omitted); *See Altria Grp.*, 555 U.S. at 77-78 (discussing the history and purpose of the Labeling Act) (internal citations omitted); *Cipollone*, 505 U.S. at 520 (discussing the difference in scope of the pre-emption clauses of the 1965 Act and 1965 Act).
[50] The preemption provisions of the Labeling Act are described in Section 5(a)-(b), codified at 15 U.S.C. § 1334(a)-(b). The purpose of the Labeling Act is set forth in 15 U.S.C. § 1331.
[51] *Cipollone*, 505 U.S. at 519-20.
[52] *Marotta*, 214 So. 3d at 596 (citations omitted).

"state-law damages actions."[53] On the other hand, the 1969 Act contained a "broader" preemption provision that expanded upon the scope of preemption under the 1965 Act by also preempting state-law damages actions that are predicated on a legal duty that "constitutes a 'requirement or prohibition based on smoking and health ... imposed under State law with respect to ... advertising or promotion[.]"[54] Courts have since referred to this determination as the "predicate duty" analysis, in that the "'central inquiry' [is] ... the nature of the predicate duty on which each claim is based[.]"[55]

Thus, while the United States Supreme Court has determined that failure to warn claims that "require a showing that ... [the defendant's] post-1969 advertising or promotions [of cigarettes] should have included additional, or more clearly stated, warnings, those claims are pre-empted" by the Labeling Act,[56] it has also concluded that common-law claims are not always precluded merely because they have some relationship to smoking and health.[57] Specifically, the United States Supreme Court has noted that the 1969 Act "does not generally pre-empt 'state-law obligations to avoid marketing cigarettes with manufacturing defects or to use a demonstrably safer alternative design for cigarettes[,]'"[58] state law "claims that rely solely on [the defendant's] ... testing or research practices or other actions unrelated to advertising or promotion,"[59] fraud claims that "rely on a state-law duty to disclose ... [material] facts through channels of

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[53] *Cipollone*, 505 U.S. at 519-20.
[54] *Id.* at 524.
[55] *Lynn v. Philip Morris United States*, 2017 Del. Super. LEXIS 263, at *19 (Super. Ct. May 30, 2017) (citing *Cipollone*, 505 U.S. at 523-24).
[56] *Cipollone*, 505 U.S. at 524.
[57] *Id.* at 521-23.
[58] *Id.* at 523.
[59] *Id.* at 525-26.

communication other than advertising or promotion[,]"[60] or state law claims based on the defendant's general duty "not to deceive" or "make fraudulent statements" when the "state common-law rule … has nothing to do with smoking and health."[61] The current version of the Labeling Act has the same preemptive effect as the 1969 Act.[62]

Here, Plaintiffs assert claims based on product defects inherent in Newport cigarettes under design defect and inadequate warning theories, the essence of which are reflected in the following allegations:

> Newport cigarettes were defective and unreasonably dangerous to users and consumers, including … [Decedents,] because such cigarettes were carcinogenic, addictive, and contained dangerous levels of tar, nicotine and other substances. The foreseeable risks posed by the defendant's Newport cigarettes could have been reduced or avoided by the defendant's adoption of a reasonable alternative design.
> …
>
> Newport cigarettes were defective and unreasonably dangerous to users and consumers, including [Decedents,] … for the additional reason that prior to 1970, [Lorillard] … failed to provide an adequate warning of the health hazards and addictive properties of Newport cigarettes, all of which were known or should have been known to … [Lorillard].[63]

These theories are reverberated in Plaintiffs' claims for strict products liability, negligence, and breach of the implied warranty of merchantability,[64] while the inadequate warning theory is also

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[60] *Id.* at 528.
[61] *Altria Grp.*, 555 U.S. at 81; *id.* at 82-83 (noting that "respondents' claim that the deceptive statements 'light' and 'lowered tar and nicotine' induced them to purchase petitioners' product alleges a breach of the duty not to deceive. To be sure, the presence of the federally mandated warnings may bear on the materiality of petitioners' allegedly fraudulent statements, 'but that possibility does not change [respondents'] case from one about the statements into one about the warnings'") (citations omitted).
[62] *See id*, 555 U.S. 70.
[63] Pl. Gerald's November 9, 2015, Am. Compl. ¶¶ 17-18; Pl. Brown's November 9, 2015, Am. Compl. ¶¶ 18-19.
[64] Pl. Gerald's November 9, 2015, Am. Compl. ¶ 31; *but see* Pl. Brown's November 9, 2015, Am. Compl. ¶ 31 (only alleging "Defendant Reynolds, as successor to Lorillard, owed Patrice Hale Brown a duty to exercise reasonable care[,]" without the following additional language: "with respect to their design, testing, manufacture, marking [sic], promotion, distribution and sale of Newport cigarettes"). Plaintiff Brown has since agreed to voluntarily dismiss his "Breach of Warranty claim." Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., pp. 3-4 n. 21.

relevant to Plaintiffs' fraud based and civil conspiracy claims.[65] The claims premised on Newport cigarettes containing a design defect are not preempted by the Labeling Act because the theory does not pertain to advertising or promotion of Newport cigarettes by Lorillard.[66] As to the claims based on a failure to warn theory, they are not preempted to the extent they are based on inadequate warnings given by Lorillard prior to July 1, 1969.[67]

As to Plaintiffs' claims for fraudulent concealment and fraudulent misrepresentation, the analysis is more complicated. The United States Supreme Court has concluded that post-1969 fraud claims that do "not seek to impose a [specific] prohibition 'based on smoking and health[,]'" but rather are based on "the more general duty not to make fraudulent statements[,]" are not preempted by the Labeling Act, even where the misrepresentation occurs in the advertisement and promotion of cigarettes.[68] When liability is premised a defendant's "affirmative misrepresentations" in advertising or promotion in violation of the state's "general duty not to make fraudulent statements," courts have consistently concluded that the claims are not preempted by the Labeling Act.[69] However, "a lack of uniformity remains among courts that have considered whether fraudulent concealment claims are preempted by ... [the Labeling Act,]" specifically, where liability is premised on the defendant's alleged concealment, suppression, or omission of material facts in the advertisement and promotion of cigarettes.[70] Courts focusing on this "predicate duty analysis" have concluded that fraudulent concealment claims, like claims premised

[64] Def.'s Mot. for Summ. J. (*Gerald*), p. 11.
[65] *See* Pl. Gerald's November 9, 2015, Am. Compl. ¶¶ 44-55; Pl. Brown's November 9, 2015, Am. Compl. ¶¶ 42-52.
[66] *See Cipollone*, 505 U.S. at 523.
[67] *See id.* at 524.
[68] *Altria Grp.*, 555 U.S. at 86-87 (citations omitted).
[69] *See Lynn*, 2017 Del. Super. LEXIS 263, at *22-26.
[70] *Lynn*, 2017 Del. Super. LEXIS 263, at *22-26 (collecting cases).

on the defendant's affirmative misrepresentations, are not preempted to the extent the claims are based on the defendant's general "duty not to deceive."[71] In contrast, courts adhering to a narrow reading of the relevant federal precedent have focused on whether the concealment stemmed from an advertisement or promotion, concluding that "fraudulent concealment claims only escape preemption if they 'allege concealment in some channel *other than* advertising or promotion.'"[72] The Court agrees with the former view. As the Superior Court of Delaware recently concluded, "[t]o focus narrowly on whether the concealment or misrepresentation occurred in an advertisement or promotion is to ignore the limitation in" the Labeling Act that preemption occurs only where the state's "requirement or prohibition *relates to smoking or health*."[73] In the Court's view, so long as the fraudulent concealment claim is based on a "general duty not to deceive" that is widely imposed, as opposed a duty that is specifically tailored to circumstances involving smoking or health, the claim is not preempted by the Labeling Act.

Here, Plaintiffs' fraudulent concealment and misrepresentation claims are predicated on Lorillard's purported duty to disclose "truthful information, and to not conceal or fail to disclose material facts, about smoking, addition, and health ... when disseminating information about ... [same] in the form of advertisements, reports, press releases, product packaging, sponsorship, and general media and marketing[,]" including "the addictive nature of nicotine, the manipulation of the nicotine levels in cigarettes, defendant's intention to addict consumers, and the adverse health effects of cigarettes."[74] These claims are predicated on Lorillard's general duty not to deceive,

[71] *Id.* at *25-26 (collecting cases).
[72] *Id.* at *25 (citing *In re Tobacco Litig.*, 2014 W. Va. LEXIS 1159, at *7 (W. Va. 2014)).
[73] *Id.* at *27 (citing 15 U.S.C. § 1334(b)) (emphasis added).
[74] Pl. Gerald's November 9, 2015, Am. Compl. ¶¶ 46-47; Pl. Brown's November 9, 2015, Am. Compl. ¶¶ 44-45.

which is not a requirement or prohibition "based on smoking and health." As a result, Plaintiffs' fraudulent concealment and misrepresentation claims are not preempted by the Labeling Act, even where Lorillard's allegedly wrongful conduct occurred in connection with its advertising and promotion of Newport cigarettes.[75]

Returning to Plaintiffs' negligence claims, Plaintiffs allege that Lorillard breached its duty to Decedents "to exercise reasonable care with respect to their design, testing, manufacture, marking [sic], promotion, distribution and sale of Newport cigarettes."[76] As to Lorillard's purported breach of duty of care, Plaintiffs generally point to all of the factual allegations in the Amended Complaints[77] and allege that Lorillard "failed to exercise reasonable care in making representations and providing information to the public, including ... [Decedents], about smoking, health and addiction."[78] Gerald also alleges that Lorillard breached its duty of care to England by providing samples of Newport cigarettes to minors, including England, during free giveaways of Newport cigarettes.[79]

As discussed, Plaintiffs' negligence claims premised on product defects under theories of design defect or inadequate warnings prior to July 1, 1969, are not preempted. However, to the

[75] *C.f. Altria Grp.*, 555 U.S. 70 (holding that federal law did not preempt common-law fraud claim against cigarette manufacturer based on advertising of light cigarettes); *Accord Lynn*, 2017 Del. Super. LEXIS 263, at *27-28.
[76] Pl. Gerald's November 9, 2015, Am. Compl. ¶ 31; *but see* Pl. Brown's November 9, 2015, Am. Compl. ¶ 31 (only alleging "Defendant Reynolds, as successor to Lorillard, owed Patrice Hale Brown a duty to exercise reasonable care[,]" without the following additional language: "with respect to their design, testing, manufacture, marking [sic], promotion, distribution and sale of Newport cigarettes").
[77] Pl. Brown's November 9, 2015, Am. Compl. ¶ 32; Pl. Gerald's November 9, 2015, Am. Compl. ¶ 32.
[78] Pl. Gerald's November 9, 2015, Am. Compl. ¶ 32(b). Plaintiff Brown's allegation differs slightly from that in Gerald's Amended Complaint. Specifically, Plaintiff Brown alleges that Lorillard breached its duty of care by "negligently misrepresent[ing] to members of the media, congress, and the public, including Patrice Hale Brown, that its cigarettes were not carcinogenic or addictive ... [when] Lorillard knew, or should have known, of the falsity of such representations." Pl. Brown's November 9, 2015, Am. Compl. ¶ 32(b).
[79] Pl. Gerald's November 9, 2015, Am. Compl. ¶ 32(c)-(d).

extent Lorillard's duty of care is "based on smoking and health" and pertains to "advertising or promotion" of cigarettes by Lorillard after July 1, 1969, the claims are preempted; but, the claims are not preempted when premised on Lorillard's duty to exercise reasonable care "through channels of communication other than advertising or promotion."[80] As to the theory in *Gerald* that Lorillard breached its duty of care by "distributing samples of [Newport] ... cigarettes to minors, including ... England[,]" the Amended Complaint alleges, and the record clearly supports, that England was "a child and teenager ... in the early 1960s."[81] Therefore, even assuming, *arguendo*, the distribution of free cigarettes to minors constitutes "promotion" under the Labeling Act, Gerald's negligence claim based on this particular allegation is not preempted because Lorillard's purported negligence occurred prior to the adoption of the 1969 Act.[82]

Finally, Plaintiffs' claims for civil conspiracy involve Lorillard's purported involvement in a conspiracy to "conceal or omit information regarding the health consequences of cigarettes and their addictiveness ... in order to misinform and deceive the government, the public, and consumers[,]" including Decedents.[83] The United States Supreme Court has made clear that "[t]he

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[80] *See Cipollone*, 505 U.S. at 528-29; *Marotta*, 214 So. 3d at 599 & n. 6 ("[T]he majority of state and federal court decisions that have addressed the question of federal preemption in tobacco product liability cases have held that Congress only intended to preempt state laws to the extent that they relate to labeling or advertising of tobacco products") (collecting cases).
[81] Pl. Gerald's November 9, 2015, Am. Compl. ¶¶ 50, 8, 10(c), 32; *infra* n. 301, n. 485.
[82] *See Reilly*, 533 U.S. at 552 (emphasizing that the Labeling Act does not preempt state laws prohibiting cigarette distribution to minors, but does preempt state regulations that target advertising that tended to promote tobacco use by children); *see also R.J. Reynolds Tobacco Co. v. Seattle-King Cty. Dep't of Health*, 473 F. Supp. 2d 1105, 1109 (W.D. Wash. 2007) ("Three federal courts, including this one, have already determined that cigarette sampling is a form of promotion, and, therefore, state laws regulating such sampling are prohibited") (citing *R.J. Reynolds Tobacco Co. v. McKenna*, 445 F. Supp. 2d 1252 (W.D. Wash. 2006); *Jones v. Vilsack*, 272 F.3d 1030 (8th Cir. 2001); *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411 (D. Vt. 1998)); *but see People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal. 4th 707, 726, 36 Cal. Rptr. 3d 814, 828, 124 P.3d 408, 420 (Cal. 2005) ("We here find no 'clear and manifest purpose of Congress' [in the Labeling Act] to bar state regulation of the nonsale distribution of cigarettes to minors or adults").
[83] Pl. Gerald's November 9, 2015, Am. Compl. ¶¶ 57, 56-64; Pl. Brown's November 9, 2015, Am. Compl. ¶¶ 54, 53-61.

predicate duty underlying this claim is a duty not to conspire to commit fraud[,]" which "is not a prohibition 'based on smoking and health'" subject to preemption under the Labeling Act.[84] As a result, Plaintiffs' claims for civil conspiracy are not preempted.

As to Reynolds' contention that conflict preemption principles preclude the imposition of tort liability based on the non-unique characteristics and inherent risks of all cigarettes because doing so would amount to a ban of cigarettes in violation of congressional intent, this argument was recently rejected by the United States Court of Appeals for the Eleventh Circuit and the Florida Supreme Court.[85] In those cases, Reynolds asserted many of the same arguments that it makes here, including, *inter alia*, that the United States Supreme Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*[86] means "that states may not ban cigarettes because 'Congress . . . has foreclosed the removal of tobacco products from the market.'"[87] However, as the Eleventh Circuit and Florida Supreme Court pointed out, the holding in *Brown & Williamson* only foreclosed the FDA from banning cigarettes, a decision which "does not extend to the states."[88]

Specifically, the Eleventh Circuit found that nothing in the federal statutes "reflects a federal objective to permit the sale or manufacture of cigarettes[,]" rather, the only significant requirement imposed on cigarette manufacturers by the federal statutes "is the warning label requirement for cigarette packages and advertising."[89] As a result, the Eleventh Circuit determined that a state's "[r]ules governing the design of cigarettes or even banning the sale of cigarettes" do

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[84] *Cipollone*, 505 U.S. at 530.
[85] *See Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169 (11th Cir. 2017); *Marotta*, 214 So. 3d 590.
[86] 529 U.S. 120, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000).
[87] *Marotta*, 214 So. 3d at 597 (citing *Brown & Williamson*, 59 U.S. at 137); *Graham*, 857 F.3d at 1190.
[88] *Marotta*, 214 So. 3d at 597; *Graham*, 857 F.3d at 1187.
[89] *Graham*, 857 F.3d at 1187.

not "frustrate the objectives of the[ ] federal laws on tobacco ... that require[ ] a certain label when and if cigarettes are sold."[90] The Eleventh Circuit further reasoned that "[s]tate governments retain their historic police powers to protect public health[,]" which is not superseded by a "clear and manifest purpose of Congress[,]"and ultimately concluded that neither express preemption nor conflict preemption "displace tort liability based on the dangerousness of all cigarettes manufactured by the tobacco companies[,]" including claims for strict liability and negligence that are not based "on a determination that the warnings on cigarette packages and advertisements were inadequate."[91] Similarly, the Florida Supreme Court also recently concluded that the relevant federal statutes governing tobacco products were not intended "to insulate the tobacco industry from state tort liability" and "[s]trict liability and negligence claims [based on the sale of ordinary cigarettes] ... do not interfere with the regulation of advertising and promotion of cigarettes and, therefore, do not clearly conflict with congressional objectives."[92]

Finding the reasoning of the Eleventh Circuit and Florida Supreme Court sound and persuasive, the Court hereby adopts the conclusions rendered in their decisions. As a result, the Court concludes that, even assuming, *arguendo*, the design defect theory inherent in Plaintiffs' product defect claims is one that is common to all ordinary cigarettes, this affords no basis for precluding the claims under federal preemption principles.

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[90] *Graham*, 857 F.3d at 1187-89.
[91] *Id.*
[92] *Marotta*, 214 So. 3d at 596-601.

B. Claims based on design defect: Strict products liability (Count I), negligence (Count III), and breach of the implied warranty of merchantability (Count IV).

As discussed, one of the theories underlying Plaintiffs' claims for strict products liability, negligence, and breach of the implied warranty of merchantability is that Newport cigarettes contained a design defect.[93] In its Motions for Summary Judgment, Reynolds argues it is entitled to summary judgment as a matter of law on Plaintiffs' claims for strict liability (Count I), negligence (Count III), and breach of the implied warranty of merchantability (Count IV), which Reynolds asserts are premised on a design defect theory, "because [Plaintiffs] cannot prove that there was a defect in the design of Newport cigarettes[.]"[94]

Specifically, Reynolds posits that there is no genuine issue of material fact that Newport cigarettes did not contain a design defect because Plaintiffs cannot prove the foreseeable risks of harm posed by Newport cigarettes could have been reduced or avoided by the adoption of a reasonable alternative design since Plaintiffs "fail[ ] to identify any specific defect in Newport cigarettes that is not simply an inherent feature in all cigarettes[,]" Newport cigarettes "contain government-mandated warnings[,]" and "consumers understood the risks of cigarette smoking ... during the time [Decedents] ... smoked[,]" yet Decedents continued to smoke "in the face of public awareness of their risks."[95] Reynolds also contends that Plaintiffs have failed to satisfy their burden of demonstrating disputed material facts remain with respect to whether Lorillard's failure to adopt a reasonable alternative design proximately caused Decedent[s'] injuries."[96] In opposition,

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[93] Pl. Gerald's November 9, 2015, Am. Compl. ¶¶ 3-5, 8-10, 15-20, 30-35, 36-43; Pl. Brown's November 9, 2015, Am. Compl. ¶¶ 3-5, 9-11, 16-21, 30-34, 35-41.
[94] Def.'s Mot. for Summ. J. (*Brown*), pp. 9-10; Def.'s Mot. for Summ. J. (*Gerald*), p. 16.
[95] Def.'s Mot. for Summ. J. (*Brown*), pp. 9-15; Def.'s Mot. for Summ. J. (*Gerald*), pp. 16-19.
[96] Def.'s Mot. for Summ. J. (*Brown*), pp. 13-15; Def.'s Mot. for Summ. J. (*Gerald*), pp. 20-22.

Plaintiffs contend that genuine issues of material fact exists with respect to proximate causation and "whether or not there was a reasonable safer alternative design for Newport cigarettes[,]" claiming "Lorillard could have ... manufactured cigarettes with non-addictive levels of nicotine and non-carcinogenic levels of tar, but chose not to do so."[97]

a. Product defect based on a design defect under Virgin Islands law.

The Supreme Court of the Virgin Islands has adopted the Restatement (Third) of Torts: Products Liability §§ 1, 20, which provides that "[o]ne engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."[98] Under the Restatement (Third) of Torts: Products Liability §§ 1 and 2, the standard for determining whether a product is defective depends on the type of defect alleged, of which there are three categories: (1) manufacturing defect; (2) design defect; or (3) inadequate warning or instructions.[99] Following the Supreme Court of the Virgin Islands' lead, the Superior Court has rejected the consumer expectation test under Restatement (Second) of Torts § 402A and instead considers product defects claims based on a design defect under the Restatement (Third) of Torts: Products Liability §§ 1 and 2(b).[100] Under Section 2(b), "[a] product is defective in design when the foreseeable risks of harm posed by the

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[97] Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., pp. 6, 1, 13; Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 16, 24.

[98] *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 983-84 (V.I. 2011) ("Virgin Islands local courts should apply sections 1 and 20 of the Third Restatement [(of Torts: Products Liability)] and allow lessors to be held strictly liable for injuries resulting from a defective product"); *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 1, 20.

[99] *Davis v. Hovensa, LLC*, 63 V.I. 475, 488 (Super. Ct. 2015) (citing RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a).

[100] *Davis*, 63 V.I. at 488 (conducting the requisite analysis mandated in *Banks*, 55 V.I. 967 and adopting the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) as the soundest rule for the Virgin Islands for design defect cases)); *See Tutein v. Ford Motor Company*, 2016 V.I. LEXIS 50, *10 (V.I. Super. Ct. Mar. 18, 2016) (citing *Davis*, 63 V.I. at 488).

product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe."[101]

Section 2(b) "adopts a reasonableness ('risk-utility balancing') test as the standard for judging the defectiveness of product designs."[102] This "risk-utility balancing" test involves an "independent assessment of advantages and disadvantages" by weighing the magnitude and foreseeability of harm against the impact the proposed alternative design would have on efficiency and utility of the product.[103] This will generally require "a comparison between an alternative design and the product design that caused the injury, undertaken from the viewpoint of a reasonable person"[104] and "the plaintiff must prove that such a reasonable alternative was, or reasonably could have been, available at time of sale or distribution."[105] In sum, "[a] broad range of factors may be

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[101] *Davis*, 63 V.I. at 488 (citing RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b)). Having reviewed the Superior Court's *Banks* analysis in *Davis v. Hovensa, LLC* and agreeing with the Court's methodology and conclusions, the Court hereby adopts the standard articulated in that case. *See id.* at 487-489. The Court recognizes that some state supreme courts in other jurisdictions have rejected RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) based on variety of criticisms, including, *inter alia*, that Section 2(b) imposes burdens on plaintiffs that defy "the policies underlying strict products liability law" because the risk-utility balancing under Section 2(b) incorporates a negligence standard, while also requiring the additional element that plaintiffs prove a "reasonable alternative design." *Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 506 (Fla. 2015) (citing *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 751-52 (Wis. 2001)). While the Court is aware of these concerns raised by other courts, deviation from the Superior Court's adoption of the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b), which the Court finds is sound and within the confines of *Banks*, would unnecessarily create discordant case law in this jurisdiction. Moreover, the Restatement does appear to recognize "the possibility that product sellers may be subject to liability even absent a reasonable alternative design when the product design is manifestly unreasonable." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. b, e.

[102] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d.

[103] *See id.* cmt. a, f, & reporter's notes cmt. a. "Products are not generically defective merely because they are dangerous. Many product-related accident costs can be eliminated only by excessively sacrificing product features that make products useful and desirable. Thus, the various trade-offs need to be considered in determining whether accident costs are more fairly and efficiently borne by accident victims, on the one hand, or, on the other hand, by consumers generally through the mechanism of higher product prices attributable to liability costs imposed by courts on product sellers." *Id.* at cmt. a.

[104] *Id.* at cmt. d.

[105] *Id.* at cmt. d, f.

considered in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe. The factors include, among others":

> the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, and the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing. ... The relative advantages and disadvantages of the product as designed and as it alternatively could have been designed may also be considered. Thus, the likely effects of the alternative design on production costs; the effects of the alternative design on product longevity, maintenance, repair, and esthetics; and the range of consumer choice among products are factors that may be taken into account. A plaintiff is not necessarily required to introduce proof on all of these factors; their relevance, and the relevance of other factors, will vary from case to case.[106]

Therefore, "[t]o establish a prima facie case of [design] defect, the plaintiff must prove the availability of a technologically feasible and practical alternative design that would have reduced or prevented the plaintiff's harm."[107] The issue is one for the trier of fact where "[s]ufficient evidence [is] ... presented so that reasonable persons could conclude that a reasonable alternative could have been practically adopted."[108]

b. A genuine issue of material fact exists with respect to whether Newport cigarettes contained a design defect.

In arguing that there is no genuine issue of material fact that Newport cigarettes do not contain a design defect, Reynolds points to excerpts from the trial testimony of William A. Farone,

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[106] *Id.* cmt. f. (internal citations omitted). Comment *f* of the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 further provides: "the factors interact with one another. For example, evidence of the magnitude and probability of foreseeable harm may be offset by evidence that the proposed alternative design would reduce the efficiency and the utility of the product. On the other hand, evidence that a proposed alternative design would increase production costs may be offset by evidence that product portrayal and marketing created substantial expectations of performance or safety, thus increasing the probability of foreseeable harm. Depending on the mix of these factors, a number of variations in the design of a given product may meet the test in Subsection (b). On the other hand, it is not a factor under Subsection (b) that the imposition of liability would have a negative effect on corporate earnings or would reduce employment in a given industry." *Id.*
[107] *Id.*
[108] *Id.*

Ph.D. in *Evans v. Lorillard Tobacco Co.*,[109] portions of which Plaintiffs intend to offer at trial as expert testimony, who Plaintiffs describe as "a former scientist for Philip Morris … [with] first-hand knowledge of how cigarettes are designed and the feasibility of safer alternatives."[110] Reynolds also refers to excerpts from the deposition testimony of Plaintiffs' "expert historian," Robert Proctor, Ph.D.[111] Specifically, Reynolds asserts that "Dr. Farone testified that Newports were defective because they, like all cigarettes, contained carcinogens and addictive levels of nicotine[,]" Dr. Proctor "testified that Newports are no different than any other cigarette in those respects[,]" and Plaintiffs have offered "no evidence that Newport cigarettes were defectively designed because they contained menthol."[112] Reynolds further contends that the "reasonable alternative design" proposed by Dr. Farone, which purportedly involves replacing "all of the currently available cigarettes … with no (or very low) tar and no (or very low) nicotine alternatives[,]" is not technologically feasible and practical as a matter of law because it is "dependent upon all cigarette manufacturers removing all of their current cigarette brands from the market and introducing new cigarette brands that adopt Dr. Farone's proposed no-tar and no-nicotine design."[113]

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[109] No. 04-2840-B (Mass. Super. Ct. Suffolk Cty. Nov. 16-17, 2010); *See* Def.'s Ex. EE (*Gerald*), Excerpts from Trial Testimony of William A. Farone, Ph.D. in *Evans* ("Dr. Farone Trial Testimony"); Def.'s Ex. R (*Brown)* (same).
[110] Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 17; Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., p. 6. Plaintiffs will submit portions of Dr. Farone's testimony in *Evans* in lieu of his live testimony in the trial of these actions. *See* September 27, 2016, Mem. Op. & Order.
[111] Def.'s Mot. for Summ. J. (*Gerald*), p. 18; Def.'s Mot. for Summ. J. (*Brown*), p. 11.
[112] Def.'s Mot. for Summ. J. (*Gerald*), p. 18 (citing Def.'s Ex. EE (*Gerald*), Dr. Farone Trial Testimony, at 1737:12-1738:24; Def.'s Ex. FF (*Gerald*), Deposition of Robert Proctor, Ph.D. dated March 12, 2016 ("Proctor Dep."), at 89:10-90:11); Def.'s Mot. for Summ. J. (*Brown*), p. 11 (citing Def.'s Ex. R (*Brown)*, Dr. Farone Trial Testimony, at 1737:05-1738:24; Def.'s Ex. S (*Brown*), Proctor Dep., at 89:10-90:11).
[113] Def.'s Mot. for Summ. J. (*Gerald*), pp. 18-19; Def.'s Mot. for Summ. J. (*Brown*), pp. 11-12.

In response, Plaintiffs contend that "it is for the jury to decide if the Newport cigarettes that [Decedents] … smoked were defective[,]" and also point to excerpts from Dr. Farone's trial testimony in *Evans* and Dr. Proctor's deposition testimony and expert report.[114] Specifically, Plaintiffs refer to Dr. Farone's testimony "that cigarettes are a 'highly engineered' product[,]" "some 57 or 58 different things one takes into account in designing a cigarette to deliver a certain amount of tar and a certain amount of nicotine[,]" and that Lorillard could have manufactured Newport cigarettes "with substantially lower tar and nicotine."[115] Further, Dr. Farone testified that Lorillard manufactured Newport cigarettes with: (1) an "addictive" "level of nicotine"; (2) "excessive" levels of carcinogens that cause cancer; and (3) menthol, an additive that "activates other receptors and masks the harshness irritancy" of "[n]icotine and other alkaloids in tobacco[,]" which, "makes it easier to initiate new immature smokers."[116] In addition, Plaintiffs refer to the following conclusions of Dr. Proctor: (1) "Newports contain two specific defects, inhalability that produces lung disease and an additive level of nicotine"; (2) "[t]he tobacco industry has a long history of manipulating the chemistry of nicotine, principally with the goal of creating a mild and more attractive cigarette but also to create and sustain addiction"; and (3) "cigarettes with low nicotine tobaccos are also easily produced, either by solvent extracts or genetic means."[117] The Court agrees with Plaintiffs that the opinions of Dr. Farone and Dr. Proctor are sufficient to

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[114] Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., pp. 17-20; Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., pp. 8-9.

[115] Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., pp. 17-18 (citing Pls.' J.A., Dr. Farone Trial Testimony, at 1712:19, 1713:11-17, 1737, 1738, 1740, 1754-1755, 1771, 1779, 1784, 1793); Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., pp. 7-8 (citing same).

[116] Pls.' J.A., Dr. Farone Trial Testimony, at 1737:16-17, 1763:23-24, 1764:1-3, 1772:18-22, 1773:1-14, 1174:14-17; *infra* n. 373.

[117] Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., pp. 19-20 (citing Pls.' J.A., Proctor Dep., at 89:114-16, Proctor Report at 4, 7); Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., p. 9 (citing same).

"reasonably support[ ] the conclusion that a reasonable alternative design could have been practically adopted at the time of sale[,]"[118] which would have reduced or avoided the foreseeable risks of harm so as to create a genuine issue of material fact on this issue.

The ultimate determination of whether Dr. Farone's proposed alternative design for Newport cigarettes was reasonable and whether its omission rendered Newport cigarettes not reasonably safe is a fact-intensive inquiry, which involves an assessment of Dr. Farone's and Dr. Proctor's credibility and a weighing of their testimony and other evidence. Likewise, even assuming, *arguendo*, that Reynolds correctly asserts that the levels of tar and nicotine in Newport cigarettes are the same as those in all "ordinary" cigarettes and Dr. Farone's proposed alternative design would require the replacement of "all ... current cigarette brands[,]" this does not establish that Dr. Farone's proposed alternative design is unavailable as a matter of law because such a conclusion requires the resolution of underlying factual issues regarding the technological feasibility and practicality of the proposed alternative design.[119]

Likewise, despite Reynolds' contention, these underlying factual questions are not resolved as a matter of law through evidence that Newport cigarettes contained "government-mandated warnings" and the public's awareness of the risks of smoking, the significance of which can only be determined through a weighing of the evidence by the fact-finder, and, in any event, represent only two of numerous factors to be considered when assessing the existence of a reasonable alternative design.[120] While some courts have held that "[a] product cannot be labeled either

[118] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. f.
[119] *C.f. Evans v. Lorillard Tobacco Co.*, 465 Mass. 411, 430-31, 990 N.E.2d 997, 1015-16 (Mass. 2013).
[120] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. g (RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) "rejects conformance to consumer expectations as a defense. The mere fact that a risk presented by a product design is open and obvious, or generally known, and that the product thus satisfies expectations, does not

defective or unreasonably dangerous 'if a danger associated with the product is one that the product's users generally recognize"[121] and have taken "judicial notice of the common knowledge of the dangers of smoking[,]"[122] the risk-utility balancing test of the Restatement (Third) of Torts: Products Liability § 2(b) rejects "consumer expectations ... [as] an independent standard for judging the defectiveness of product designs."[123] Similarly, "obviousness of risk does not necessarily obviate a duty to provide a safer design" under Section 2(b) because "[j]ust as warnings may be ignored, so may obvious or generally known risks be ignored, leaving a residuum of risk great enough to require adopting a safer design."[124] Moreover, the Court agrees that the discordant decisions of other courts "about whether or not to take judicial notice [on the issue of common knowledge of the dangers of smoking] illustrates ... that this fact is subject to considerable dispute, such that taking judicial notice of it would be improper."[125]

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prevent a finding that the design is defective. But the fact that a product design meets consumer expectations may substantially influence or even be ultimately determinative on risk-utility balancing in judging whether the omission of a proposed alternative design renders the product not reasonably safe. It follows that, while disappointment of consumer expectations may not serve as an independent basis for allowing recovery under Subsection (b), neither may conformance with consumer expectations serve as an independent basis for denying recovery. Such expectations may be relevant in both contexts, but in neither are they controlling"); *Id.* at cmt. l ("However, obviousness of risk does not necessarily obviate a duty to provide a safer design. Just as warnings may be ignored, so may obvious or generally known risks be ignored, leaving a residuum of risk great enough to require adopting a safer design").

[121] *Little v. Brown & Williamson Tobacco Corp.*, 243 F. Supp. 2d 480, 491 (D.S.C. 2000) (citing *Anderson v. Green Bull, Inc.*, 322 S.C. 268, 471 S.E.2d 708, 710 (S.C. Ct. App. 1996)).

[122] *Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F. Supp. 2d 263, 274 (D.R.I. 2000)); *See Little*, 243 F. Supp. 2d at 491 n.8 (collecting cases).

[123] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. g.

[124] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. l.

[125] *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76, 106 (Mo. Ct. App. 2006) (quoting *Wright v. Brooke Group Ltd.*, 114 F. Supp. 2d 797, 817 (N.D. Iowa 2000)) (internal quotation marks omitted). The Superior Court may only take judicial notice of an adjudicative fact "that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." V.I. R. EVID. 201(a)-(b); *Rodriguez v. Rodriguez-Ramos*, 64 V.I. 447, 457 (V.I. 2016) (citations omitted). Neither circumstance applies here.

Because a determination of whether Newport cigarettes contain a design defect requires the resolution of the aforementioned factual issues through, *inter alia*, the rendering of credibility determinations and the weighing of evidence, functions which are left to the sound discretion of the jury at a trial on the merits,[126] the Court will not grant Reynolds' Motions for Summary judgment with respect to this issue.

c. A genuine issue of material fact exists with respect to whether the alleged defective design of Newport cigarettes proximately caused Decedents' injuries.

Reynolds also argues that Plaintiffs cannot prove that the alleged defective design of Newport cigarettes proximately caused the Decedents' injuries. Proximate causation is an essential element of plaintiffs' claims for strict products liability,[127] negligence,[128] and breach of the implied warranty of merchantability.[129] To establish causation in the Virgin Islands, "a plaintiff must demonstrate both cause in fact and proximate cause."[130] "Proximate cause is established where the

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[126] *See Williams*, 50 V.I. at 197 (citing *Anderson*, 477 U.S. at 255).
[127] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 ("One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect"); *Id.* at § 20; *Id.* at § 15 ("Whether a product defect caused harm to persons or property [under the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1] is determined by the prevailing rules and principles governing causation in tort"); *Id.* at § 2 cmt. q ("Under § 1, the product defect must have caused harm to the plaintiff"); *Banks*, 55 V.I. at 983-84 (applying RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 to strict liability claim involving "injuries resulting from defective product"); *Bertrand v. Mystic Granite & Marble, Inc.*, 63 V.I. 772, 781-83 (V.I. 2015) (reversing the granting of summary judgment on plaintiff's claim for strict liability based on product defect because, *inter alia*, a genuine issue of material fact remained with respect to causation).
[128] *See Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 380 (V.I. 2014) ("T]he foundational elements of negligence [are]— (1) a legal duty of care to the plaintiff, (2) a breach of that duty of care by the defendant (3) constituting the factual and legal cause of (4) damages to the plaintiff"); *See Brady v. Cintron*, 55 V.I. 802, 823 (V.I. 2011) ("Causation includes cause in fact and legal causation, which is often referred to as proximate cause") (citations omitted).
[129] *Charles v. Arcos Dorados USVI, Inc.*, 2016 V.I. LEXIS 113, *6-7 (V.I. Super. Ct. Aug. 18, 2016) ("In order to recover on a claim for breach of the implied warranty of merchantability, a Plaintiff must demonstrate that: 1) an implied warranty of merchantability existed, 2) the warranty was broken by the seller, 3) the breach of the warranty proximately caused, 4) the loss sustained") (citing 11A V.I.C. § 2-314 cmt. 13).
[130] *Adams v. N. W. Co., Inc.*, 63 V.I. 427, 442 (Super. Ct. 2015) (citing *Brady*, 55 V.I. at 823).

party who bears the burden shows that 'an original act is wrongful or negligent and in a natural and continuous sequence produces a result which would not have taken place without the act[.]'"[131] Thus, "proximate causation ... requires the plaintiff to show that the tort was both the 'but-for' cause of the injury and 'a substantial factor in bringing about the result.'"[132]

In arguing Plaintiffs cannot prove proximate cause with respect to their design defect claims, Reynolds opines that "[t]here is no expert evidence ... that a specific design defect, as distinguished from the mere act of smoking any cigarette, caused [the Decedents'] injuries and death" and "there is zero evidence that [Decedents] would have used any of the allegedly alternatively designed cigarettes that Plaintiff[s] and [their] ... experts propose," or that Decedents' injuries would have been avoided had they used them.[133] Plaintiffs counter that the issue of proximate cause is typically a question for the jury and whether Decedents "would have smoked a safer cigarette is irrelevant as a matter of law[.]"[134]

Further, Plaintiffs assert that the following establishes that genuine issues of material fact exist with respect to proximate causation: According to the expert testimony of Dr. Farone and Dr. Proctor, "Lorillard could have chosen to make Newport cigarettes safer and ... not all cigarettes contain dangerous levels of tar and addictive levels of nicotine"; and physicians have found that Decedents' cancers were caused by cigarette smoking, which was due, at least in part, to Decedents' nicotine addiction.[135] In addition, both Plaintiffs cite the expert reports of Dr. James

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[131] *Sealey-Christian*, 52 V.I. at 432 (citing *Clinger v. Duncan*, 166 Ohio St. 216, 141 N.E.2d 156, 162 (1957)).
[132] *Molloy v. Indep. Blue Cross*, 56 V.I. 155, 180 n. 6 (V.I. 2012) (citing *Sealey-Christian*, 52 V.I. at 432).
[133] Def.'s Mot. for Summ. J. (*Gerald*), pp. 20-21; Def.'s Mot. for Summ. J. (*Brown*), p. 14.
[134] Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 24, 26; Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., pp. 13-14.
[135] Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 25 (emphasis omitted); Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., pp. 13-14 (emphasis omitted).

Nelson, who examined Decedents before their deaths.[136] Additionally, Gerald also refers to the expert report of "Dr. Samuel Hughes, one of [England's] treating doctors."[137] Though Plaintiff Brown also refers to the expert report of Dr. Erole Hobdy, who is described as one of Decedent Brown's treating physicians,[138] the report does not appear to have been attached as an exhibit.[139] In Dr. Nelson's individual reports, Dr. Nelson concludes, in pertinent part, that Decedent Brown's "death emanated from her lung cancer" and England's death "emanated from his bladder cancer[,]" which Dr. Nelson found "directly and positively related to ... [their] cigarette smoking, which commenced in or about the 1960's and resulted in nicotine addiction."[140] With respect to England, Dr. Hughes further reported:

> There is more than a reasonable degree of medical certainty that both of Mr. England's primary cancers, his neck cancer and a bladder cancer are related to his long history of smoking ... Part of his inability to stop smoking is directly related to the strong addiction created by nicotine as it changes the brains which includes metabolic, and even structural changes, to the brain of long term smokers. Particularly in those people who start smoking at a young age during the brain development during pre-teen and teenage years.[141]

Again, the Court agrees with Plaintiffs and finds that this evidence is sufficient to create a genuine issue of material fact with respect to whether the purported defective design of Newport cigarettes proximately caused Decedents' injuries, including, *inter alia*, Decedents' development of cancer. Both England and Decedent Brown testified that they were addicted to smoking

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[136] Pls.' J.A., Report of James D. Nelson, M.D. (examination of England) ("Nelson Report of England"); Report of James D. Nelson, M.D. (examination of Brown) ("Nelson Report of Brown"); *See also* Def.'s Ex. F (*Gerald*), Deposition of James D. Nelson, M.D. ("Dr. Nelson Dep.").
[137] Pls.' J.A., Report of Samuel Hughes, M.D., M.B.A. ("Dr. Hughes Report").
[138] *See* Pls.' J.A., Nelson Report of Brown, p. 2 (labled "P.B. e102").
[139] *See* Pls.' J.A.; Def.'s Mot. for Summ. J. (*Brown*) & Reply (*Brown*).
[140] Pls.' J.A., Nelson Report of Brown, p. 7; Pls.' J.A., Nelson Report of England, p. 8.
[141] Pls.' J.A., Dr. Hughes Report, p. 2.

Newport cigarettes, with England smoking Newport cigarettes from 1960 to 2005,[142] and Decedent Brown smoking Newport cigarettes from 1960 to 1976.[143] This, coupled with the expert testimony of Dr. Farone and Dr. Proctor, and the aforementioned reports of Dr. Nelson and Dr. Hughes, sufficiently create genuine issues of material fact with respect to whether the levels of nicotine and carcinogens in Newport cigarettes constituted a "substantial factor" in Decedents' development of cancer.

This conclusion is not altered by Reynolds' contention that Plaintiffs' burden of proving proximate causation on summary judgment requires Plaintiffs to demonstrate that Decedents' cancers were caused by a "unique defect ... not shared by all cigarettes."[144] First, Reynolds cites no authority for this proposition, and, therefore, it is not properly before the Court.[145] Nevertheless, even assuming, *arguendo*, Reynolds is attempting to refer to the "state of the art" defense, which "has been variously defined to mean that the product design conforms to industry custom, that it reflects the safest and most advanced technology developed and in commercial use, or that it reflects technology at the cutting edge of scientific knowledge[,]" whether a design conforms to

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[142] Def.'s Ex. D (*Gerald*), Discovery Deposition of England, dated March 13-15, 2012 ("England Disc. Dep."), at 39:1-11, 172:25-173:6, 371:14-16; Def.'s Ex. E (*Gerald*), Trial Preservation Deposition of England, dated March 16, 2012 ("England Preserv. Dep."), at 11:2-17, 15:12-14, 19:19-20:19, 21:17-22:23, 54:24-55:1; Def.'s Ex. G, England's Second Supplemental Answers to First Set of Interrog. served by Lorillard ("England's Second Supp. Answers"), Interrog. Answer Nos. 1, 13, 14; Pl. Gerald's November 9, 2015, Am. Compl. ¶¶ 8-9, 50, 33.

[143] Def.'s Ex D (*Brown*), Discovery Deposition of Patrice Hale Brown dated July 19-21, 2011 ("Brown Disc. Dep."), at 58:17-25, 59:1-16, 52:11-19, 138:22-25, 139:1-25, 360:8-25; Def.'s Ex. E (*Brown*), Brown's First Supplemental Response to Defendant's Interrog. ("Brown's First Supp. Answers"), Interrog. Answer No. 15; Pl. Brown's November 9, 2015, Am. Compl. ¶¶ 20-21.

[144] Def.'s Mot. for Summ. J. (*Gerald*), p. 21; Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., p. 14.

[145] *People of the Virgin Islands v. Penn*, 53 V.I. 315, 318 (V.I. Super. Ct. 2010) (denying a defendant's motion to dismiss when he did not present any argument or case law supporting his claim of discrimination); *See Simpson v. Golden*, 56 V.I. 272, 280 (V.I. 2012) ("The rules that require a litigant to brief and support his arguments ... before the Superior Court, are not mere formalistic requirements. They exist to give the Superior Court the opportunity to consider, review, and address an argument"); *Bertrand*, 63 V.I. at 782 ("[S]imply stating a principle of law without any argument or explanation of how it applies to the case at hand is not sufficient to fairly present the issue to the Superior Court") (citing *Yusuf v. Hamed*, 59 V.I. 841, 851 n.5 (V.I. 2013)).

the "state of the art" is only one of many considerations involved in the risk-utility balancing test under the Restatement (Third) of Torts: Products Liability § 2(b),[146] which neither constitutes an absolute defense nor precludes a plaintiff "from demonstrating that a reasonable alternative could have been practically adopted."[147] To the extent Reynolds is attempting to reiterate its argument that conflict preemption bars the imposition of tort liability based on defects inherent in all cigarettes, this contention has already been rejected by the Court.

Furthermore, the Court agrees with the conclusion of other courts that "a plaintiff alleging defective design" is not required "to point to a specific design flaw resulting in a product that poses a danger greater than that inherent in products of its kind" in order to survive summary judgment.[148] Rather, in order to allege and prove a design defect, a plaintiff must demonstrate the defect was present in the specific cigarette brand at issue. Moreover, courts in "other jurisdictions applying some form of risk-utility test to design defect claims against cigarette manufacturers" have recognized that the presence of menthol or manipulation of the "product to give smokers particular doses of tar and nicotine[,]" as described by Dr. Farone with respect to Newport cigarettes, constitute defects specific to the cigarette brand at issue.[149] As a result, the testimony of

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[146] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d.
[147] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d; *See also id.* at reporter's notes cmt. d IV.B (noting that RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d "disagrees" "with the[ ] extreme minority positions" adhering to an absolute "state of the art" defense) (collecting cases).
[148] *Boerner v. Brown & Williamson Tobacco Corp.*, 260 F.3d 837, 846 (8th Cir. 2001) ("Arkansas law does not, however, require a plaintiff alleging defective design to point to a specific design flaw resulting in a product that poses a danger greater than that inherent in products of its kind") (citing *Buchanna v. Diehl Mach. Inc.*, 98 F.3d 366, 370 (8th Cir. 1996) (Arkansas law does not require that a plaintiff show that a product poses a danger not posed by similar products in order to avoid summary judgment, although trier of fact may consider such evidence)).
[149] *Izzarelli v. R.J. Reynolds Tobacco Co.*, 321 Conn. 172, 205-06, 136 A.3d 1232, 1251 (Conn. 2016) (collecting cases).

Dr. Farone is sufficient to demonstrate the existence of a design defect specific to Newport cigarettes so as to satisfy Plaintiffs' burden on summary judgment.[150]

Likewise, the Court is also not persuaded by Reynolds' argument that Plaintiffs' burden of demonstrating proximate causation on summary judgment requires a showing that Decedents would have smoked a safer cigarette. While the approaches for establishing defects under the Restatement (Second) of Torts § 402A and Restatement (Third) of Torts: Products Liability § 2 differ, with the Third Restatement replacing the Second Restatement's "consumer expectations test" with a risk-utility balancing test, "[t]he causation prong, under both [versions of the Restatement] … , simply applies the general rules of causation, requiring the plaintiff to show that the defect caused the injury or harm alleged."[151] Notwithstanding, Reynolds ignores the deposition testimony of Decedent Brown that suggests Decedent Brown would have smoked a safer cigarette.[152]

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[150] Additionally, note that in proving the reasonable alternative design aspect of a design defect claim, plaintiff must rely on expert testimony in "many[,]" but not all, cases. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. f ("While a plaintiff must prove that a reasonable alternative design would have reduced the foreseeable risks of harm, Subsection (b) does not require the plaintiff to produce expert testimony in every case. Cases arise in which the feasibility of a reasonable alternative design is obvious and understandable to laypersons and therefore expert testimony is unnecessary to support a finding that the product should have been designed differently and more safely"); *See Tutein*, 2016 V.I. LEXIS 50, at *16-17 (conducting the requisite analysis mandated in *Banks*, 55 V.I. 967 and adopting the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 as the soundest rule for the Virgin Islands for demonstrating an inferred defect); *Davis*, 63 V.I. at 491(citations omitted). Notwithstanding, the Court reiterates that its analysis here rests solely on Plaintiffs' showing under the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b). The parties have not suggested that the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 applies under the circumstances at issue in these cases.

[151] *Aubin*, 177 So. 3d at 505, 513.

[152] Decedent Brown testified that when she switched to Merit cigarettes, which the record reflects was in 1976, she thought a lower tar, lower nicotine cigarette, such as Merit, was safer, as follows:

> Q: You did, in your mind, think that it could be safer to smoke a lower tar, lower nicotine cigarette?
> A: Yes.
> Q: Safer than what? When you said it was safer, what did you think was safer?
> …
> A: Well, at the time I was smoking Newports and I thought perhaps it was safer it was lower tar.
> Q: Were you aware of some risks of smoking at that time and so that switching to lower tar cigarette would be safer form a health perspective?

In arguing Plaintiffs must demonstrate Decedents would have smoked a safer cigarette, Reynolds cites non-Virgin Islands cases, *Whiteley v. Philip Morris, Inc.*[153] and *Estate of White v. R.J. Reynolds Tobacco Co.*[154] *Whiteley* is California case involving the sufficiency of evidence at trial as opposed to on summary judgment, wherein the court concluded that "there is simply no substantial evidence from which the jury could conclude that the negligent design of cigarettes was 'in reasonable medical probability' a 'substantial factor' contributing to [the decedent's] risk of developing lung cancer."[155] First of all, *Whiteley* was based on the application of California law regarding the standard of proof of causation in toxic tort cases, which has not been adopted in the Virgin Islands.[156] Second, the court's determination in *Whiteley* that the plaintiff failed to "cite any evidence ... from which the jury could assume that, were the suggested design changes made, [the decedent] ... would have smoked the safer cigarette, smoked less, or quit smoking altogether" was one of many factors considered by the court, and, was particularly relevant because any conclusion to the contrary would have been a product of jury speculation since such "would run counter to the evidence, which showed that when [decedent] moved from unfiltered to filtered cigarettes, the number of cigarettes she smoked actually *increased*."[157]

Reynolds has not identified, and the Court's research has not revealed, any Virgin Islands law that suggests proximate causation in the context of a design defect claim requires, as a matter

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> A: Yes. The controversy was still swirling around whether it was hazardous or not hazardous and I thought, well, if they come up with a less hazardous brand, great.

Pls.' J.A., Brown Disc. Dep., 208:15-25, 209:1-7; *See id.* 207:13-25, 208:1-13. 209:15-25.
[153] 117 Cal. App. 4th 635, 11 Cal. Rptr. 3d 807 (Cal. App. 1st Dist. 2004).
[154] 109 F. Supp. 2d 424 (D. Md. 2000).
[155] *Whiteley*, 117 Cal. App. 4th at 703.
[156] *See id.* at 698-701; *See also Rutherford v. Owens-Ill., Inc.*, 16 Cal. 4th 953, 976 n.11, 67 Cal. Rptr. 2d 16, 31, 941 P.2d 1203, 1219 (Cal. 1997).
[157] *Whiteley*, 117 Cal. App. 4th at 702; *See Haglund v. Philip Morris, Inc.*, 26 Mass. L. Rep. 205 n.12 (Mass. Super. 2009) (distinguishing *Whiteley*, 117 Cal. App. 4th 635).

of law, that the injured party would have actually used the proposed reasonable alternative design. Rather, in order to bring the issue of causation before a jury on a design defect claim, the evidence must support a reasonable inference, rather than a guess, that the use of an alternative reasonable design would have prevented the Decedents' injuries.[158] The United States District Court for the Virgin Islands has concluded that "[p]roving that an alleged defect was the legal cause of an injury requires testimony from a qualified expert who can testify about specific causation."[159] Here, Plaintiffs have submitted the expert testimony of Dr. Farone and Dr. Proctor, as well as the expert reports of Dr. Nelson and Dr. Hughes, which satisfies their burden on summary judgment.[160]

The other case cited by Reynolds, *Estate of White*, is equally inapposite. There, the United States District Court for the District of Maryland described the "causation" element of a negligence or strict liability claim based on a design defect under Maryland law as requiring the plaintiff to "show that [the decedent] ... would have accepted and used the alternatively designed cigarette."[161] A close review of that case indicates that the court's conclusion was rendered in reliance on Maryland case law regarding causation in "automobile crash-worthiness" cases based on defect related increases in harm, a concept that involves the application of separate, specialized

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[158] *C.f. Chelcher v. Spider Staging Corp.*, 892 F. Supp. 710, 715 n.7 (D.V.I. 1995) (citing *Conti v. Ford Motor Co.*, 743 F.2d 195 (3d Cir. 1984)).

[159] *Anders v. Puerto Rican Cars, Inc.*, 2009 U.S. Dist. LEXIS 85848, at *25-26 (D.V.I. Sep. 15, 2009)

[160] *Accord In re Catalyst Litig.*, 2010 V.I. LEXIS 126, *17-18 (V.I. Super. Ct. June 30, 2010) (in the context of a toxic tort case, the determination of causation with respect to plaintiff's negligence claim involved "genuine issues of material facts .... that should be left to the trier of fact to decide at trial" because "the record shows that Plaintiff ... worked with catalyst while working at Defendant HOVIC's refinery over a number of years," was "told by his doctor that there are catalyst deposits inside of Plaintiff['s] ... system[,] ... Plaintiff ... has developed mixed dust pneumoconiosis[,] ... [and] Dr. Barrie and Dr. Teitelbaum, Plaintiff['s] expert witnesses, argue that catalyst dust can, and in Plaintiff['s] ... case did, cause mixed dust pneumoconiosis").

[161] *Estate of White*, 109 F. Supp. 2d at 434 (citing *Nissan Motor Co. v. Nave*, 129 Md. App. 90, 119-20, 740 A.2d 102, 118 (1999)

principles of causation, distinct from the general rules of causation applicable here.[162] The court in *Estate of White* did not address the differing standards of causation and, without more, the Court is not persuaded that an application of this specialized causation standard is appropriate in the cases *sub judice*, where the parties do not address causation in terms of the "enhancement" of harm due to a product defect.

Finally, the Court notes that Reynolds' position—that an injured person's failure to demonstrate he or she would have used the reasonable alternative design defeats a design defect claim as a matter of law—is reminiscent of using contributory negligence as an absolute bar to recovery. Contributory negligence, "the traditional common law rule that any negligence by the plaintiff—no matter how small—defeated all recovery[,]" was abrogated by the enactment of the Virgin Islands' comparative negligence statute, 5 V.I.C. § 1451, in 1973.[163] In construing 5 V.I.C. § 1451, the Supreme Court of the Virgin Islands has abolished the use of implied assumption of risk, which encompasses the open and obvious doctrine, as "a complete defense to negligence conflicts" because it violates 5 V.I.C. § 1451(a), which requires plaintiff's comparative fault be assessed by the trier of fact after a trial on the merits.[164] On the other hand, "[u]nder traditional

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[162] *Id.* (citing *Nave*, 129 Md. App. 90, 119-20) (after recounting the essential elements of a design defect case in Maryland, the court further stated that "in 'automobile crash-worthiness' cases, where the alleged design defect did not cause the initial accident, plaintiffs have the burden of establishing that the design used by the manufacturer caused greater injuries to the victim than would have occurred had a proper design been used. ... When, as here, a vehicular accident results in death, plaintiffs must produce sufficient evidence to establish that the design of the vehicle in question caused an otherwise survivable accident to be fatal"); *Compare* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 15 (describing the general rule governing causal connection between product defect and harm) with *id.* at § 16 (describing the standard of causation for increased harm due to a product defect); *See also id.* at § 15 cmt. a & reporter's note cmt. a.

[163] *Machado*, 61. V.I. at 373 (citations omitted); 5 V.I.C. § 1451(a) ("In any action based upon negligence to recover for injury to person or property, the contributory negligence of the plaintiff shall not bar a recovery, but the damages shall be diminished by the trier of fact in proportion to the amount of negligence attributable to the plaintiff").

[164] *Machado*, 61 V.I. at 395-400; *Id.* at 398 (Under 5 V.I.C. § 1451, "if there is evidence suggesting that a plaintiff's actions contributed to [his or] her own injury it must be presented to the jury, which may then allocate fault accordingly") (citing *Sealey-Christian*, 52 V.I. at 427).

strict products liability theory, the defenses of assumption of the risk, in the sense of a voluntary encounter with a known product defect ... operate[s] as absolute bars to plaintiff's recovery."[165] It remains unclear whether the principles of comparative negligence proscribed in 5 V.I.C. § 1451 apply to eliminate implied assumption of risk as an absolute defense to claims arising under a theory of strict products liability.[166]

5 V.I.C. § 1451 explicitly refers to "action[s] based upon negligence[,]" but it "is made expressly inapplicable only to statutorily based absolute liability actions" and the Restatement (Third) of Torts: Products Liability § 2 "involves neither statutorily based liability nor absolute liability."[167] The Supreme Court of the Virgin Islands has not addressed whether 5 V.I.C. § 1451 applies in actions based on strict liability generally, nor has it considered the concept in relation to strict products liability actions. In 1979, the Third Circuit found in *Murray v. Fairbanks Morse*[168] that the express terms of 5 V.I.C. § 1451 did not apply to strict products liability actions, but that the statutory recognition of comparative principles authorized the court to judicially adopt a "pure

[165] *Murray v. Fairbanks Morse*, 610 F.2d 149, 162 (3d Cir. 1979)
[166] Comparative fault is an affirmative defense that is waived unless it is pled in the defendant's answer. *Edward v. GEC, LLC*, No. 2017-0025, 2017 V.I. Supreme LEXIS 46, at *16-17 (V.I. Aug. 1, 2017) (The Supreme Court of the Virgin Islands "has emphasized that affirmative defenses are all those which must be proven by the defendant, and that affirmative defenses are waived unless pled in an answer") (citations omitted); V.I. R. CIV. P. 8(c)(1) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including ... comparative negligence"); *Machado*, 61 V.I. at 396 ("[I]mplied assumption of risk, involves 'an affirmative defense to an established breach of duty' where the plaintiff's actions demonstrate that she appreciated the risk involved and proceeded regardless of that risk") (citations omitted); *C.f. Phillip v. Marsh-Monsanto*, 2017 V.I. Supreme LEXIS 30, at *7 n.3 (V.I. May 30, 2017) ("Phillip did not assert an affirmative defense under the Virgin Islands Statute of Frauds. As a result, that defense is waived"). These defenses have not been waived, as Reynolds and Lorillard, LLC assert comparative negligence and assumption of risk as affirmative defenses in their respective Answers to Plaintiffs' Amended Complaints. Def. Reynold's July 12, 2017, Answer, Defenses, and Jury Demand (*Gerald*), ¶¶ 84, 75-76; Lorillard's LLC's July 12, 2017, Answer, Defenses, and Jury Demand (*Gerald*), ¶¶ 84, 75-76; Def. Reynold's July 12, 2017, Answer, Defenses, and Jury Demand (*Brown*), ¶¶ 84, 75-76; Lorillard's LLC's July 12, 2017, Answer, Defenses, and Jury Demand (*Brown*), ¶¶ 84, 75-76.
[167] *Murray*, 610 F.2d at 157-58 (citing 5 V.I.C. § 1451(b)).
[168] 610 F.2d 149.

comparative fault approach utilizing causation as the conceptual basis for apportioning damages" in strict liability actions under the Restatement (Second) of Torts § 402A.[169] The Third Circuit's conclusion that 5 V.I.C. § 1451 did not apply to actions under Section 402A was largely based on "[t]he key conceptual distinction between strict products liability theory and negligence ... that the plaintiff need not prove faulty [c]onduct on the part of the defendant in order to recover" under a theory of strict products liability, which unlike a negligence theory, does not ask "[t]he jury ... to determine if the defendant deviated from a standard of care in producing his product."[170] But, even in its adoption of a comparative causation approach to strict products liability actions, the Third Circuit recognized "the elimination of assumption of the risk as a complete bar to recovery may be consistent with a proper allocation of the loss in strict products liability cases," though the court declined to rule on the issue because there was no evidence in that case to suggest that the plaintiff "in any way voluntarily proceeded to encounter a known product defect."[171]

Considering the Third Circuit's diminished authority in deciding matters of local law,[172] the Supreme Court's rejection of the Restatement (Second) of Torts § 402A in favor of the Restatement (Third) of Torts: Products Liability § 1, and the Superior Court's adoption of the Restatement (Third) of Torts: Products Liability § 2(b) to design defect claims,[173] the weight and relevance of the Third Circuit's decision in *Murray* is clearly limited. Indeed, the standard of

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[169] *Id.* at 162-63. The Third Circuit further explained that "[u]nlike comparative negligence, comparative fault asks the trier of fact to allocate the loss solely on the causal connection between the faulty product, I. e., [sic] the defect and the injury and the faulty conduct of the plaintiff and the injury." *Id.* at 163.
[170] *Id.* at 159.
[171] *Id.* at 162.
[172] *Hodge v. Bluebeard's Castle, Inc.*, 62 V.I. 671, 685-92 (V.I. 2015) (holding that this Court is not bound by decisions of the Appellate Division or the Third Circuit, even where those decisions concern the same parties and legal issues); *Hamed v. Hamed*, 63 V.I. 529, 534-35 (V.I. 2015) (explaining that Appellate Division and Third Circuit decisions are not binding on the Superior Court).
[173] *Banks*, 55 V.I. at 984; *Davis*, 63 V.I. at 488.

liability for design defects under the Restatement (Third) of Torts: Products Liability §§ 1, 2(b), as well as that for inadequate warnings or instructions under Section 2(c), "achieve the same general objectives as does liability predicated on negligence."[174] In fact, the Restatement (Third) of Torts: Products Liability §§ 1, 2(b)-(c) abandon the doctrinal categorizations of strict liability, negligence, and the implied warranty of merchantability in favor of a single tort theory for each specific defect, a concept the Court addresses at length below.[175] Additionally, the overall landscape of products liability law regarding the applicability of comparative negligence principles to strict products liability has changed since the Third Circuit rendered its decision in *Murray*, as many jurisdictions now apply comparative negligence principles to products liability actions.[176]

The evolution of products liability law in the Virgin Islands from strict liability under the Restatement (Second) of Torts § 402A to standards reminiscent of negligence under the Restatement (Third) of Torts: Products Liability §§ 1, 2 suggest a renewed relevance of 5 V.I.C. § 1451 to product defect claims based on the Restatement (Third) of Torts: Products Liability § 2. Evidence regarding whether Decedents would have smoked a safer cigarette relates the alleged contribution of Decedents to their own losses or injuries, while evidence of the public's awareness of the risks inherent in cigarette smoking pertains to Decedents' implied assumption of risk. This evidence speaks to Decedents' contributory negligence, which under 5 V.I.C. § 1451, must be presented to the jury, [who] ... may then allocate fault accordingly under" the comparative

[174] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a ("Subsections (b) and (c), which impose liability for products that are defectively designed or sold without adequate warnings or instructions and are thus not reasonably safe, achieve the same general objectives as does liability predicated on negligence").
[175] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n; *Id.* at reporter's notes cmt. n; *Id.* at § 1 cmt. a.
[176] *C.f.* 57B AM. JUR. 2d Products Liability § 978 (2017) (footnotes omitted) *and* 63A AM. JUR. 2d Products Liability § 1228 (2017) (footnotes omitted) *with Murray*, 610 F.2d at 156 (noting that "a division of authority as to whether [a comparative negligence] statute may be applied in strict products liability cases") (collecting cases).

negligence statute.[177] While the Court, at this juncture, declines to definitively decide whether 5 V.I.C. § 1451 applies to product defect claims arising under the Restatement (Third) of Torts: Products Liability § 2, the aforementioned analysis further substantiates the Court's conclusion that a lack of evidence indicating that Decedents would have smoked a safer cigarette and the evidence demonstrating the public's awareness of the risks associated with cigarette smoking do not defeat Plaintiffs' design defect claims as a matter of law.[178] Moreover, to the extent evidence regarding whether Decedents would have smoked a safer cigarette relates to causation, the Court finds it is not determinative of the causation element as a matter of law, and, therefore, also does not provide grounds for granting summary judgment on these claims.

As a result, the Court finds that genuine issues of material fact remain with respect to whether the alleged defective design of Newport cigarettes proximately caused Decedents' injuries. Consequently, Reynolds is not entitled to summary judgment on Plaintiffs' claims for strict products liability, negligence, and breach of the implied warranty of merchantability on this ground.

C. Claims based on failure to warn: Strict products liability (Count I), negligence (Count III), and breach of the implied warranty of merchantability (Count IV).

Plaintiffs' claims for strict products liability, negligence, and breach of the implied warranty of merchantability are also premised on the theory that, prior to 1970, Lorillard failed to

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[177] *Machado*, 61 V.I. at 398 (citing *Sealey-Christian*, 52 V.I. at 427); *See Bertrand*, 63 V.I. at 780 (citing *Machado*, 61 V.I. at 397-98).

[178] *C.f. Boerner*, 260 F.3d at 848 ("Dr. Feingold's statement that Mrs. Boerner's lung cancer was caused by exposure to the carcinogens in cigarette smoke is sufficient to create a jury issue on proximate cause. In reaching this conclusion, we have considered the district court's conclusion that Mrs. Boerner would not have used a safer alternative product because she disliked filtered cigarettes, and find it to be beside the point. Under Arkansas law, contributory negligence is no bar to recovery under a strict liability theory") (citations omitted).

adequately warn of the health risks and addictiveness associated with smoking Newport cigarettes.[179] Reynolds moves for summary judgment on Plaintiffs' claims for strict products liability (Count I), negligence (Count III), and breach of the implied warranty of merchantability (Count IV), to the extent they are based on Lorillard's purported failure to warn "about the health risks and addictiveness of smoking prior to July 1, 1969[,]" arguing Plaintiffs "cannot establish that Lorillard had a duty to warn about those generally-known risks" or "prove that the alleged lack of an adequate warning proximately caused Decedent[s'] injuries."[180] In opposition, Plaintiffs submit that genuine issues of material fact exist with respect to whether Lorillard breached its duty to warn Decedents "that Newport cigarettes were dangerous and addictive prior to July 1, 1969, … [and] whether Lorillard's failure to warn proximately caused … [Decedents'] injuries and resulting death."[181]

a. Product defect based on inadequate warnings or instructions under Virgin Islands law.

In claiming Lorillard had no pre-1969 duty to warn consumers of the risks of smoking, Reynolds cites the Restatement (Third) of Torts: Products Liability § 2(c) and Comment *j* of Section 2(c) for authority.[182] On the other hand, Plaintiffs point to the duty to warn set forth in the Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 18 and a portion of the

[179] *See* Pl. Gerald's November 9, 2015, Am. Compl. ¶¶ 3-5, 8-10, 15-20, 30-35, 36-43; Pl. Brown's November 9, 2015, Am. Compl. ¶¶ 3-5, 9-11, 16-21, 30-34, 35-41.
[180] Def.'s Mot. for Summ. J. (*Gerald*), pp. 23-24; Def.'s Mot. for Summ. J. (*Brown*), p. 17.
[181] Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 32; Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., p. 20.
[182] Def.'s Mot. for Summ. J. (*Gerald*), p. 24; Def.'s Mot. for Summ. J. (*Brown*), p. 18.

Restatement (Third) of Torts: Products Liability § 2(c) as "[t]he relevant inquiry in a failure to warn product defect case."[183]

In *Banks v. Int'l Rental & Leasing Corp.*,[184] the Supreme Court determined that, by vesting the supreme judicial authority in the Supreme Court of the Virgin Islands, the Legislature implicitly repealed 1 V.I.C. § 4, under which the Restatements of Law had previously been applicable in the Virgin Islands in "the absence of local laws to the contrary."[185] "[I]nstead of mechanistically following the Restatements[,]"[186] the Supreme Court of the Virgin Islands instructed the Superior Court in *Banks* to conduct a three-part analysis when confronted with an issue of common law not yet addressed by the Supreme Court of the Virgin Islands.[187] Under *Banks*, the Court must balance the following non-dispositive factors:

> (1) whether any Virgin Islands courts have previously adopted a particular rule;
> (2) the position taken by a majority of courts from other jurisdictions; and
> (3) most importantly, which approach represents the soundest rule for the Virgin Islands.[188]

Because the Supreme Court of the Virgin Islands has yet to address the applicable law regarding product defect claims based on inadequate warnings or instructions, and the Superior Court has yet to do so within the confines of *Banks*, the Court must conduct a *Banks* analysis in order to

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[183] Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 32 (citing *Eaglin v. Castle Acquisition, Inc.*, No. 2011-48, 2012 U.S. Dist. LEXIS 140894, at *15-16 (D.V.I. Sep. 28, 2012) (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. AND EMOT. HARM § 18); *Peters v. V.I. Water & Power Auth.*, 58 V.I. 49, 55 (Super. Ct. 2013) (citing RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2)) (other citation omitted); Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., pp. 20-21 (same).
[184] 55 V.I. 967.
[185] *Id.* at 979.
[186] *Gov't of the V.I. v. Connor*, 60 V.I. 597, 603 (V.I. 2014) (citing *Simon v. Joseph*, 59 V.I. 611, 623 (V.I. 2013) (interpreting *Banks*)).
[187] *Banks*, 55 V.I. at 981-84; *See Machado*, 61 V.I. at 380 (citing *Better Bldg. Maint. of the V.I., Inc. v. Lee*, 60 V.I. 740, 757 (V.I. 2014)) (other citations omitted).
[188] *Simon*, 59 V.I. 611; *Hamed*, 63 V.I. at 534-37 (discussing the evolution of *Banks* and its progeny); *Machado*, 61 V.I. at 380 (citing *Better Bldg. Maint. of the V.I., Inc. v. Lee*, 60 V.I. 740, 757 (V.I. 2014)) (other citations omitted).

determine the law governing product defect claims based on inadequate warnings or instructions, *e.g.* "failure to warn" claims based on a product defect, in the Virgin Islands.

At the outset, the Court notes that there are three *Banks* issues lurking here. The first involves a determination of the applicable common law to strict products liability claims based on inadequate warnings or instructions. The second and third issues only arise if the Restatement (Third) of Torts: Products Liability §§ 1, 2(c) applies. The second *Banks* issue involves a determination of whether the Restatement (Second) of Torts, or other common law, applies to impose a separate "duty to warn" on suppliers of products at the time of sale so as to create a distinct cause of action for negligent failure to warn, when the case otherwise falls within the purview of the Restatement (Third) of Torts: Products Liability § 2(c). Finally, the third issue asks whether plaintiffs should be permitted to submit product defect claims based on inadequate warnings or instructions to the jury under multiple theories of recovery, namely, those for strict products liability, negligence, and implied warranty of merchantability. Because these issues are interrelated, the Court addresses them together in a single *Banks* analysis below.

1. Rules previously adopted by Virgin Islands courts.

i. Product defects based on inadequate warnings or instructions under strict liability and negligence.

With respect to the first factor under *Banks*, whether any Virgin Islands courts have previously adopted a particular rule, courts in the Virgin Islands initially applied the Restatement (Second) of Torts § 402A to product defect claims,[189] including those based on inadequate

[189] *Banks*, 55 V.I. at 981("[S]ection 402A [of the Second Restatement] has received widespread acceptance in Virgin Islands courts") (internal quotation marks and citations omitted).

instructions or warnings.[190] In the years following the American Law Institute's approval of the Restatement (Third) of Torts: Products Liability in 1997, "a few Virgin Islands courts began applying it to the cases before them."[191] However, in 2005, the Superior Court expressly rejected the Restatement (Third) of Torts: Products Liability §§ 1, 2 as violative of 1 V.I.C. § 4, which was in effect at that time, and applied Section 402A to a failure to warn claim based on a product defect.[192] There, the Superior Court also recognized that "causes of action for failure to warn exist in … [the Restatement (First) of Torts § 388, the Restatement (Second) of Torts §§ 388, and 402A,] … respectively, as alternative theories of recovery."[193] Similarly, the United States District Court for the Virgin Islands has also applied the Restatement (Second) of Torts § 388, which the court found "codifie[d] the cause of action for negligent failure to warn[,]" into strict products liability actions arising under Restatement (Second) of Torts § 402A.[194] All of these cases involved a rote application of the Restatements through 1 V.I.C. § 4.

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[190] *See In re Kelvin Manbodh Asbestos Litig. Series*, 47 V.I. 215, 241 n. 29 (Super. Ct. 2005) ("Numerous non-binding trial court decisions, have applied section 402A, including in a failure to warn context") (citing *Poole v. Ford Motor Co.*, 17 V.I. 354, 357 (D.V.I. 1980); *Battiste v. St. Thomas Diving Club, Inc.*, 15 V.I. 184, 189 (D.V.I. 1979)); *See also Belofsky v. GE*, 1 F. Supp. 2d 504, 508 & n. 1 (D.V.I. 1998); *Chelcher v. Spider Staging Corp.*, 892 F. Supp. 710, 714 (D.V.I. 1995).

[191] *Hartzog v. United Corp.*, 59 V.I. 58, 69 (Super. Ct. 2011) (citing *Paul v. Electric Ave.*, 2001 U.S. Dist. LEXIS 14261, (D.V.I. App. Div. Aug. 29, 2001) (unpublished); *Hamlet v. Oliver Exterminating, Inc.*, 44 V.I. 99, 110-12 (Terr. Ct. 2001)).

[192] *See Manbodh Asbestos Litig.*, 47 V.I. at 224-42, 245-46; *Id.* at 242 (noting that "[t]o date, only two courts in this jurisdiction have applied the Restatement (Third) of Torts section 1, the corresponding products liability section") (citations omitted).

[193] *Id.* at 245, 226 n. 6 (citations omitted). Ultimately, the Superior Court applied the Restatement (First) of Torts § 388, but noted that "the language of section 388 in the Restatement (First) and (Second) of Torts is nearly identical[.]" *Id.* at 241 (citations omitted);

[194] *See Martin v. S.C. Johnson & Sons*, 1996 U.S. Dist. LEXIS 19722, at *18-24 (D.V.I. Mar. 21, 1996); *See Manbodh Asbestos Litig.*, 47 V.I. at 241 n. 29 ("Restatement (Second) of Torts section 388 has also been applied by the District Court") (citing *Viger v. Commercial Ins. Co. of Newark*, 19 V.I. 40, 42 (D.V.I. 1982) *rev'd on other grounds* by 707 F.2d 769, 19 V.I. 642 (3d Cir. 1983)).

After applying its three-factor analysis for the first time in *Banks*, the Supreme Court of the Virgin Islands adopted the Restatement (Third) of Torts: Products Liability §§ 1, 20 and held that "lessors [of chattel] may be held strictly liable for injuries resulting from a defective product."[195] However, it remains "unclear whether courts are meant to apply section 1 [of the Restatement (Third) of Torts: Products Liability] in the limited context of allowing claims against lessors, or whether the Supreme Court intended the entirety of the section to replace anything contrary contained in the Second Restatement."[196] In addressing product defect claims based on inadequate warnings or instructions in the first years following *Banks*, the Superior Court did not conduct the requisite *Banks* analysis, but instead continued to utilize 1 V.I.C. § 4, whether through outright reliance on the Restatements or prior case law looking thereto, which resulted in the Superior Court applying the Restatement (Second) of Torts § 402A in some instances and the Restatement (Third) of Torts: Products Liability §§ 1, 2(c) in others.[197]

On the related, but distinct concept, of product defect claims based on defective design, the Superior Court has performed *Banks* analyses, and, as discussed above, adopted the Restatement (Third) of Torts: Products Liability §§ 1, 2(b) as the "soundest rule for the Virgin Islands,"[198] as well as the Restatement (Third) of Torts: Products Liability § 3, which permits the use of circumstantial evidence "as an alternate means of recovery for plaintiffs who cannot satisfy the requirements" of the Restatement (Third) of Torts: Products Liability §§ 1, 2 because "the specific defect cannot be identified or the product has been destroyed."[199]

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195 *Banks*, 55 V.I. at 984.
196 *Bertrand v. Cordiner Enters.*, 2013 V.I. LEXIS 67, *16 (V.I. Super. Ct. Nov. 15, 2013).
197 *Compare id.* at *19-20 with *Peters*, 58 V.I. at 54-55.
198 *Davis*, 63 V.I. at 486-89.
199 *Tutein*, 2016 V.I. LEXIS 50, at *15-16.

ii. Submission of multiple theories of recovery for product defects based on inadequate warnings or instructions to the trier of fact.

a) Strict liability and the implied warranty of merchantability.

Next, the Court looks to decisions by Virgin Islands courts regarding the issue of instructing the jury on multiple theories of recovery for a product defect. First, the Court considers instructions to the trier of fact on strict products liability and implied warranty of merchantability as independent theories of recovery in product defect cases. Applying the Restatement (Second) of Torts § 402A to plaintiff's strict products liability claim in 1983, the Third Circuit set aside the jury's findings that the product was not defective and unreasonably dangerous under Section 402A, but that the sale of the product breached the implied warranty of merchantability, as irreconcilably inconsistent because "the defect at issue ... plainly falls within the common core of both causes of action," reasoning "we can conceive of no theory under which the allegedly defective [product] ... could have been defective and unfit for its ordinary purposes under [11A V.I.C. § 2-314 of the Virgin Islands Uniform Commercial Code ("U.C.C."),] but not also defective and unreasonably dangerous within section 402A."[200] There, the Third Circuit noted that "Virgin Island courts have ... tended to merge the two theories, applying warranty terms to strict liability causes of action and vice-versa."[201] Indeed, beginning in 1968, courts in the Virgin Islands historically applied the Restatement (Second) of Torts § 402A to claims for the breach of the implied warranty of merchantability under 11A V.I.C. § 2-314 arising from alleged defects in food consumed by

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[200] *Gumbs v. Int'l Harvester, Inc.*, 718 F.2d 88, 94-95 (3d Cir. V.I. 1983) (internal and other citations omitted).
[201] *Id.* at 95 (citing *Poole v. Ford Motor Co.*, 17 V.I. 354 (D.V.I. 1980); *Battiste v. St. Thomas Diving Club, Inc.*, 15 V.I. 184 (D.V.I. 1979)).

plaintiffs.[202] The issue does not appear to have been raised in recent years, though the Superior Court has pointed out that uncertainty exists with respect to whether principles of negligence or strict liability apply to claims for breach of the implied warranty of merchantability under 11A V.I.C. § 2-314.[203]

b) Strict products liability and negligence.

Finally, the Court considers instructions to the trier of fact on strict liability and negligence as independent theories of recovery in product defect cases. At the outset, it is helpful to recall the Third Circuit's decision in 1979, in which it distinguished the theories of strict products liability and negligence, as follows:

> In the case of products liability, the fault inheres primarily in the nature of the product. The product is "bad" because it is not duly safe; it is determined to be defective and (in most jurisdictions) unreasonably dangerous ... (S)imply

[202] *See, e.g.*, *Bronson v. Club Comanche*, 286 F. Supp. 21, 22-23 & n. 3 (D.V.I. 1968); *Battiste*, 15 V.I. 184 (framing the issue as "what legal standard governed the applicability of the implied warranty provisions of [11A V.I.C.] § 2-314 and [11A V.I.C.] § 2-315 to ciguatera fish poisoning and adopting the "reasonable expectations test," under the RESTATEMENT (SECOND) OF TORTS § 402A (1965)); *Hoch v. Venture Enters.*, 473 F. Supp. 541, 543 (D.V.I. 1979); *Chapman v. Cafe Madeleine*, 39 V.I. 161, 164 (Terr. Ct. 1998) ("The implied warranty imposes a strict liability upon him making him liable to his customers even though in the exercise of all possible care in the purchase and preparation of the food he could not discover its unwholesome nature") (citing *Bronson*, 286 F. Supp. at 23); *See also White v. S & E Bakery*, 26 V.I. 87, 89-90 (Terr. Ct. 1991) (noting that "[a] person who alleges injury caused by a defective product delivered by the manufacturer or seller may not only sue for breach of express or implied warranties under the UCC, or sue in negligence, but may also bring an action seeking to enforce strict tort liability against the manufacturer or seller" without addressing the standard of liability applicable to each cause of action) (citations omitted). Additionally, when ruling on a summary judgment motion in a case premised on personal injuries sustained by the plaintiff as a result of an allegedly defective saw in 2008, the District Court separately considered the plaintiff's claims for negligence, strict products liability, and breach of the implied warranty of merchantability, but implied that the Restatement (Second) of Torts § 402A was relevant to plaintiff's claim breach of implied warranty of merchantability. *Martin v. Powermatic, Inc.*, 2008 U.S. Dist. LEXIS 44211, at *18 (D.V.I. June 4, 2008) ("The elements of a claim for breach of the implied warranty of merchantability and a claim based upon the Restatement 2d Torts § 402A are essentially the same") (citing *Gumbs*, 718 F.2d at 94-95).

[203] *Charles*, 2016 V.I. LEXIS 113, at *7-8 n. 4 ("Although the official comments to 11A V.I.C. § 2-314 establish that proving some breach — some wrongdoing on the part of the defendant — is an essential element of a claim for breach of the warranty of merchantability, and state that 'evidence indicating that the seller exercised care in the manufacture, processing or selection of the goods is relevant to the issue of whether the warranty was in fact broken,' some courts have analyzed these claims under a strict liability framework") (citations omitted). The Superior Court did not resolve the issue because Plaintiff had failed to satisfy her burden on proof on summary judgment with respect to the element of proximate causation. *Id.*

> maintaining the bad condition or placing the bad product on the market is enough for liability ... One does not have to stigmatize conduct as negligent in order to characterize it as fault.
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> ...
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> [Thus, t]he key conceptual distinction between strict products liability theory and negligence is that the plaintiff need not prove faulty [c]onduct on the part of the defendant in order to recover [under a strict products liability theory]. The jury is not asked to determine if the defendant deviated from a standard of care in producing his product.[204]

There, the Third Circuit noted that "products liability cases are often tried on alternative theories of negligence and strict liability."[205]

In *Acosta v. Honda Motor Co.*,[206] a products liability action based theories of defective design and failure to warn, the trial court instructed the jury at the conclusion of trial on negligence and strict liability under the Restatement (Second) of Torts § 402A, where "the jury was given lengthy special interrogatories which, among other things, directed it to consider the strict liability count first, and, if it found the defendants liable thereon, to disregard the negligence count."[207] On appeal, the Third Circuit rejected the defendant's argument that the trial court's dual instructions

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[204] *Murray*, 610 F.2d at 159-63 (adopting a "pure comparative fault approach utilizing causation as the conceptual basis for apportioning damages" to strict liability actions under the Restatement (Second) of Torts § 402A in the Virgin Islands, a judicial construct distinct from comparative negligence under 5 V.I.C. § 1451) (internal and other citations omitted); *Id.* at 159 n. 12 ("We believe the initial determination of fault is necessary to avoid situations in which conduct that is reasonable on the part of the plaintiff might contribute causally to an injury and the plaintiff would accordingly bear part of the loss. Only when conduct fails to meet a societal standard of reasonable care should the causal link between conduct and injury be examined"); *Id.* at 163 ("Unlike comparative negligence, comparative fault asks the trier of fact to allocate the loss solely on the causal connection between the faulty product, I. e., [sic] the defect and the injury and the faulty conduct of the plaintiff and the injury").
[205] *Id.* at 157.
[206] 717 F.2d 828 (3d Cir. V.I. 1983).
[207] *Id.* at 831. Although "[t]he complaint, which stated causes of action in negligence, strict product liability under section 402A of the *Restatement (Second) of Torts*, and breach of implied warranty of merchantability" under 11A V.I.C. § 2-314, [t]he Court had already dismissed the breach of implied warranty count on statute of limitations grounds[,]" which was not appealed. *Id.* at 831 & n. 1.

to the jury on negligence and strict liability were improper because "a jury is likely to be confused by the presence of the two concepts in the same case[,]" noting:

> [Defendant's] argument ignores the fact that many plaintiffs plead alternative theories of negligence and strict products liability. Thus juries are frequently asked, as was the case here, simultaneously to consider both fault and nonfault based standards of liability. Moreover, we are convinced that a properly instructed jury will be able to distinguish between the standards applicable to awards of compensatory and punitive damages.[208]

More recently, the Superior Court has stated that a plaintiff's product defect claim based on inadequate warnings or instructions could be "brought under a theory of negligence or strict liability" under the Restatement (Second) of Torts § 388 and the Restatement (Third) of Torts: Products Liability § 2, respectively, but that case involved the sufficiency of the complaint at the motion to dismiss stage rather than the viability of submitting both theories to the jury at trial.[209] Similarly, the concept was briefly touched on by the Supreme Court of the Virgin Islands while reviewing the Superior Court's grant of summary judgment, but the Supreme Court did so only in mentioning that the plaintiff asserted theories of liability for "negligence, breach of implied and express warranty, and strict liability for the 'defective condition'" of a product in the complaint.[210]

Admittedly, the Motions for Summary Judgment currently pending before the Court do not require a resolution of the jury instructions issue. However, because the issue has not been directly addressed by the Supreme Court of the Virgin Islands, involves concepts intertwined with the first

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[208] *Id.* at 835 n.10 (citations omitted).

[209] *Peters*, 58 V.I. at 57-59 (citations omitted). As discussed, a *Banks* analysis was not performed. *See id.* at 54-55, 57-59.

[210] *Bertrand*, 63 V.I. at 781 ("In its complaint, the estate alleged that Abaco was liable for negligence, breach of implied and express warranty, and strict liability for the 'defective condition' of the clamp"); *C.f. Walker v. Skyclimber, Inc.*, 571 F. Supp. 1176, 1177 (D.V.I. 1983) ("Plaintiffs subsequently filed this action seeking damages for personal injuries allegedly sustained ... when they fell from a scaffolding device ... Plaintiffs' claim against both ... the [supplier] and manufacturer of the hoist, sounds in negligence as well as strict liability ... Regarding the latter cause of action, plaintiffs allege that the accident was caused by a defect in the skyclimber hoist").

and second *Banks* issues described above, and jury trial in these cases is imminent, the Court will conduct a *Banks* analysis on this issue in order to ensure the adoption of a comprehensive and cohesive approach to product defect claims based on inadequate warnings or instructions in the Virgin Islands.

2. The position taken by a majority of courts from other jurisdictions.

The second factor under *Banks*, "determining the position taken by a majority of courts from other jurisdictions[,] directs the Superior Court to consider all potential sides of an issue by viewing the potentially different ways that other states and territories have resolved a particular question."[211]

i. Strict liability for product defects based on inadequate warnings or instructions.

"The general obligation to provide reasonable instructions and warnings is … widely recognized" in all jurisdictions.[212] From there, "[a]n overwhelming majority of jurisdictions support[ ] the proposition that a manufacturer has a duty to warn only of risks that were known or should have been known to a reasonable person."[213] This concept is embodied in the Restatement (Third) of Torts: Products Liability § 2(c), which provides:

> A product is defective when, at the time of sale or distribution, it … is defective because of inadequate instructions or warnings. A product:
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> …
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> (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor,

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[211] *Connor*, 60 V.I. at 603 (citations omitted).
[212] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 reporter's notes cmt. i (citations omitted).
[213] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 reporter's notes cmt. m, 2 (collecting cases).

> or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.[214]

This standard is specific to product defects based on inadequate warnings or instructions, as opposed to the Restatement (Second) of Torts § 402A, which adheres to a "one size fits all approach" to all product defects, regardless of type, the standard for which is based on whether the "'product in a defective condition [is] unreasonably dangerous to the user or consumer.'"[215] Courts have concluded that, under the plain text of Section 402A, as well as Comment *i* of Section 402A, "liability [under Section 402A] … hinge[s] on the consumer's expectations of product safety and performance[,]"[216] hence, the standard under Section 402A is widely recognized as the "consumer expectations test."

Notably, the plain text of the Restatement (Second) of Torts § 402A "subjects a seller of a defective product to strict liability without regard to the knowledge of the defect and 'even though [the seller] has exercised all possible care in the preparation and sale of the product.'"[217] Nevertheless, of the courts that apply the Restatement (Second) of Torts § 402A to product defect claims based on a failure to warn, most require an "element of knowledge or 'state of the art' evidence" that shows the danger was known or knowable by the manufacturer, often citing Comment *j* of Section 402A for authority.[218] Additionally, some courts in other jurisdictions

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[214] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c); *Id.* at § 2 cmt. m & reporter's notes cmt. m, 2.
[215] *Davis*, 63 V.I. at 487 (citing RESTATEMENT (SECOND) OF TORTS § 402A).
[216] *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 402A, cmts. g & i). Comment *i* of Section 402A provides, in pertinent part:

> The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

[217] *Owens-Ill., Inc. v. Zenobia*, 325 Md. 420, 432, 601 A.2d 633, 639 (1992) (citing RESTATEMENT (THIRD) OF TORTS § 402A).
[218] *Id.* at 640-41.

impose a knowledge requirement in products liability actions based on failure to warn by applying the Restatement (Second) of Torts § 388, "which sets forth the basis for warning claims based upon negligence principles[,]"[219] a concept the Court addresses at length below. Only an extreme minority of courts in other jurisdictions have ever "held that neither the defendant's actual knowledge nor evidence of scientific knowledge about the dangerous characteristics of the product is relevant in a strict liability failure to warn case."[220]

With respect to the adequacy of warnings or instructions, the Restatement (Third) of Torts: Products Liability § 2(c) adopts a reasonableness test similar to that used for determining design defects under Section 2(b), though Comment *i* admits that "the defectiveness concept is more difficult to apply in the warnings context" and suggests that while "[n]o easy guideline exists for

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[219] *See* 2-12 Cary Stewart Sklaren, *Products Liability* § 12.07, at 3(c) (2017). RESTATEMENT (SECOND) OF TORTS § 388 (1979) provides:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

See also RESTATEMENT (SECOND) OF TORTS § 388 cmt. l (regarding subpart (c)) ("The supplier's duty is to exercise reasonable care to inform those for whose use the article is supplied of dangers which are peculiarly within his knowledge. If he has done so, he is not subject to liability, even though the information never reaches those for whose use the chattel is supplied"); *Mercer v. Pittway Corp.*, 616 N.W.2d 602, 623 (Iowa 2000) ("While section 388 deals specifically with suppliers of chattels, section 394 of the Restatement (Second) of Torts subjects manufacturers to the same liability") (citations omitted); RESTATEMENT (SECOND) OF TORTS § 394 ("The manufacturer of a chattel which he knows or has reason to know to be, or to be likely to be, dangerous for use is subject to the liability of a supplier of chattels with such knowledge").

[220] *Zenobia*, 325 Md. At 640 (citing *Elmore v. Owens-Illinois, Inc.*, 673 S.W.2d 434, 436-439 (Mo.1984); *Beshada v. Johns-Mansville Prods. Corp.*, 447 A.2d 539 (N.J. 1982), *limited to its facts by Feldman v. Lederle Labs*, 479 A.2d 374, 386-88 (N.J. 1984); *Kisor v. Johns-Manville Corp.*, 783 F.2d 1337, 1340-1342 (9th Cir. 1986) (applying Washington law)); *See* Richard W. Wright, Article, *The Principles of Product Liability*, 26 Rev. Litig. 1067, 1077-78 (2007); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 reporter's notes, cmt. m.

courts to adopt in assessing the adequacy of product warnings and instructions … [, i]n making their assessments, courts must focus on various factors, such as content and comprehensibility, intensity of expression, and the characteristics of expected user groups."[221] While some courts and scholars have characterized the reasonableness test under Section 2(c) as a "risk-utility" balancing test,[222] others have noted that nothing in the plain text of the Restatement (Third) of Torts: Products Liability § 2 or its Comments suggests that the test is based on "risk-utility" balancing rather than reasonableness.[223] In any event, the Court will refer to the analysis proscribed under Section 2(c) as a "risk-utility" test, which is reflective of legal nomenclature employed since the adoption of the Restatement (Third) of Torts: Products Liability.

Some courts in other jurisdictions apply a "risk-utility" test to product defect claims based on inadequate warnings or instructions in the manner set forth in the Restatement (Third) of Torts:

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[221] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. i; *Id.* ("In evaluating the adequacy of product warnings and instructions, courts must be sensitive to many factors. It is impossible to identify anything approaching a perfect level of detail that should be communicated in product disclosures. For example, educated or experienced product users and consumers may benefit from inclusion of more information about the full spectrum of product risks, whereas less-educated or unskilled users may benefit from more concise warnings and instructions stressing only the most crucial risks and safe-handling practices. In some contexts, products intended for special categories of users, such as children, may require more vivid and unambiguous warnings. In some cases, excessive detail may detract from the ability of typical users and consumers to focus on the important aspects of the warnings, whereas in others reasonably full disclosure will be necessary to enable informed, efficient choices by product users. Product warnings and instructions can rarely communicate all potentially relevant information, and the ability of a plaintiff to imagine a hypothetical better warning in the aftermath of an accident does not establish that the warning actually accompanying the product was inadequate"); *See also id.* at reporter's notes cmt. i ("The Restatement, Second, of Torts § 388, Comment *n*, utilizes the same factors set forth in Comment *i* [of the Restatement (Third) of Torts: Products Liability § 2] in deciding whether a warning should be given directly to third persons. It has been relied on by numerous courts") (citations omitted).

[222] Mark Geistfeld, Article, *Inadequate Product Warnings and Causation*, 30 U. Mich. J.L. Reform 309 (1997).

[223] *See* Paul D. Rheingold & Susan B. Feinglass, Article, *Risk-Utility Analysis in the Failure to Warn Context*, 30 U. Mich. J.L. Reform 353, 335-56 (1997) ("[O]thers suggest that the risk-utility test is incorporated likewise into the parallel section of the draft Restatement (Third) on a warning defect. Not only is the black letter statement devoid of such language, neither the comments nor the reporters' notes indicates that a judge or jury should consider such an analysis in determining whether a warning was adequate. One therefore could attempt to rest a case by showing the absence of any such language, especially because every nuance of the proposed Restatement's language has been reviewed extensively") (internal and other citations omitted).

Products Liability § 2(c).[224] At least one court in another jurisdiction has rejected outright the application of a risk-utility test to these claims, reasoning "[a] risk/utility analysis is not well suited to an inadequate warnings case, for in a warnings case, as distinguished from a defective design case, the utility of a product will remain constant whether or not a warning is added, but the risk will not."[225] Instead, many courts in other jurisdictions continue to assess the adequacy of warnings or instructions within the framework of the Restatement (Second) of Torts § 402A by considering whether the warnings or instructions, or lack thereof, rendered the product "unreasonably dangerous[,]"[226] which in turn, has resulted in some courts applying the "consumer expectations test" derived from Comment *i* of Section 402A.[227] At least one court in another jurisdiction has exercised the option of applying either the consumer expectations test or a risk-utility test when determining the adequacy of warnings or instructions in a product defect case.[228]

Despite the difference in assessing the adequacy of warnings or instructions, an "overwhelming" majority of courts in other jurisdictions adhere to "[t]he rule that no duty is owed

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[224] Sklaren, *Products Liability* § 12.01, at 5 (citing *Krummel v. Bombardier Corp.*, 206 F.3d 548, 551 (5th Cir. 2000) (applying Louisiana law); *See Cavers v. Cushman Motor Sales, Inc.*, 95 Cal. App. 3d 338, 349, 157 Cal. Rptr. 142, 149 (Cal. Ct. App. 1979) (rejecting the plaintiff's challenge to the trial court's jury instruction on strict liability failure to warn that an "article may be deemed defective if the manufacturer/lessor fails to warn of dangerous propensities '... which in the absence of an adequate warning render the article *substantially* dangerous to the user.' Whether a danger is substantial or insubstantial must be determined from the evidence and measured in the light of several criteria none of which is totally controlling including the potential injurious consequences of such danger, the likelihood that injury might result, the quality and extent of danger to which the user is exposed, and whether a danger is latent or patent").

[225] *Estate of Hicks v. Dana Cos., LLC*, 2009 PA Super 220, ¶ 28, 984 A.2d 943, 962 (Pa. Super. Ct. 2009) (internal and other citations omitted).

[226] *Products Liability* § 4.02, at 3 (2017) (collecting cases)

[227] *Id.* (collecting cases); *See Wilson v. Glenro, Inc.*, 524 F. App'x 739, 740-41 (2d Cir. 2013) ("[A] manufacturer, like the Defendant, has a duty to warn 'when it knows or has reason to know of dangers inherent in the product at the time the product is sold, or when the product is dangerous to an extent beyond that which would be contemplated by an ordinary consumer'") (citing *Needham v. Coordinated Apparel Grp.*, 174 Vt. 263, 268, 811 A.2d 124, 129 (Vt. 2002)).

[228] *Neilson v. The Corp. of The Presiding Bishop*, 2002 Wash. App. LEXIS 2406, *34 (Wash. Ct. App. Sept. 30, 2002) (plaintiff may show that failure to provide adequate warnings caused injury by either risk-utility or consumer expectations test)).

to warn of obvious and generally known dangers[,]"[229] which is also recognized in the Comments to the Restatement (Second) of Torts §§ 402A and 388, as well as the Restatement (Third) of Torts: Products Liability § 2.[230] Nearly all of these jurisdictions determine whether a product has obvious dangers under an objective standard, *e.g.* whether the danger would have been obvious to a reasonable person in similar circumstances, which "is not dependent upon the actual knowledge of the product's user or his or her actual awareness of the danger[,]"[231] though at least one court in another jurisdiction continues to adhere to a "subjective" standard.[232] And, many courts in other jurisdictions "have held obvious dangers to be merely one of several factors to be considered on the issue of the existence of a duty to warn[,]"[233] while only two courts in other jurisdictions appear to have rejected the open and obvious doctrine in warning cases outright.[234] Additionally, many courts in other jurisdictions have determined that whether a danger is (or is not) open and obvious can constitute a question of law,[235] but, "[w]hen reasonable minds may differ as to whether the risk was obvious or generally known, the issue is to be decided by the trier of fact."[236] Finally, in

[229] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 reporter's notes, cmt. j (collecting cases); *See id.* at cmt. j ("In general, a product seller is not subject to liability for failing to warn or instruct regarding risks and risk-avoidance measures that should be obvious to, or generally known by, foreseeable product users"); *Id.* at cmt. l ("The fact that a risk is obvious or generally known often serves the same function as a warning"); Sklaren, *Products Liability* § 12.07, at 1(a)-(f) & 3 (collecting cases).
[230] *See* RESTATEMENT (SECOND) OF TORTS § 402A, cmt. j; *Id.* at § 388 cmt. k; RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. j; *See also* RESTATEMENT (FIRST) OF TORTS § 388 cmt. j.
[231] Sklaren, *Products Liability* § 12.07, at 1(f) (collecting cases).
[232] *Id.* (citing *Abney v. Crosman Corp.*, 919 So. 2d 289, 290 (Ala. 2005) (evaluating subjective knowledge held by seven-year-old child, lethal danger presented by air rifle was open and obvious)).
[233] *Id.* at 1(e) (listing eight states that consider obviousness of danger as merely a factor to consider) (footnote omitted).
[234] *Id.* at 1(d) (citing *Tacke v. Vermeer Mfg. Co.*, 220 Mont. 1, 713 P.2d 527, 535 (Mont.1986) (fact that danger of compression feed rollers is obvious does not eliminate duty to warn); *Harris v. Karri-On Campers, Inc.*, 640 F.2d 65, 76 (7th Cir. 1981) (the obvious danger doctrine "has no applicability in West Virginia"; plaintiff injured when propane gas system in a trailer ignited) (applying West Virginia law)).
[235] *Id.* at 1(g) (collecting cases).
[236] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. j; *See* Sklaren, *Products Liability* § 12.07, at 1(h) (whether risk is open or obvious is a question of fact) (collecting cases).

most jurisdictions, an open and obvious danger that obviates the need for a warning will not preclude liability under a design defect theory, an approach that is also adopted by the Restatement (Third) of Torts: Products Liability § 2.[237]

There are numerous other nuances involved in the application of failure to warn concepts in strict liability cases by courts in other jurisdictions, but, having described the overall approaches in relative detail, the Court concludes the foregoing discussion is sufficient for purposes of *Banks*.

ii. Negligent failure to warn involving product defects.

As discussed, courts in nearly all jurisdictions impose a "knowledge requirement" by either expressly or implicitly refusing to impose liability for risks that were not knowable by the defendant.[238] Numerous courts and scholars have noted that by "injecting [a] ... knowledge requirement into their strict liability/failure to warn equation[,]" courts have essentially eliminated strict products liability for failure to warn claims in favor of a negligence theory,[239] though not all courts agree with this characterization.[240] The Comments to the Restatement (Third) of Torts:

[237] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 reporter's note cmt. d, IV.C. ("A strong majority of courts have rejected the 'open and obvious' or 'patent danger' rule as an absolute defense to a claim of design defect") (collecting cases); *See id.* reporter's note cmt. j (citations omitted).
[238] *supra* n. 213.
[239] *See Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 289 (Iowa 1994) ("After reviewing the authorities and comments on the failure to warn question, we believe any posited distinction between strict liability and negligence principles is illusory. ... The standard applied by these 'strict liability' jurisdictions is exactly the same in practice as holding defendants to an expert standard of care under a negligence theory. The burden on plaintiffs is the same. They must prove a defendant knew or should have known of potential risks associated with the use of its product, yet failed to provide adequate directions or warnings to users. ... We also find the product/conduct distinction made by several jurisdictions to justify maintaining a strict liability/failure to warn theory of little practical significance ... Maintaining the distinction to justify submission of failure to warn claims under both strict liability and negligence theories is a vain effort. We hold it was error to submit instructions regarding Prosoco's failure to warn under both negligence and strict liability theories") (internal and other citations omitted); Wright, 26 Rev. Litig. at 1068, 1070-71.
[240] *See, e.g.*, *Carlin v. Superior Court*, 13 Cal. 4th 1104, 1112, 56 Cal. Rptr. 2d 162, 166, 920 P.2d 1347, 1351 (Cal. 1996); *See* also *Simonetta v. Viad Corp.*, 165 Wash. 2d 341, 356, 197 P.3d 127, 135 (Wash. 2008); *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 181 (Tex. 2004); Sklaren, *Products Liability* § 12.01, at 1(e) (internal citations and footnotes omitted).

Products Liability § 2 make clear that negligence principles are encompassed within Sections 2(b) and 2(c), which respectively define product defects based on design defect and inadequate warning or instructions.[241] These Comments, as well as those accompanying the Restatement (Third) of Torts: Products Liability § 1, instruct that Section 2(b) and 2(c) abandon the traditional doctrinal labels of negligence, strict liability, and breach of implied warranty of merchantability by defining "liability for each form of defect in terms directly addressing the various kinds of defects."[242] However, the Comments also note that "negligence retains its vitality as an independent theory of recovery for a wide range of product-related, harm-causing behavior *not involving defects at time of sale.*"[243]

As to the approaches taken by courts in other jurisdictions, "[i]n some states, there is virtually no difference between warning causes of action asserted in strict liability and in negligence ... [, while i]n other states[,] the difference is dramatic."[244] California is a jurisdiction that recognizes failure to warn claims based on strict liability and negligence as separate causes of action. The California Supreme Court has explained:

> The third type of defect "is a product that is dangerous because it lacks adequate warnings or instructions." "Generally speaking, manufacturers have a duty to warn consumers about the hazards inherent in their products." A warning informs consumers about hazards of which they are unaware, so that they can avoid the product or minimize its danger by careful use. In California, as in a majority of jurisdictions, liability for failure to warn is conditioned on the manufacturer's actual or constructive knowledge of the risk.

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241 RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a ("Subsections (b) and (c), which impose liability for products that are defectively designed or sold without adequate warnings or instructions and are thus not reasonably safe, achieve the same general objectives as does liability predicated on negligence").
242 RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. a.; *Id.* at § 2 cmt. n.; *Id.* at reporter's notes cmt. n; *See Manbodh Asbestos Litig.*, 47 V.I. at 226 n.6 (discussing "the abandonment of the typical strict liability/negligence designations" in RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 1-2).
243 RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n (emphasis added).
244 Sklaren, *Products Liability* § 12.01, at 1(e) (internal citations and footnotes omitted).

> ...
>
> The "known or knowable" standard arguably derives from negligence principles and failure to warn claims are generally "'rooted in negligence' to a greater extent than" manufacturing or design defect claims. Unlike those other defects, a "'warning defect' relates to a failure extraneous to the product itself" and can only be assessed by examining the manufacturer's conduct. These principles notwithstanding, California law recognizes separate failure to warn claims under both strict liability and negligence theories. In general, a product seller will be *strictly liable* for failure to warn if a warning was feasible and the absence of a warning caused the plaintiff's injury. *Reasonableness of the seller's failure to warn is immaterial in the strict liability context.* Conversely, to prevail on a claim for *negligent* failure to warn, the plaintiff must prove that the seller's conduct fell below the standard of care. If a prudent seller would have acted reasonably in not giving a warning, the seller will not have been negligent.[245]

Unlike California law, the Restatement (Third) of Torts: Products Liability § 2(c) incorporates an assessment of reasonableness in its risk-utility test—thus, the reasonableness of the seller, supplier, or manufacturer's failure to warn is not immaterial under Section 2(c)—which arguably vitiates the need for dual theories of liability based on negligence and strict products liability when both are assessed under Section 2(c).[246]

In many other jurisdictions where courts continue to recognize strict products liability claims based on inadequate warnings or instructions and negligent failure to warn claims as separate and distinct causes of action, the law is similarly structured to California's in that the standard governing strict liability claims does not encompass some essential component of the

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[245] *Webb v. Special Elec. Co., Inc.*, 370 P.3d 1022, 1030 (Cal. 2016) (internal and other citations omitted) (second emphasis added).

[246] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n ("Since the tests speak of foreseeable risk, a plaintiff is free to introduce evidence of a defendant's conduct even in the context of a strict liability case, since what was foreseeable is relevant to the test for liability. Secondly, the standard used for liability is that the product must be 'not reasonably safe.' The tests in §§ 2(b) and 2(c) require a reasonableness balancing approach. Courts should not create jury confusion by allowing claims on both negligence and strict liability to go to juries when they are evaluating the reasonableness of the product and the alternative design").

negligence standard, such as an assessment regarding the reasonableness of the manufacturer's conduct.[247] In these jurisdictions, negligent failure to warn claims arising from a product defect at the time of sale are often based on the "duty to warn" set forth in the Restatement (Second) of Torts § 388.[248]

The Court recognizes that the general obligation to warn is briefly addressed in the Restatement (Second) of Torts § 297(b) and "indirectly in § 301[,]" as well as the Restatement (Third) of Torts: Physical and Emotional Harm § 18.[249] However, specific "warning obligations

[247] 63A AM. JUR. 2d Products Liability § 1022 (2017) ("Some courts have held that there is an important difference between negligence counts and strict liability counts in failure-to-warn cases, maintaining that in a strict liability action the need for, and the sufficiency of, a warning should be expressed without reference to negligence principles. The rationale for the distinction is that in a strict liability case the court is concerned with the condition (that is, the dangerousness) of an article which is sold with an inadequate or no warning, while in the negligence context the court is concerned with the reasonableness of the manufacturer's actions in selling the article") (collecting cases); *Id.* at § 1021 ("Many courts have examined and compared the application of strict liability and negligence theories and concluded that there is sometimes little, if any, difference between the theories in the failure-to-warn context. Under both theories, according to the courts that see them as merged, the duty to warn rests on the negligence concept of foreseeability and upon a subjective determination by the trier of facts of what constitutes a reasonable warning under all the circumstances") (collecting cases); *See, e.g., Mercer*, 616 N.W.2d at 619 623-24 ("We have adopted section 402A of the Restatement (Second) of Torts (1965) regarding strict liability claims. ... We have adopted section 388 of the Restatement (Second) of Torts for determining whether a manufacturer of goods has fulfilled its duty to warn of a product's dangerous propensities. ... A claim alleging a manufacturer failed to warn of the dangers involved in using a product is properly based on a theory of negligence, not strict liability. ... concerning a manufacturer's duty to warn at the point of sale[,] ... the inquiry is whether a reasonable manufacturer knew or should have known of the danger, in light of the generally recognized and prevailing best scientific knowledge, yet failed to provide adequate warning to users or customers") (internal and other citations omitted); *Simonetta*, 165 Wash. 2d at 354-56 ("We apply the rule of strict liability embodied in the *Restatement (Second) of Torts* § 402A (1965), as the law in this jurisdiction with respect to unreasonably dangerous products ... We have further rejected the language in comment h [of Section 402A] that suggests a duty on the part of the seller to provide warnings as imposing a negligence principle upon the doctrine of strict liability ... Although the theories are similar in certain contexts, distinctions exist. We recognize strict liability as a theory that may or may not be asserted alongside negligence in the failure to warn context and emphasize the contrast in analytical focus between the theories: in a negligence action, the focus is on the conduct of the defendant; in a strict liability action, the focus is on the product itself and the reasonable expectations of the user. Under strict liability, a product is not reasonably safe when it is unsafe to an extent beyond that which would be reasonably contemplated by the ordinary consumer") (internal and other citations omitted).

[248] *Id.*; *See* Sklaren, *Products Liability* § 12.07, at 3(c); *See also* RESTATEMENT (SECOND) OF TORTS § 394 ("The manufacturer of a chattel which he knows or has reason to know to be, or to be likely to be, dangerous for use is subject to the liability of a supplier of chattels with such knowledge").

[249] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. AND EMOT. HARM § 18 reporter's notes cmt. a ("The Restatement Second of Torts deals with the general obligation to warn briefly in § 297(b) and indirectly in § 301. The warning obligations that negligence law places on product suppliers are dealt with in §§ 388-405. Inadequate warnings are a major category of product defect in the Products Liability Restatement) (citing RESTATEMENT (THIRD) OF TORTS:

that negligence law places on product suppliers" are set forth in the Restatement (Second) of Torts §§ 388-405 and the Restatement (Third) of Torts: Products Liability § 2, among other Restatement sections, which are more relevant to the Court's analysis here.[250] Moreover, it makes sense that the Restatement (Second) of Torts includes Section 388, a separate provision imposing a "duty to warn" on suppliers,[251] because Section 402A imposes strict liability for product defects without consideration of the supplier's conduct under a reasonableness standard. However, apart from Section 2(c), the Restatement (Third) of Torts: Products Liability does not contain a separate section imposing a "duty to warn" at the point of sale on suppliers because the concept is already encompassed within the standard set forth in Section 2(c).[252]

PRODUCTS LIABILITY § 2(c) & cmts. k-m); *Id.* at cmt. a ("A failure to warn of the risks created by the actor's conduct can be negligence on the part of the actor under § 3; this Section [the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. AND EMOT. HARM § 18] discusses how § 3 applies to warning claims. ... For the obligations of product manufacturers and other sellers to warn of dangers posed by a product, see [RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY] §§ 2(c), 6(d), 10, 13"). In relying on RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. AND EMOT. HARM § 18, Plaintiffs cite a District Court case applying the provision, but that case is inapposite, as it involved a negligence claim for injuries sustained by the plaintiff after she "allegedly tripped on an 'opening in [a] walkway' and fell, breaking her ankle" rather a product defect claim based on the defendant's failure to warn. *Eaglin*, 2012 U.S. Dist. LEXIS 140894, at *1.

[250] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. AND EMOT. HARM § 18 reporter's notes cmt. a ("The warning obligations of in-the-business product sellers are governed by Restatement Third, Torts: Products Liability § 2(c)").

[251] RESTATEMENT (SECOND) OF TORTS § 388; *See id.* at § 394.

[252] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 reporter's notes cmt. i(5) ("The Restatement, Second, of Torts § 388, Comment *n*, utilizes the same factors set forth in Comment *i* [of the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2] in deciding whether a warning should be given directly to third persons"). Note, however, that the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY imposes a post-sale duty to warn, which was not a concept recognized by the RESTATEMENT (SECOND) OF TORTS § 388. Kennth Ross & J. David Price, *Post-Sale Duties: The Most Expansive Theory in Products Liability*, 74 Brooklyn L. Rev. 963, 964-965 (2009) ("According to section 388 of the Restatement (Second), warnings were required only if a risk associated with a product was known or should have been known at the time of sale. The post-sale duty section in the Restatement (Third) was truly new when written, not merely a revision of section 388") (citations omitted).

iii. Submission of multiple theories of recovery for product defects based on inadequate warnings or instructions to the trier of fact.

As mentioned above, the Comments to the Restatement (Third) of Torts: Products Liability §§ 1, 2 suggest that Sections 2(b) and 2(c) provide the sole standard for imposing liability for product defects based on defect design and inadequate warnings or instructions at the time of sale.[253] These Comments further instruct that "courts are free to utilize the concepts of negligence, strict liability, or implied warranty of merchantability as theories of liability" in characterizing claims under Sections 2(b) and 2(c),[254] but that "two or more factually identical defective-design claims or two or more factually identical failure-to-warn claims should not be submitted to the trier of fact in the same case under different doctrinal labels."[255] This is because, "[r]egardless of the doctrinal label attached to a particular claim, [the] … claims rest on [the same] risk-utility assessment … [and t]o allow two or more factually identical risk-utility claims to go to a jury under different labels, whether 'strict liability,' 'negligence,' or 'implied warranty of merchantability,' would generate confusion and may well result in inconsistent verdicts."[256]

While courts remain split with respect to merging theories of recovery for product defects based on failure to warn under strict liability and negligence, "many courts have merged theories of recovery for breach of implied warranty and strict liability on the basis that each theory states the same strict liability claim[,]" while "a majority of jurisdictions have [similarly] merged theories

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[253] *supra* n. 242.
[254] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 reporter's notes cmt. n; *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. a.; RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n.
[255] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n.
[256] *Id.*; *See Manbodh Asbestos Litig.*, 47 V.I. at 226 n.6.

of recovery for ... negligent failure to warn with implied warranty theories."[257] "In merging theories of recovery, courts have reasoned that strict liability and implied warranty of merchantability are parallel theories of recovery—one in contract and the other in tort[,]"[258] which is the approach taken by the Restatement (Third) of Torts: Products Liability § 2, as recited above. Note that some courts that merge these theories of recovery do so only on a case-by-case basis and have not ruled that merger would be appropriate in all cases.[259]

In contrast, some courts in other jurisdictions have refused to merge the theories of strict liability and negligence with implied warranty theories in the context of product defect claims.[260] One court in another jurisdiction that refused to do so reasoned, *inter alia*, that the breach of implied warranty remedy is set forth under the State's "version of the Uniform Commercial Code[,]" and "as long as that legislative source of authority exists, we are not free to merge the warranty cause of action with its tort-based sibling" and "must construe and apply this separate

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[257] *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 572, 618 N.W.2d 827, 842 (Neb. 2000) (citing *Vassallo v. Baxter Healthcare Corp.*, 428 Mass. 1, 696 N.E.2d 909 (Mass. 1998) (collecting cases)) (internal citations omitted).

[258] *Id.* (citing *Castrignano v. E.R. Squibb & Sons, Inc.*, 546 A.2d 775 (R.I. 1988)); *See* John E. Theuman, Annotation, 41 A.L.R.4th 9, *Products Liability: Inconsistency of Verdicts on Separate Theories of Negligence, Breach of Warranty, or Strict Liability* (1985 and Supp. 2017) (citing cases holding that there was no irreconcilable inconsistency in verdict for defendant on strict liability and verdict for plaintiff on negligence and cases reaching contrary conclusion).

[259] *Neb. Plastics, Inc. v. Holland Colors Ams., Inc.*, 2003 U.S. Dist. LEXIS 19968, at *68 (D. Neb. Nov. 6, 2003) (citations omitted); *See Stahlecker v. Ford Motor Company*, 266 Neb. 601, 667 N.W.2d 244, 252 (Neb. 2003).

[260] *See e.g., Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 639 N.Y.S.2d 250, 662 N.E.2d 730 (N.Y. 1995); *See also Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 667-68 (Tex. 1999) ("We recognize, too, that the consequences of liability determinations under strict liability and breach of warranty theories are different[,]" including, *inter alia*, differences with respect to the availability defenses, types of damages, and theories of recovery, and the applicable statute of limitations period. ... "Plaintiffs are generally entitled to obtain findings that will support alternative theories of recovery, even if those theories address but a single injury. In such cases, the trial court should structure the jury charge to obtain findings that will allow the plaintiff to elect a basis of recovery, and the defendant to assert defenses that may not be available to all theories. Our holding today does not hamper the trial court from submitting a charge on multiple theories. We hold only that the jury should not be asked to consider the identical defect finding in response to questions relating to strict-liability and breach-of-implied-warranty claims"); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n. & reporter's notes cmt. n (acknowledging that some courts refuse to merge the implied warranty theory of recovery with tort theories of recovery in products liability actions).

remedy in a manner that remains consistent with its *current* roots in contract law."[261] There, the court further explained that many of the courts that have "pronounced the merger of breach of warranty with the other products liability theories sounding in tort," have done so in reliance "on specific State statutory schemes that were enacted to govern products liability litigation, [which] contain express preemptive language and also specifically define 'product liability claim' as one encompassing breach of express or implied warranty as well as negligence and strict liability in tort[,]" but that its Legislature had not adopted similar "unifying measures."[262]

3. The soundest rules for the Virgin Islands.

Finally, the third factor under *Banks*, requires the Court to adopt the soundest rule for the Virgin Islands.

i. Adoption of the Restatement (Third) of Torts: Products Liability § 2(c) to product defect claims based on inadequate warnings or instructions.

Considering the foregoing, the Court finds that the Restatement (Third) of Torts: Products Liability § 2(c), read in conjunction with the Section 1, constitutes the soundest rule for the Virgin Islands. The adoption of Section 2(c) aligns with the Superior Court's recognition of separate standards of liability based on the specific type of defect alleged[263] and is consistent with the Supreme Court of the Virgin Islands' imposition of liability for product defects under Section 1.[264] Further, this rule promotes uniformity in the Court's consideration of product defect claims, since the Superior Court has already adopted Section 2(b) with respect to design defects, and the

[261] *Denny*, 87 N.Y.2d at 256, 259 (internal and other citations omitted);
[262] *Id.* at 260 (collecting cases) (internal and other citations omitted).
[263] *See Davis*, 63 V.I. at 488; *Tutein*, 2016 V.I. LEXIS 50, *10, 16-17.
[264] *See Banks*, 55 V.I. at 983-84.

"reasonableness test for judging the adequacy of product instructions and warnings" in Section 2(c) "parallels … [the] similar standard for judging the safety of product designs" under Section 2(b).[265] Further, a risk-utility test promotes flexibility, which is crucial in an area of law, such as products liability, that so frequently involves the resolution of highly complex factual issues.

The Court recognizes that the use of a risk-utility test in product defect cases based on failure to warn is not without criticism.[266] One major criticism stems from the risk-utility test's failure to provide "a straightforward legal standard[,]" which prevents it from functioning "as an effective tool in the warning area" since it neither "provides … guidelines for manufacturers on how to increase the quality of warnings" nor assists "the tasks of judges and juries" in determining the adequacy of warnings and instructions.[267] Two Reporters that participated in drafting the Restatement (Third) of Torts: Products Liability, Professors James Henderson and Aaron Twerski, have since proposed the addition of a "reasonable alternative warning" requirement to the standard for evaluating defects based on inadequate warnings or instructions, similar to the "reasonable alternative design" element of a design defect under Section 2(b).[268] But, even they note that "requiring a [reasonable alternative warning] implies a measure of arbitrariness that requiring a [reasonable alternative design] does not."[269]

On the other hand, it has been noted that "[o]ther kinds of cases involving the disclosure of information require the jury to resolve issues similar to those involved in warning cases" and, so long as the risk-utility test is implemented by properly instructed juries, "it should not be

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[265] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. i.
[266] *See* Rheingold & Feinglass, 30 U. Mich. J.L. Reform 353.
[267] *Id.* at 365-66.
[268] James A. Henderson, Jr. & Aaron D. Twerski, Article, *Fixing Failure to Warn*, 90 Ind. L.J. 237, 244 (2014-2015).
[269] *Id.*

particularly difficult for juries to" competently resolve issues involving "the adequacy of a warning" in a product defect case.[270]

While the Court does not take the criticisms of the risk-utility test for evaluating defects based on inadequate warnings or instructions lightly, it must also take into account the unique challenges inherent in these claims, which, regardless of the method employed, "may defy solution."[271] Scholars have yet to identify a perfect solution for the problems posed by failure to warn claims in product liability actions, and many courts in other jurisdictions, some of which are bound by statutes governing products liability, continue to hold fast to approaches long entrenched in their jurisprudence. In stark contrast to these jurisdictions is the Virgin Islands, where even the fundamental tenets of common law remain uncertain in the wake of *Banks*. With this in mind, the Court finds that the stability and consistency fostered by the adoption of the Restatement (Third) of Torts: Products Liability § 2(c) outweigh the challenges posed by it. For these reasons, the Court concludes that the Restatement (Third) of Torts: Products Liability § 2(c) constitutes the soundest rule for the Virgin Islands with respect to product defect claims based on inadequate warnings or instructions.

ii. Rejection of a separate "duty to warn" in product defect cases that fall within the purview of the Restatement (Third) of Torts: Products Liability § 2(c).

Having adopted the Restatement (Third) of Torts: Products Liability § 2(c), the Court declines to adopt the "duty to warn" set forth under the common law, including, *inter alia*,

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[270] *See* Geistfeld, 30 U. Mich. J.L. at 335-37.
[271] *See* James A. Henderson, Jr. & Aaron D. Twerski, Article, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 271 (1990).

Restatement (Second) of Torts § 388, in circumstances where the defendant's purported liability falls within the purview of Section 2(c). In this instance, a separate cause of action for negligent failure to warn is unnecessary because the underlying negligence principles are encompassed within the standard set forth in Section 2(c). Applying Section 2(c) to negligent failure to warn claims promotes uniformity in this jurisdiction's treatment of failure to warn claims in the context of products liability. In addition, it promotes judicial economy and efficacy by consolidating the analysis of claims arising under Section 2(c).

That being said, this ruling does not preclude a plaintiff from asserting a theory of negligence based on an alleged product defect due to inadequate warnings or instructions at the point of sale, but rather imposes Section 2(c) as the applicable standard for judging the defendant's liability. Likewise, the standard for determining the defendant's liability under a theory of "strict" liability is also that set forth in Section 2(c). This approach adheres to that recognized by the Restatement (Third) of Torts: Products Liability §§ 1, 2, specifically, Comment *a* and Comment *n*, respectively. Consistent with this approach, the Court's adoption of Section 2(c) does not preclude a plaintiff from initially asserting product defect claims for failure to warn at the point of sale under multiple theories in the complaint. However, "[i]n proceedings in which multiple theories are alleged, … the procedural stage in a tort action" when a plaintiff must choose which theory to pursue is a question left to local law.[272]

To further clarify, the Court reiterates that, according to Comment *n* of the Restatement (Third) of Torts: Products Liability § 2, "[p]laintiffs may, consistent with the foregoing principles,

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[272] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n ("In proceedings in which multiple theories are alleged, the Restatement leaves to local law the question of the procedural stage in a tort action at which plaintiff must decide under which theory to pursue the case").

join claims based on product defect existing at time of sale or other distribution and claims based on theories of recovery that do not rest on a premise of product defect at time of sale."[273] For example, "[c]laims based on misrepresentation, express warranty, and implied warranty of fitness for particular purpose, in particular, are not within the scope of [Section 2] … and thus are unaffected by it[,]" as are negligence claims based on "product-related, harm-causing behavior not involving defects at time of sale."[274]

iii. Submission of multiple theories of recovery for product defects based on inadequate warnings or instructions to the trier of fact.

a) Prohibition against dual instructions on negligence and strict liability for factually identical claims.

Because the Court has applied the standard set forth under the Restatement (Third) of Torts: Products Liability § 2(c) to negligence and strict liability claims based on product defects resulting from inadequate warnings and instructions at the time of sale, the Court finds, as the soundest rule for the Virgin Islands, that "two or more factually identical failure-to-warn claims should not be submitted to the trier of fact in the same case under different doctrinal labels" of negligence and strict liability.[275] This rule adopts the reasoning of the Restatement (Third) of Torts: Products Liability § 2's Comment *n* and the accompanying Reporter's Notes, as they pertain to the use of

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[273] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n (emphasis added).

[274] *Id.* ("[N]egligence retains its vitality as an independent theory of recovery for a wide range of product-related, harm-causing behavior not involving defects at time of sale. … [t]his Restatement includes several such topics in later Chapters, including post-sale failure to warn (see § 10); post-sale failure to recall (see § 11); and a successor's liability for its own failure to warn (see § 13). Other topics are covered in the Restatement, Second, of Torts. Thus, for example, negligent entrustment is treated in § 390. Liability for negligent service, maintenance, or repair, or negligent overpromotion of a product, is governed by the rules set forth in §§ 291 et seq").

[275] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n; *See id.* at reporter's notes cmt. n; *See also id.* at § 1 cmt. a.

negligence and strict liability as dual theories of recovery on factually identical causes of action.[276] In accordance therewith, this rule precludes plaintiffs from submitting dual instructions to the jury on negligence and strict liability that are based on *identical facts* that require the *same* application of the risk-utility test.[277] Because negligence and strict liability will be judged under the same standard—Section 2(c)—this rule is necessary to avoid juror confusion and inconsistent jury verdicts that can ensue when factually identical failure to warn claims involving the same risk-utility assessment are submitted to the jury as independent theories of recovery, and promotes juridical efficacy and economy by avoiding retrial due to inconsistent jury verdicts.

b) The implied warranty of merchantability may be submitted as an independent theory of recovery.

Finally, the Court must craft a rule with respect to the last remaining issue, which is whether a plaintiff that submits a product defect claim based on inadequate warnings or instructions to the trier of act under a theory of negligence or strict liability may also submit the implied warranty of merchantability as an independent theory of recovery. The Court answers in the affirmative and finds that the soundest rule for the Virgin Islands is to permit plaintiffs to submit product defect claims based on inadequate warnings or instructions to the trier of fact under the implied warranty of merchantability as an independent theory of recovery.

Admittedly, this rule reflects the minority approach and deviates from the position taken by the Restatement (Third) of Torts: Products Liability § 2.[278] However, unlike other jurisdictions, the Virgin Islands Legislature has not enacted a comprehensive statutory scheme codifying

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[276] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n. & reporter's notes cmt. n.
[277] *Id.*
[278] *See id.*

products liability law and other Virgin Islands statutes do not clearly demonstrate legislative intent to encompass the implied warranty of merchantability as a theory of recovery within products liability tort law.[279] On the contrary, the implied warranty of merchantability is governed by the Virgin Islands U.C.C., which provides for "recovery in contract" rather than tort.[280]

Moreover, prior decisions by the Virgin Islands courts that equate the essential elements of a breach of implied warranty of merchantability claim to those of a strict products liability claim involved an application of the Restatement (Second) of Torts § 420A, which no longer applies to product liability actions based on defective design or inadequate warnings or instructions.[281] Further, with this Court's adoption of the Restatement (Third) of Torts: Products Liability § 2(c), the adequacy of warnings or instructions are determined under a risk-utility test, but nothing in 11A V.I.C. § 2-314 of the Virgin Islands U.C.C. suggests that the merchantability of goods is assessed through risk-utility balancing. While evidence pertaining to risk-utility balancing may, in some cases, be relevant with respect to the determination of whether the merchant violated the warranty,[282] it may be inconsequential in others, where, for example, the product remained unfit for the ordinary purposes for which it was used, despite the utility outweighing the risk.[283]

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[279] *C.f. Denny*, 87 N.Y.2d at 256, 259.
[280] *See Banks v. Int'l Rental & Leasing Corp.*, 680 F.3d 296, 300 (3d Cir. 2012); 11A V.I.C. § 2-314; *Charles*, 2016 V.I. LEXIS 113, at *6-7 ("In order to recover on a claim for breach of the implied warranty of merchantability, a Plaintiff must demonstrate that: 1) an implied warranty of merchantability existed, 2) the warranty was broken by the seller, 3) the breach of the warranty proximately caused, 4) the loss sustained") (citing 11A V.I.C. § 2-314 cmt. 13).
[281] *See Davis*, 63 V.I. at 488; *supra*.
[282] *See* 11A V.I.C. § 2-314 cmt. 13 ("evidence indicating that the seller exercised care in the manufacture, processing or selection of the goods is relevant to the issue of whether the [implied] warranty [of merchantability] was in fact broken").
[283] *C.f. Denny*, 87 N.Y.2d at 263 ("[U]nder the evidence in this case, a rational fact finder could have simultaneously concluded that the Bronco II's utility as an off-road vehicle outweighed the risk of injury resulting from rollover accidents *and* that the vehicle was not safe for the 'ordinary purpose' of daily driving for which it was marketed and sold").

Regardless of the outcome of risk-utility balancing, if goods do not meet the standards delineated in 11A V.I.C. § 2-314, "they are inferior and violate the implied warranty of merchantability."[284] Therefore, "the core element of 'defect' is subtly different in" causes of action under 11A V.I.C. § 2-314 and the Restatement (Third) of Torts: Products Liability § 2(c).[285]

For these reasons, for purposes of submitting theories of recovery for product defect claims based on inadequate warnings or instructions to the jury, the Court declines to merge the theory of implied warranty of merchantability with theories of negligence or strict liability under the Restatement (Third) of Torts: Products Liability § 2(c).

b. A genuine issue of material fact exists with respect to whether Reynolds breached its duty to warn under the Restatement (Third) of Torts: Products Liability § 2(c).

Reynolds argues that there is no genuine issue of material fact that Lorillard did not have a duty to warn of the health risks and addictiveness of smoking prior to July 1, 1969, because the Restatement (Third) of Torts: Products Liability § 2(c) does not impose liability for failing to warn or instruct regarding obvious or generally known risks since the risks of smoking have been "commonly known for decades."[286] In support thereof, Reynolds submits the affidavit and expert report of Michael Schaller, Ph.D., a Professor of History at the University of Arizona, who states:

> [S]ince the early 20th century people were being warned in a variety of ways that tobacco use could be life shortening and could cause a variety of diseases. Information was also disseminated that smoking could be difficult to quit. By the mid-1950s information was widely circulated specifically linking smoking to lung cancer and other diseases such as cancers of the throat and bladder. By the late 1950s, broad public awareness existed that cigarette smoking had been linked to

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[284] *Gulf Trading Corp. v. Nat'l Enters.*, 912 F. Supp. 177, 180 (D.V.I. 1996)
[285] *Denny*, 87 N.Y.2d at 256.
[286] Def.'s Mot. for Summ. J. (*Gerald*), p. 24; Def.'s Mot. for Summ. J. (*Brown*), p. 18.

> lung cancer and other diseases. This awareness continued and grew over the next several decades.[287]

Reynolds also urges the Court to take judicial notice of the conclusions of "many other courts[,]" which "have recognized that the potential health risks and addictiveness of cigarettes long have been generally known."[288]

In opposition, Plaintiffs contend that genuine issues of material fact remain with respect to whether Lorillard owed a pre-1969 duty to warn because the evidence suggests that "Lorillard had superior knowledge, and that it knew, as early as the 1950s that cigarette smoking was dangerous and addictive."[289] Therefore, Plaintiffs claim Lorillard "owed a duty to disclose this information … so that consumers could ma[k]e an informed choice about the decision to begin or to continue to smoke[,]" particularly considering that Lorillard "continued to heavily advertise Newport cigarettes, including to children … and … publically pledged to aid in the research and to disclose any pertinent information concerning the dangerousness of smoking."[290] In support of the suggestion that the health risks and addictiveness of smoking were not obvious or generally known prior to 1969, Plaintiffs point to the expert report of Dr. Proctor, who details numerous specific instances where the tobacco industry, including Lorillard in some instances, did not disclose this information, but instead "conspired to hide the hazards of cigarettes from the American public."[291] According to Dr. Proctor, Lorillard's actions and omissions were largely performed through "[t]he

[287] Def.'s Ex. L (*Gerald*), Affidavit and Expert Report of Michael Schaller, Ph.D. ("Schaller Report"), ¶ 9; Def.'s Ex. L (*Brown*), Schaller Report, ¶ 9.
[288] Def.'s Mot. for Summ. J. (*Gerald*), p. 25 (citations omitted); Def.'s Mot. for Summ. J. (*Brown*), p. 19 (citations omitted).
[289] Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 33; Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., p. 21.
[290] *Id.*
[291] *See generally* Pls.' J.A., Proctor Report; *See also id.* at p. 3 ¶ 1, pp. 9-31, pp. 37-41, pp. 51-57, pp. 66-91 ("App. II: Chronology of Conspiracy").

Tobacco Institute (founded in 1958), the Tobacco Industry Research Council (founded in 1954 and continued after 1963 as the Council for Tobacco Research) [("TIRC" or collectively "TIRC/CTR")][,]" which were trade organizations sponsored by the major tobacco companies, including Lorillard.[292] As one example among many, Plaintiffs specifically refer to "the so-called 'Frank Statement to Cigarette Smokers,' [("Frank Statement")] published in newspapers across the country on January 4, 1954 by the ... [TIRC] and sponsored by the major tobacco companies, including Lorillard[,]" which claimed, *inter alia*:

> RECENT REPORTS on experiments with mice have given wide publicity to a theory that cigarette smoking is in some way linked with lung cancer in human beings.
>
> Although conducted by doctors of professional standing, these experiments are not regarded as conclusive in the field of cancer research. However, we do not believe that any serious medical research, even though its results are inconclusive [sic] should be disregarded or lightly dismissed.
>
> At the same time, we feel it is in the public interest to call attention to the fact that eminent doctors and research scientists have publicly questioned the claimed significance of these experiments.
>
> Distinguished authorities point out:
>
> 1. That medical research of recent years indicates many possible causes of lung cancer.
>
> 2. That there is no agreement among the authorities regarding what the cause is.
>
> 3. That *there is no proof that cigarette smoking is one of the causes.*
>
> 4. That statistics purporting to link cigarette smoking with the disease could apply with equal force to any one of many other aspects of modern life. Indeed the validity of the statistics themselves is questioned by numerous scientists.

[292] Pls.' J.A., Proctor Report, pp. 20, 22; Pls.' J.A., Proctor Dep., 57:8-25, 58:1-22; *See* Pls.' J.A., Proctor Report, p. 70 ¶ 29 (citations omitted).

> *We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business*
>
> *We believe the products we make are not injurious to health.*
>
> *We always have and always will cooperate closely with those whose task it is to safeguard the public health.*
>
> ...
>
> Many people have asked us what we are doing to meet the public's concern aroused by the recent reports. Here is the answer:
>
> 1. *We are pledging aid and assistance to the research effort into all phases of tobacco use and health. This joint financial aid will of course be in addition to what is already being contributed by individual companies.*
>
> 2. For this purpose we are establishing a joint industry group consisting initially of the undersigned. This group will be known as [sic] TOBACCO INDUSTRY RESEARCH COMMITTEE.
>
> 3. In charge of the research activities of the Committee will be a scientist of unimpeachable integrity and national repute. In addition there will be an Advisory Board of scientists disinterested in the cigarette industry. A group of distinguished men from medicine, science, and education will be invited to serve on this Board. These scientists will advise the Committee on its research activities.
>
> This statement is being issued because we believe the people are entitled to know where we stand on this matter and what we intend to do about it.[293]

Reynolds counters that neither the Frank Statement nor Dr. Proctor's Report satisfy Plaintiffs' burden because the record in these cases establish that the Frank Statement did not reach Decedents.[294]

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[293] Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 33; Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., p. 21 (both citing TIRC, "A Frank Statement to Cigarette Smokers," Jan. 4, 1954, http://legacy.library.ucsf.edu/tid/ysd1aa00) (last visited on August 28, 2017) (emphasis added); *See* Pls.' J.A., Proctor Report, p. 71 ¶ 32.

[294] Def.'s Reply (*Gerald*), pp. (citing Def.'s Ex. D (*Gerald*), England Disc. Dep., 423:4-6); Def.'s Reply (*Brown*), pp. 9-10 (citing Def.'s Ex D (*Brown*), Brown Disc. Dep., at 356:20-357:12).

Comment *i* of the Restatement (Third) of Torts: Products Liability § 2 touches on product defect claims based on inadequate warnings or instructions that are premised on the manufacturer's "duty to provide warnings for informed decisionmaking[,]" *e.g.* warnings that are necessary "to inform users and consumers of nonobvious and not generally known risks that unavoidably inhere in using or consuming the product" as opposed to warnings that "alert[ ] users and consumers to the existence and nature of product risks so that they can, by appropriate conduct during use or consumption, reduce the risk of harm[.]"[295] Comment *i* explains:

> [Warnings for informed decisionmaking] allow the user or consumer to avoid the risk warned against by making an informed decision not to purchase or use the product at all and hence not to encounter the risk. In this context, warnings must be provided for inherent risks that reasonably foreseeable product users and consumers would reasonably deem material or significant in deciding whether to use or consume the product. Whether or not many persons would, when warned, nonetheless decide to use or consume the product, *warnings are required to protect the interests of those reasonably foreseeable users or consumers* who would, based on their own reasonable assessments of the risks and benefits, decline product use or consumption. When such warnings are necessary, their omission renders the product not reasonably safe at time of sale.[296]

It this type of warning—warnings for informed decisionmaking—upon which Plaintiffs' argument rests. As the foregoing makes clear, under the Restatement (Third) of Torts: Products Liability § 2(c), a manufacturer owes a duty to warn to *foreseeable* users or consumers, which includes a broader subset of the population than a mere "ordinary" or "average" consumer under the Restatement (Second) of Torts § 402A.[297] With respect to whether risks were obvious or generally known, Comment *j* of the Restatement (Third) of Torts: Products Liability § 2 is equally clear that

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[295] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. i.
[296] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. i (emphasis added).
[297] *See Todd v. Societe BIC, S.A.*, 21 F.3d 1402, 1407-08 (7th Cir. 1994) (discussing the difference between an objective standard based on the expectations of an ordinary consumer and a foreseeable user).

the relevant inquiry is based on an objective standard from the standpoint of foreseeable product users or consumers.[298] Specifically, Comment *j* provides: "a product seller is not subject to liability for failing to warn or instruct regarding risks and risk-avoidance measures that should be obvious to, or generally known by, *foreseeable product users*."[299] In making this determination, other courts deciding tobacco litigation cases have looked to the time period within which the injured person began smoking,[300] and this Court agrees. Further, considering the applicable objective standard, Reynolds' contention that Plaintiffs must demonstrate that the misleading communications by the tobacco industry or Lorillard actually reached Decedents presupposes a subjective inquiry and therefore lacks merit.

Here, in evaluating whether the risks of smoking cigarettes were obvious or generally known, the relevant time period is 1960, which the Court can reasonably infer from the record in these cases is the year that Decedents began smoking at the age of nine in the case of England and at sixteen in the case of Decedent Brown.[301] If children and teenagers of these ages were foreseeable users of cigarettes, the Court's objective inquiry should be made from the standpoint of a reasonable child or teenager; otherwise, the inquiry will be based on that of a reasonable adult.

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[298] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. j; *See supra* n. 231 (most courts in other jurisdictions utilize an objective standard when determining whether risks were obvious or generally known in products liability actions).

[299] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. j (emphasis added); *See id.* at cmt. i.

[300] *C.f. Insolia v. Phillip Morris, Inc.*, 216 F.3d 596, 600 (7th Cir. 2000) ("Instead, what the ordinary consumer contemplated about the dangers of smoking should be evaluated at the time the plaintiffs began smoking").

[301] Def.'s Ex. G (*Gerald*), England's Second Supp. Answers, Interrog. Answer No. 1 (listing England's date of birth as December 28, 1950) & Interrog. Answer No. 13 ("I [(England)] first began smoking Newport cigarettes when I was about 9 years old, and always smoked Newport cigarettes ... By age 13 I was smoking, usually, a pack a day. In my adult life, I smoked, usually, a pack to a pack-and-a-half of Newports"); Def.'s Ex. E (*Brown*), Brown's First Supp. Answers, Interrog. Answer No. 15 (stating Decedent Brown started smoking half a back of Newport cigarettes a day in the fall of 1960 at the age of 16 and smoked one to two packs of Newport cigarettes a day from 1961 to 1976).

In order to determine whether children and teenagers were foreseeable users of cigarettes in 1960, the Court looks to the materials submitted in connection with Reynolds' summary judgment motions.[302] Plaintiffs submitted the expert report of Anthony Biglan, Ph.D., who refers, *inter alia*, to:

- A survey that "reported on the smoking behavior of 7,521 high school and college students in 1958 and 1959" that indicated "56% of high school respondents were smokers in 1959[,]" 4% of which were smoking Newport cigarettes"[303];
- "A study by Albert Palmer [that] was conducted for the Tobacco Industry Research Committee in 1964[,]" that, in turn, cites a study that showed "'a few of the youngsters began to smoke early, but the greatest increase in proportion of smokers came in the eleven to sixteen year age group'"[304];
- A survey conducted in 1969 that showed "70% of the men had begun to smoke by the time they were 18"[305];
- An internal Lorillard memo dated June 28, 1973, stating that "in the last few years, smoking among the 12 to 18 year age group increased from 14.7% to 15.7% among boys and from 8.4 to 13.3% among girls";[306]
- In 1981, Lorillard received the results of a study it had commissioned entitled "An Exploratory Study for Newport – Smoking and Purchase Behavior of Young Adults," which stated "[o]ne-half of these respondents started to smoke at ages 10 to 13 years ... [t]he remaining half of the respondents was divided between those who started to smoke at 14, 15, 16 years of age and those who started to smoke at 17 or 18 years. Among these participants it was rare to start smoking at an age older than 18 years."[307]

[302] *C.f. Insolia*, 216 F.3d at 600.
[303] Pls.' J.A., Report of Anthony Biglan, Ph.D. ("Biglan Report"), p. 27 ¶ 85 (citations omitted).
[304] Pls.' J.A., Biglan Report, p. 27 ¶ 86 (citations omitted).
[305] Pls.' J.A., Biglan Report, p. 28 ¶ 89 (citations omitted).
[306] Pls.' J.A., Biglan Report, p. 29 ¶ 91 (internal quotation marks and citations omitted).
[307] Pls.' J.A., Biglan Report, p. 27 ¶ 84 (citations omitted).

Additionally, Dr. Biglan details examples where Lorillard discussed the necessity of, and its efforts in, attracting persons under the age of 18 to their cigarettes, and other marketing efforts to young people, including, *inter alia*:[308]

- Statements made by Lorillard in its 1956 and 1954 annual report to stockholders;[309]

- "A memo from ... [the] Vice President for Advertising to ... the President and CEO of Lorillard, dated September 15, 1964[,]" stating "[t]he brand [Newport] was marked [sic] as a fun cigarette. It was advertised as such and obtained a youthful group as well as an immature group of smokers. NEWPORT was marketed successfully as planned";[310]

- "A document dated January 1968 and labeled 'P. Lorillard Company, Corporate Network Activity' listed network shows that had ads for Lorillard brands, including Newport ... [and] provide estimates of the number of teens and children that each show reached. It indicated that during January there were 172 million instances of exposure of teens to Lorillard ads and 218 million exposures to children."[311]

- Lorillard received, on an unspecified date, an analysis conducted in 1969 by "[t]he Economic and Market Analysis Department of the Eastman Chemical Company" that "was intended to prove '... a better insight into the habits and attitudes of the younger age group'";[312]

- "A Lorillard Document provides estimates of the number of adults and non-adults that would be reached by spot advertising for Newport during the year 1970[,]" including estimates "of those reached who are 2- to 11-years-old and 12- to 17-years-old[,]";[313]

- Lorillard's annual report in 1964 stated "Once of the most effective methods of creating new customers is 'sampling'—at the supermarket, the factory gate, on a downtown thoroughfare, wherever people congregate. In 1964 our consumer sampling program with Kent and Newport the main beneficiaries, was considerably expanded."[314]

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[308] *See* V.I. R. EVID. 105 (evidence can be inadmissible for one purpose, but admissible for proving another).
[309] Pls.' J.A., Biglan Report, p. 26 ¶¶ 82 (stating that in its 1954 Annual Report, Lorillard "attributed the down turn in sales, in part, to '... the fact that there was population shrinkage in the younger age groups and an increase in the older age groups'"), 83 (stating that in its 1956 Annual Report, Lorillard said "it is necessary to properly slant our appeals so that all groups are attracted: both young adults who, in their formative days of life, are setting their future patterns; ... and the more mature clientele whose confidence in the products' quality must be maintained") (citations omitted).
[310] Pls.' J.A., Biglan Report, p. 31 ¶ 101 (citations omitted).
[311] Pls.' J.A., Biglan Report, p. 31 ¶ 102 (citations omitted).
[312] Pls.' J.A., Biglan Report, p. 27 ¶ 88 (citations omitted).
[313] Pls.' J.A., Biglan Report, p. 31 ¶ 104 (citations omitted).
[314] Pls.' J.A., Biglan Report, p. 36 ¶ 125 (citations omitted).

- An internal Lorillard memo dated October 24, 1974, that "proposes that the company invest[ ] additional money … into 'promotion, a sampling and point of sale efforts' … concentrated on this very young adult category.'"[315] Yet, a memo dated May 28, 1965, Lorillard notified its Field Division, and Assistant Division Managers to stop distributing free samples to those under the age of 21" in accordance with the tobacco industry's Advertising Code;[316]

- An internal Lorillard document from 1978 refers to the "'fantastic' success of the Newport brand in recent years, adding that 'the base of our business is the high school student.'"[317]

The record is relatively limited in terms of outlining specific instances that demonstrate that children and teenagers were expected users of cigarettes manufactured by Lorillard in the late 1950s and 1960s. Yet, the Court must view the record in a light most favorable to Plaintiffs. In so doing, the Court finds that Plaintiffs have submitted more than a "scintilla" of evidence that teenagers were foreseeable users of Lorillard's cigarettes in 1960, but that the record is insufficient to demonstrate children below the age of twelve years old were foreseeable users during this time period. Consequently, the Court will consider whether the addictiveness and risks of smoking cigarettes would have been obvious to, or generally known by, a reasonable teenager in 1960, the year Decedents began smoking.

In resolving this inquiry, the Court looks further into the record of these cases. In the expert report submitted by Plaintiffs, Dr. Proctor lists in meticulous detail a chronology of acts by the tobacco industry to obscure, deny, or dispute claims that cigarette smoking was addictive and posed health risks throughout the 20th century.[318] And, despite Reynolds' contention, the Frank Statement is a suitable example of the public stance taken by the tobacco industry, including

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[315] Pls.' J.A., Biglan Report, p. 29 ¶ 93 (citations omitted).
[316] Pls.' J.A., Biglan Report, p. 36 ¶ 127 (citations omitted).
[317] Pls.' J.A., Proctor Report, p. 27 ¶ 97 (citations omitted).
[318] *See* Pls.' J.A., Proctor Report, pp. 66-91 ("App. II: Chronology of Conspiracy"); *See also generally* Pls.' J.A., Proctor Report.

Lorillard, on the dangers of smoking in 1954.[319] Dr. Proctor also references "[t]ens of thousands of letters to and from ordinary smokers [that] are preserved in the online Legacy Tobacco Documents Library," many of which "express clear ignorance of tobacco hazards" prior to, and even a decade after, July 1, 1969.[320]

In addition, Dr. Proctor refers to the following:

- A 1953 "confidential Roper poll for Philip Morris" where people were asked "What harm, if any, do you think cigarette smoking does to you either mentally, physically, and emotionally?" and, while "roughly half of [the respondents] ... recognized there was 'something harmful' about smoking in the abstract," only one respondent provided "cancer" as his or her answer.[321]

- The following year, a 1954 "Gallup poll found that 90 percent of Americans had 'heard or read about' a connection between smoking and lung cancer. When this same group was asked whether they believed what they had read, fewer than half of those polled answered 'yes.'"[322]

- Four years later, a 1958 "Gallup poll found that when American smokers were asked 'do you think that smoking is or is not one of the causes of cancer of the lung' 33 percent answered 'yes,' with the remainder answering 'no' or 'undecided.'"[323] The following year, a 1959 "Roper poll for Philip Morris reveal[ed] that while most of [the respondents] ... had *heard* that smoking had been linked to cancer, nearly 70 percent agreed that 'as long as you are careful not to smoke too much, cigarettes won't do you any real harm'" and "when asked to identify 'the trouble with cigarettes ... only about one percent [of respondents] mention[ed] cancer."[324] Even twenty years later, this principle was reflected in a 1979 BAT Southhampton study, where "90 percent ... [of] smokers who had never tried to quit and had no intention of doing so ... agreed there was 'nothing wrong with smoking as long as a person smokes moderately[,]" while "70 percent of all smokers agreed that 'mild cigarettes are safer than strong cigarettes' and that 'Low Tar Cigarettes are Safer than Other Cigarettes [sic].'"[325]

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[319] *supra* n. 293; V.I. R. EVID. 201(b)(2) ("The court may judicially notice a fact that is not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned").
[320] Pls.' J.A., Proctor Report, pp. 41-45 (citations omitted).
[321] Pls.' J.A., Proctor Report, p. 69 ¶ 26 (citations omitted).
[322] Pls.' J.A., Proctor Report, p. 38 (citations omitted).
[323] Pls.' J.A., Proctor Report, p. 39 (citations omitted).
[324] Pls.' J.A., Proctor Report, p. 74 ¶ 47 (citations omitted).
[325] Pls.' J.A., Proctor Report, p. 39 (citations omitted).

- In 1964, the United States Surgeon General issue his seminal report on smoking, where health risks associated with smoking were addressed, but where smoking was described as habituating rather than addictive.[326]

- The following year, in 1965, "a Louis Harris poll found that when 1,250 Americans were asked whether smoking was a 'major' or a 'minor cause of lung cancer, only 20 percent of the heavy smokers said 'major cause.'"[327] Two years later, in 1967, "the U.S. Federal Trade Commission release[d] its report on federal cigarette labeling, pointing out that '[t]he belief appears to be widely held that filter cigarettes are less hazardous to health than regular cigarettes.'"[328]

- Fourteen years after that, a 1981 "FTC Staff Report reviews the state of popular understanding of tobacco harms in the U.S., and concludes that millions of Americans still know little about the nature and extent of harms caused by smoking."[329]

- The following year, in 1982, "[a] Roper poll for the Tobacco Institute finds that only a quarter of the American public regarded smoking as 'an addiction,' while more than half of those polled regarded it as just 'a habit.'"[330] Six years later, in 1988, the United States Surgeon General issued another report on smoking, and, for the first time, characterized smoking as addictive.[331] The Tobacco Institute's response to the Surgeon General's 1988 report was that "[a]fter years of well-funded research, it has not been established that cigarette smoking produces a physical dependence to nicotine" and "the Surgeon General's own figures indicate that more than 40 million Americas are former smokers, 95 percent of them having given up smoking without professional help[,]" which "doesn't mirror any common-sense description of addiction."[332]

- Eight years after that, the tobacco industry continued to deny that smoking "causes cancer or is addictive[,]" with the chief executive officers "from the major tobacco manufacturers

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[326] While Dr. Proctor refers to the Surgeon General's 1964 report, it does not appear to have been cited directly. In any event, the Court may take judicial notice of the report. *See* V.I. R. EVID. 201(a)-(b). Further, in his deposition, Dr. Proctor testified the Surgeon General's 1964 report was 'the single most important force in producing that increased knowledge in the '60s, more important, for example, than the warnings, ... because its widely publicized, and, and its really the publicity combined with the report because obviously most people wouldn't read the report itself. But it's the publicity THAT creates the broader understanding, and that's why you get this unprecedented wave of quitting after the Surgeon General's report." Pls.' J.A., Proctor Dep., at 25:13-25, 26:1.
[327] Pls.' J.A., Proctor Report, p. 39 (citations omitted).
[328] Pls.' J.A., Proctor Report, p. 78 ¶ 65 (citations omitted).
[329] Pls.' J.A., Proctor Report, p. 86 ¶ 106 (citations omitted).
[330] Pls.' J.A., Proctor Report, p. 86 ¶ 108 (citations omitted).
[331] Pls.' J.A., Proctor Report, p. 89 ¶ 117 (citations omitted).
[332] Pls.' J.A., Proctor Report, p. 89 ¶ 117 (citations omitted).

testify[ing to same] under oath before the Waxman Committee in the U.S. Congress" in 1994.[333]

- In 2001, "Monograph 13 of the National Cancer Institute concludes that low tar, light, and filter cigarettes offer no health benefit."[334]

Considering this evidence, as well as the entirety of Dr. Biglan's and Dr. Proctor's reports, reasonable minds could differ as to whether the addictiveness and risks of cigarette smoking were obvious or generally known to reasonable teenagers in 1960, when Decedents first began smoking cigarettes. The Court recognizes that other courts have considered evidence similar to that submitted by Plaintiffs here and granted summary judgment, but those cases typically involve an application of the consumer expectations test under the Restatement (Second) of Torts § 402A, where the courts consider whether the dangers of cigarette smoking were obvious or generally known to the "ordinary" consumer, which usually are found to be adults.[335] In contrast, the Court's assessment here involves a determination of whether the dangers of cigarette smoking were obvious or generally known to foreseeable users, which here includes the reasonable teenager. Common sense suggests that even a reasonable teenager would likely be unable to appreciate risks in the same manner as a reasonable adult. Considering the record in these cases, a reasonable jury could conclude that the health risks and addictiveness associated with smoking cigarettes were not obvious or generally known by a reasonable teenager in 1960. Therefore, a genuine issue of material fact remains with respect to this issue.

Reynolds again urges the Court to take judicial notice of the conclusions of other courts regarding "the common knowledge of the general disease-related health risks of smoking," and

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333 Pls.' J.A., Proctor Report, p. 90 ¶ 124 (citations omitted).
334 Pls.' J.A., Proctor Report, p. 91 ¶ 128 (citations omitted).
335 *See Insolia*, 216 F.3d at 599-600; *Estate of White*, 109 F. Supp. 2d at 433.

the Court again reiterates that this fact may not be judicially noticed because it is neither "generally known within the trial court's territorial jurisdiction" nor "accurately and readily determin[able] from sources whose accuracy cannot reasonably be questioned."[336] There is no clear consensus among courts that the common knowledge doctrine applies in tobacco litigation cases, and, where courts have recognized it, they differ as to the year this common knowledge arose.[337] Furthermore, the Court agrees with other courts that the time periods in which a community acquired common knowledge of the general risks of smoking and the addictive nature of cigarettes may differ, and, even assuming, *arguendo*, there was a "general common knowledge that cigarettes are dangerous," this does not warrant a finding, as a matter of law, that "users of cigarettes are ... imputed with knowledge of the extent and nature of all dangers relating to cigarettes."[338]

Finally, even assuming, *arguendo*, a genuine issue of material fact did not exist with respect to whether the risks of smoking were obvious or generally known in these cases, the Court agrees with courts in other jurisdictions that this issue is "merely one of several factors to be considered on the issue of the existence of a duty to warn."[339] Consequently, this issue must be decided by the jury at trial,[340] and Reynolds is not entitled to summary judgment on this ground.

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[336] V.I. R. EVID. 201(a)-(b); *Rodriguez*, 64 V.I. at 457 (citations omitted).
[337] *Compare Guilbeault*, 84 F. Supp. 2d at 271-72 ("To summarize, most of the courts considering the common knowledge of the general disease-related health risks of smoking have placed common knowledge at least at 1966 and some before") (collecting cases) *with Thompson*, 207 S.W.3d at 106 (refusing to take judicial notice of the public's common knowledge of the dangers of smoking) *and Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515, 1526 (same) *and Wright*, 114 F. Supp. 2d at 816-17 (same).
[338] *Burton*, 884 F. Supp. at 1526.
[339] *supra* n. 233.
[340] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. j.

c. A genuine issue of material fact exists with respect to whether the absence of an adequate warning proximately caused Decedents' injuries.

Reynolds contends that it is entitled to summary judgment on Plaintiffs' pre-1969 failure to warn claims because Plaintiffs "cannot prove a causal nexus between any warning not given to Decedent[s] before July 1, 1969" and England's "2005 cancer diagnosis" and Decedent Brown's "2008 cancer diagnosis[,]" or any other injuries sustained by Decedents.[341] Plaintiffs object, arguing there are genuine issues of material fact as to whether Decedents were "exposed to, and aware of, information concerning the health risks and addictive nature of smoking" and whether Lorillard "had superior knowledge concerning the dangerousness and addictiveness of cigarettes that it had a duty to disclose, and that it failed to disclose, to users and consumers of Newport cigarettes, including … [Decedents] prior to July 1, 1969."[342]

As with Plaintiffs' claims premised on the design defect theory, proximate causation is an essential element of Plaintiffs' claims for strict products liability, negligence, and breach of the implied warranty of merchantability that are based Lorillard's pre-1969 failure to warn.[343] And, as with all product defect claims arising under the Restatement (Third) of Torts: Products Liability § 1, claims premised on inadequate warnings or instructions under Section 2(c) are subject to "prevailing rules and principles governing causation in tort."[344] Therefore, the same standard of proximate causation described above with respect to Plaintiffs' design defect claims applies

[341] Def.'s Mot. for Summ. J. (*Gerald*), p. 25; Def.'s Mot. for Summ. J. (*Brown*), p. 19.
[342] Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., pp. 22, 24; *See* Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 34 ("There is a genuine issue of material fact as to whether Mr. England was exposed to what the Defendant alleges was information 'widely circulated specifically linking smoking to lung cancer and other diseases such as cancer of the throat and bladder.'"); *Id.* at p. 36.
[343] *supra* n. 127 - 132.
[344] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 15; *See id.* at § 1; *Id.* at § 2 cmt. q.

here.[345] Additionally, Comment *i* of the Restatement (Third) of Torts: Products Liability § 2 specifically addresses the requisite proximate cause for product defect claims premised on the manufacturer's "duty to provide warnings for informed decisionmaking."[346] Comment *i* states: "Notwithstanding the defective condition of the product in the absence of adequate warnings, if a particular user or consumer would have decided to use or consume even if warned, the lack of warnings is not a legal cause of that plaintiff's harm."[347] Inherent in this Comment is the adoption of a subjective standard for causation for product defect claims based on failure to warn, which asks "whether the … [injured person], upon reading the adequate warning, would have acted in a manner that would have avoided the injury."[348]

Here, Reynolds' argument consists of two main points: (1) the deliberate choices of Decedents to smoke despite their awareness of the risks; and (2) medical causation.

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[345] *Id.* Specifically, the Court restates:

> To establish causation in the Virgin Islands, "a plaintiff must demonstrate both cause in fact and proximate cause." "Proximate cause is established where the party who bears the burden shows that 'an original act is wrongful or negligent and in a natural and continuous sequence produces a result which would not have taken place without the act[.]'" Thus, "proximate causation … requires the plaintiff to show that the tort was both the 'but-for' cause of the injury and 'a substantial factor in bringing about the result.'"

supra n. 130 - 132 (internal and other citations omitted).

[346] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. i.

[347] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. i.

[348] Geistfeld, 30 U. Mich. J.L. at 337-38 (explaining that there are three approaches to causation in the context of product defects based on failure to warn: (1) an objective standard; (2) a subjective standard; and (3) a standard that presumes causation); *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. AND EMOT. HARM § 18 cmt. c ("To justify liability in a negligent failure-to-warn case, there must be a finding of causation--a finding that the warning, if given, would have prevented the harm that resulted, such as by any of the causal mechanisms described in Comment *b*. It may be that the magnitude of the danger to which the warning relates is great and that the plaintiff would have needed to modify conduct only slightly in order to avoid the danger. In such circumstances, it can be reasonable to assume, even without specific evidence, that a warning, if given, would have caused such a change in the plaintiff's behavior; but the jury is not required to make this assumption"); *Id.* cmt. b (explaining that "[a]rmed with the information provided by a warning, the potential victim may be able conveniently to modify conduct so as to avoid the danger that the defendant's conduct entails" and listing examples of "[h]ow warnings can be a reasonable measure for reducing risk").

1. Decedents' purported awareness of the risks and deliberate choice to smoke cigarettes.

First, Reynolds argues that Plaintiffs cannot meet their burden of proximate causation because England and Decedent Brown were "aware from an early age that smoking was hazardous, and that message was constantly reinforced to [them] ... throughout [their] ... life by family members, friends, doctors, the media, and popular culture."[349] Specifically, Reynolds points generally to its "Statement of Facts" section in each motion, which include, *inter alia*, excerpts from Decedents' discovery and trial preservation depositions, Decedents' answers to interrogatories, excerpts from depositions of Decedents' physicians, friends, and family, as well as the expert report of Dr. Schaller.[350] Further, Reynolds states that during the time Decedents' smoked, the United States Surgeon General issued his seminal report on smoking in 1964 that concluded, "among other things, that cigarette smoking was causally related to lung cancer[,]" and describes the mandated warnings on cigarette packages: (1) from January 1, 1966 through March 1, 1970; (2) after April 1, 1970; and (3) beginning in 1972.[351] In further arguing Decedents chose to continue to smoke despite their awareness of the risk, Reynolds highlights that:

> "England testified [in his depositions] that he enjoyed smoking and he did not pay attention to the warning labels on his cigarette packs[,]" "took responsibility for smoking[,]" and stated "I could have stopped, you know, like they say, but I kept on."[352]

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[349] Def.'s Mot. for Summ. J. (*Gerald*), p. 26; Def.'s Mot. for Summ. J. (*Brown*), pp. 19-20.
[350] Def.'s Mot. for Summ. J. (*Gerald*), p. 26; Def.'s Mot. for Summ. J. (*Brown*), pp. 19-20 (both citing Reynolds' Statement of Facts in each respective motion and Def.'s Ex. L (*Gerald/Brown*), Schaller Report, at 29-42, 57-70 (discussing warnings about the dangers of smoking in the media and popular culture during Decedents' lifetime)).
[351] Def.'s Mot. for Summ. J. (*Gerald*), p. 26; Def.'s Mot. for Summ. J. (*Brown*), p. 20.
[352] Def.'s Mot. for Summ. J. (*Gerald*), p. 26 & n. 69 (citing Def.'s Ex. E (*Gerald*), England Preserv. Dep., at 31:23-32:08, 105:10-15, 72:17-73:02, Def.'s Ex. D (*Gerald*), England Disc. Dep., at 424:11-18); *Id.* at n. 69 (citing Def.'s Ex. H (*Gerald*), Webster Dep., at 61:12-62:3)).

On this same point with respect to Decedent Brown, Reynolds refers to Decedent Brown's deposition testimony, where:

> [Decedent Brown testified] "she saw the warning labels on her cigarette packages, but never paid attention to them and never tried to quit in response[,]" "she was not motivated to quit smoking for good before 1997, and could have quit sooner had she been motivated to do so[,]" "she bore responsibility for choosing to smoke and for not quitting sooner[,]" and stated "[i]f I didn't really enjoy it, I would have stopped" and "in my mind there was no reason to stop."[353]

In opposition, Plaintiffs point to the deposition testimony and report of their expert, Dr. Proctor, who "notes that even if one is generally aware of the dangers of smoking one could still be a victim of the campaign of doubt because it affected individual knowledge of the degree of harm cigarette smoking can cause[,]" "expounds that the effects of the campaign of misinformation generated by the tobacco industry, including Lorillard, affected a vast number of individuals in the United States[,]" and concludes that "Lorillard, along with other cigarette manufacturers ... deliberately chose to continue their campaign to reassure smokers cigarettes were safe ... [i]nstead of informing the public about what it knew in the early 1950s concerning the dangers of smoking[.]"[354] Plaintiffs also refer to the reports of Dr. Nelson, who "stated 'parental smoking, tobacco advertising, the availability of cigarettes and social acceptability, as well as promotional activities, all played important role' in Ms. Brown's teenage smoking initiation[,]"[355] while "'tobacco advertising as well as promotional activities, which lead to the availability of cigarettes,

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[353] Def.'s Mot. for Summ. J. (*Brown*), pp. 20-21 (citing Def.'s Ex D (*Brown*), Brown Disc. Dep., at 142:14-143:13, 251:17-252:01, 253:22-25, 256:17-24, 257:14-258:15, 359:24-360:12, 123:12-124:10, 145:03-09; Def.'s Ex. F (*Brown*), Trial Preservation Deposition of Brown ("Brown Preserv. Dep."), at 119-13:120:01, 127:14-130:17, 117:06-09, 118:18-22, 119:13-120:01).
[354] Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., pp. 34-35; Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., pp. 22-23 (both citing Pls.' J.A., Proctor Dep., at 59:8-13, 60:3-10; Pls.' J.A., Proctor Report, at p. 12).
[355] Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., p. 23 (citing Pls.' J.A., Nelson Report of Brown, p. 7)

played a role'" in the case of England, who "was heavily exposed to such advertisements."[356] Plaintiffs further note that "[t]he advertising in question were activities Lorillard was heavily engaged in before 1969" and both Decedents testified they "became addicted to cigarettes as … [children], before 1969."[357] Finally, Plaintiffs point to the deposition testimonies of Decedents, which purportedly indicate Decedents "w[ere] not fully aware of the dangers of smoking both when [they] … began smoking and for most of [their] … smoking life."[358] With respect to England, Gerald notes:

> [England] testified:
>
> Q: You knew it by then, that smoking could be dangerous, right?
> A: I've heard people say so.
> Q: And you knew that smoking could cause all kinds of very serious diseases, right?
> A: Not really.
> Q: No? You knew that smoking could lead to certain forms of cancer, right?
> A: At first, no.
> Q: I'm sorry, could you repeat?
> A: At first, no.
> ***
> Q: Do you remember starting [sic] in about 1966 that every pack of cigarettes had on the side something that said "Caution. Cigarette smoking may be hazardous to your health"?
> A: I remember that part, yeah.
> Q: Okay. And what did you think when you read that? Why do you think those words appeared on the cigarettes?
> A: Number one, I didn't know what "hazardous" meant, tell you the truth.
> Q: You didn't know what the word "hazardous" meant?
> A: No.
> Q: You had never heard that word before you read it on the cigarettes?

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356 Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 35 (citing Pls.' J.A., Nelson Report of England, pp. 7-8)
357 Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., p. 23 (citing Pls.' J.A., Brown Disc. Dep., at 41:21-42:17); *See* Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 35 (citing Pls.' J.A., England Preserv. Dep., at 16:10-16:16).
358 Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 35; Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., p. 23.

> A: No.
> Q: Did you ever ask anybody what these words are, what they mean?
> A: No.
> Q: Do you remember anytime those warnings changing in any way?
> A: No.[359]

As to Decedent Brown, Plaintiff Brown refers to the following:

> [Decedent Brown] testified:
>
> Q Is there any doubt in your mind that you chose Newport cigarettes because you were influenced by the advertisements of the type that we've looked at here this morning?
> A That's why I chose it, because of the - it just seemed like such a refreshing - you know, as I said, it seemed like the lady-like choice.[360]
>
> ...
>
> Q Up until 1984, did you believe that cigarette smoking was bad for your health?
> A Up until 1984?
> Q Right.
> A No.
> Q Why not?
> A Because the controversy was still back and forth all the time, and I was, you know, hoping that it really wasn't because I was addicted and I didn't know if I could stop.[361]

The Court agrees with Plaintiffs that genuine issues of material fact remain with respect to whether the absence of an adequate warning prior to 1969 proximately caused Decedents to develop cancer. Importantly, Plaintiffs' argument, supported by the expert report and deposition of Dr. Proctor, stems from the purported lack of information provided by Lorillard regarding the health risks and addictiveness associated with cigarette smoking, which prevented Decedents from

[359] Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., pp. 35-36 (citing Pls.' J.A., England Disc. Dep., at 34-35, 205).
[360] Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., p. 23 (citing Pls.' J.A., Brown Preserv. Dep., at 41:11-19).
[361] Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., pp. 23-24 (citing Pls.' J.A., Brown Preserv. Dep., at 68:8-19).

making an informed decision not to begin smoking and thus not encounter the risks associated therewith. According to Dr. Proctor, throughout the 1950s, Lorillard knew of the dangers associated with smoking, including, *inter alia*, the health risks posed by carcinogens and the addictiveness of nicotine, but "deliberately chose to continue their campaign to reassure smokers cigarettes were safe" through various means, including, *inter alia* advertisements and promotions, and, the record reflects that, at the time Decedents began smoking in 1960, the United States Surgeon General had not yet issued his 1964 report on smoking and there were no warnings on cigarette packages, which only began to appear on January 1, 1966, with the mandated phrase: "CAUTION: CIGARETTE SMOKING MAY BE HAZARDOUS TO YOUR HEALTH."[362] As Plaintiffs point out, Dr. Proctor's conclusions conflict with those of Reynolds' expert, Dr. Schaller, and it is the trier of fact who must assess the credibility of these experts and the weight of their conclusions, tasks that are beyond the Court's purview in these summary judgment proceedings.

Furthermore, that Decedents testified that they did not "pay attention" to warning labels affixed to cigarette packages after 1966—when Plaintiffs claim Decedents were already addicted to cigarettes—does not demonstrate an absence of a genuine issue of material fact with respect to whether Decedents, upon reading adequate warnings in 1960, would have acted in a manner that would have avoided the injury, such as making the informed decision not to start smoking in the first place. And, Plaintiffs have submitted evidence that suggests Decedents were not given adequate warnings that informed them of the health risks and addictiveness of smoking before they began smoking Newport cigarettes in 1960.[363] Likewise, the fact that Decedents enjoyed smoking

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[362] Def.'s Mot. for Summ. J. (*Gerald*), p. 26; Def.'s Mot. for Summ. J. (*Brown*), p. 20.
[363] Decedent Brown testified that her mother never informed her that smoking was dangerous to her health or addictive, nor did she recall being taught this in school. Pls.' J.A., Brown Disc. Dep., 46:11-25, 47:1-2, 73:1-20., 84:1-15, 85:22-

is not determinative on this issue and does not negate Decedents' testimony that suggests they were addicted to cigarettes for decades,[364] regardless of whether Decedents were aware of their own addictions during the course of their smoking history.

This issue of proximate cause is complicated here, where the alleged inadequate warning pertains to Lorillard's failure to disclose one of the very defects—addictiveness—that purportedly caused, at least in part, Decedents to continue smoking despite their subsequent receipt of any allegedly "adequate" warnings, particularly in light of the evidence that suggests Lorillard specifically engineered its product with, *inter alia*, an addictive level of nicotine and menthol, "mak[ing] it easier to initiate new immature smokers[,]"[365] such as Decedents in these cases. Further, a finding of proximate cause only requires that the inadequate warnings in 1960, or later, constitute a substantial factor—not the sole factor—in bringing about the Decedents' injuries. And, whether smokers are capable of making an informed decision to stop smoking cigarettes—and, thus, avoid the injuries caused by cigarette smoking—when given an adequate warning only after

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24, 18:14-24, 20:8-25, 21:1-2 (while attending school in grades 1-7 in Pennsylvania); 34:20-25, 35:16-19 (while attending grades 8 and 9 at Antilles in St. Thomas, U.S.V.I.), 82:22-25 (while attending a semester of high school at St. Mary's, a boarding school in South Bend, Indiana), 48:10-19 (while attending the remainder of high school at Pinecrest, a boarding school in Ft. Lauderdale, Florida). Additionally, Decedent Brown testified that she lived on St. Thomas, U.S.V.I. in 1956 and 1957, she did not think it was unhealthy that her mother, or the guests at the establishment her mother worked at, smoked cigarettes, and that the first time she recalled learning that cigarette smoking could be dangerous to her health was after she had already graduated in high school, which the record indicates was in 1962. Pls.' J.A., Brown Disc. Dep., 33:20-25, 34:1-8, 38:17-25, 39: 1-25, 73:21-25, 74:1-19; Def.'s Ex. E (*Brown*), Brown's First Supp. Answers, Interrog. Answer No. 5. Admittedly, England's testimony is less clear on this issue, but still reflects that, as a nine year old, he was not aware of the health risks and addictiveness of smoking. *See* Pls.' J.A., England Disc. Dep., 28:12-25, 29:1-2, 156:23-25, 157:1-5, 166:23-25, 167:1-4, 168:1-8; *See also* Pls.' J.A., England Preserv. Dep., at 72:23-25, 73:1-2 ("Well, I was still smoking, you know, from a child, coming up; and they said it wasn't addictive, you know, it wasn't dangerous. I could have stopped, you know, like they say, but I kept on"), 63:24-25, 64:1-2 (England stating that when he was a smoker he believed smoking cigarettes was safe).

[364] Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., pp. 23-24 (citing Pls.' J.A., Brown Preserv. Dep., at 68:8-19); Pls.' J.A., England Preserv. Dep., at 16:10-16:16; Def.'s Ex. E (*Gerald*), England Preserv. Dep., at 11:2-17; 19:19-20:19, 21:17-22:23; Def.'s Ex. D (*Gerald*), England Disc. Dep., at 173:1-14.

[365] Pls.' J.A., Dr. Farone Trial Testimony, at 1737:16-17, 1763:23-24, 1764:1-3, 1772:18-22, 1773:1-14, 1174:14-17.

the smokers are already addicted to cigarettes is a question that depends on the factual circumstances of each case, which here must be resolved by the trier of fact at trial.[366] Therefore, the Court finds this is an issue of fact that must be resolved by the jury.

Consequently, when viewing the record in the light most favorable to Plaintiffs, the Court concludes that a genuine issue of material fact exists with respect to whether the inadequate warnings on Newport cigarettes prior to July 1, 1969, were the proximate cause of Decedents' injuries.

2. Medical causation.

Second, Reynolds argues that Plaintiffs cannot "show that Lorillard's pre-1969 failure to warn proximately caused" Decedents' cancers because the conclusions of the parties' experts reveal that "accepted scientific fact[s] make[ ] it impossible for Plaintiff[s] to prove that essential link of proximate causation over the ... [decades long] span[s] from 1969 until 2005[,]" in the case of England, and 2008, in the case of Decedent Brown.[367] As to England, Reynolds refers to the deposition testimony of Dr. Nelson "that a person's risk of developing laryngeal or bladder cancer decreases immediately after smoking cessation and decreases substantially the longer a person stops smoking."[368] As to Decedent Brown, Reynolds points to the conclusion of its "expert epidemiologist, Dr. James McClave" that "at the time of [Decedent Brown's] ... 2008 lung cancer diagnosis, [Decedent] Brown—who had quit smoking Lorillard's Newport cigarettes in 1976, more than 30 years earlier—would not have been at an elevated risk for lung cancer due to her

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[366] *See Boerner*, 260 F.3d at 848.
[367] Def.'s Mot. for Summ. J. (*Gerald*), p. 27; Def.'s Mot. for Summ. J. (*Brown*), p. 21.
[368] Def.'s Mot. for Summ. J. (*Gerald*), p. 27 (citing Def.'s Ex. F (*Gerald*), Dr. Nelson Dep., at 7:04-9:24) (other citation omitted).

smoking and the epidemiological data would not support a causal connection between her smoking and her lung cancer."[369]

Essentially, Reynolds argues that Plaintiffs cannot show that there are genuine issues of material fact as to whether Decedents' smoking of Newport cigarettes from 1960 to July 1, 1969, proximately caused Decedents to develop cancer. Reynolds cites two cases where courts suggest that the plaintiff's burden of proof on the issue of causation on pre-1969 failure to warn claims requires, *inter alia*, a showing that the injured person's "pre-1969 smoking" caused the cancer.[370] However, in the Court's view, this standard misapplies the concept of proximate cause, as it is recognized in the Virgin Islands, which the Court reiterates "is established where the party who bears the burden shows that 'an original act is wrongful or negligent and in *a natural and continuous sequence* produces a result which would not have taken place without the act[.]'"[371] The preemptive effect of federal tobacco legislation, commencing on July 1, 1969, does not preclude Plaintiffs from demonstrating the necessary causal links that occurred after July 1, 1969, but which are the natural and continuous consequences of the original wrongful conduct—Lorillard's failure to provide adequate warnings of the dangers associated with smoking Newport cigarettes prior to July 1, 1969—that is not subject to federal preemption.

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[369] Def.'s Mot. for Summ. J. (*Brown*), p. 21 (citing Def.'s Ex. T (*Brown*), Report of James T. McClave, Ph.D. ("Report of McClave"), ¶¶ 25-28).
[370] *Guilbeault*, 84 F. Supp. 2d at 275 ("To prevail on the non-preempted failure to warn claim, plaintiff would have to establish causation on two levels: 1) that a pre-1969 warning would have induced him to stop smoking and 2) that his pre-1969 smoking was the proximate cause of his 1997 cancer") (citations omitted); *See Estate of White*, 109 F. Supp. 2d at 435 n.17 (noting that "[a]nother causation problem is the large time gap (sixteen years) between defendants' failure to warn in the 1960s (the claims that survived preemption dismissal) and the development of the first malignant cancer cells, which according to plaintiffs' expert, Victor Louis Roggli, M.D., would have been in 1985 (five to ten years before the 1995 diagnosis)").
[371] *Sealey-Christian*, 52 V.I. at 432 (citations omitted) (emphasis added).

Here, the Court has repeatedly reiterated that the record suggests that England and Decedent Brown began smoking Newport cigarettes in 1960 and were addicted to smoking cigarettes.[372] Further, the Court has already found that genuine issues of material fact remain with respect to whether Decedents, upon reading adequate warnings in 1960, would have acted in a manner that would have avoided the injury, such as making the informed decision not to start smoking in the first place. Additionally, the trial testimony of Dr. Farone indicates that Newport cigarettes contained an addictive level of nicotine, "excessive" levels of carcinogens "that cause cancer[,]" and menthol, which, "makes it easier to initiate new immature smokers."[373] Finally, Plaintiffs submitted reports by Dr. Nelson that state Decedent Brown's "death emanated from her lung cancer" and that England's death "emanated from his bladder cancer[,]" which Dr. Nelson found "directly and positively related to ... [their] cigarette smoking, which commenced in or about the 1960's and resulted in nicotine addiction."[374] And, Dr. Hughes reported that "[t]here is more than a reasonable degree of medical certainty that both of Mr. England's primary cancers, his neck cancer and a bladder cancer are related to his long history of smoking ... [and p]art of his inability to stop smoking is directly related to the strong addiction created by nicotine ... ."[375]

The record, when viewed in a light most favorable to Plaintiffs, suggests that the natural and continuous consequences of Lorillard's failure to provide adequate warnings regarding the dangers of smoking prior to July 1, 1969, are, as follows: Decedents began smoking Newport cigarettes; Decedents became addicted to cigarettes because Lorillard produced Newport cigarettes

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[372] *supra.*
[373] Pls.' J.A., Dr. Farone Trial Testimony, at 1737:16-17, 1738, 1763:23-24, 1764:1-3, 1772:18-22, 1773:1-14, 1174:14-17.
[374] Pls.' J.A., Nelson Report of Brown, p. 7; Pls.' J.A., Nelson Report of England, p. 8.
[375] Pls.' J.A., Dr. Hughes Report, p. 2.

with addictive levels of nicotine; Decedents smoked cigarettes for decades as a result of their addiction; Decedents' cigarette smoking caused them to be exposed to carcinogens, which cause cancer; Decedents developed cancer as a result of smoking cigarettes. This is sufficient to satisfy Plaintiffs' burden on summary judgment in this jurisdiction with respect to the issue of causation, as it demonstrates genuine issues of material fact exist with respect to whether England and Decedent Brown's cancers were proximately caused by Lorillard's failure to provide adequate warnings prior to July 1, 1969.

D. Fraudulent Concealment and Misrepresentation (Count V).

In Count V of their amended Complaints, Plaintiffs allege that "Reynolds, as the successor to Lorillard, is liable to [Decedents] ... for fraudulent concealment and misrepresentation in connection with their manufacture, distribution and sale of cigarettes" because Lorillard "intentionally, willfully and/or recklessly mispresented and/or failed to disclose material facts about the human health hazards of smoking, including addiction" and "[a]s the manufacturer, distributor, marketer, and seller of cigarettes, ... Lorillard ... had a duty when disseminating information about smoking, addiction, and health in the form of advertisements, reports, press release, product packaging, sponsorship, and general media and marketing to disseminate truthful information, and to not conceal or fail to disclose material facts about smoking, addiction, and health."[376] Plaintiffs then list twenty-five specific instances where the acts or omissions of Lorillard, the Tobacco Institute, or the tobacco industry amounted to misrepresentation or fraudulent concealment of information related to cigarette smoking.[377] Plaintiffs assert that, based

[376] Pl. Gerald's November 9, 2015, Am. Compl. ¶¶ 44-49; Pl. Brown's November 9, 2015, Am. Compl. ¶¶ 42-47.
[377] Pl. Gerald's November 9, 2015, Am. Compl. ¶ 49; Pl. Brown's November 9, 2015, Am. Compl. ¶ 47; *See* Pl. Gerald's November 9, 2015, Am. Compl. ¶ 50 (Gerald also specifically refers to Lorillard's "free giveaways" of

on Lorillard's representations and concealment, Decedents decided to purchase and smoke cigarettes in the first place, resulting in their addiction, and continued to purchase and smoke cigarettes, which proximately caused their smoking related injuries and deaths.[378]

Reynolds moves for summary judgment on Plaintiffs' claims for fraudulent concealment and misrepresentation, arguing Plaintiffs cannot prove that Decedents "relied on alleged misrepresentations or omissions of material facts, and that his [or her] reliance was 'detrimental and justifiable.'"[379] In contrast, Plaintiffs contend there are genuine issues of material fact as to whether England and Decedent Brown relied on Lorillard's misrepresentations, concealment, and omissions concerning the dangers of smoking.[380]

This Court has recognized claims for fraudulent misrepresentation and fraudulent concealment as separate causes of action.[381] A claim for fraudulent misrepresentation requires a plaintiff plead and prove:

> (1) [that the defendant] made a misrepresentation of fact, opinion, intention, or law (2) that the defendant either knew or had reason to know was false, (3) and that was made for the purpose of inducing plaintiff to act or refrain from acting on it, and (4) that plaintiff suffered pecuniary loss caused by the his or her justifiable reliance on the misrepresentation.[382]

Newport cigarettes at his apartment building in New York, none of which contained warnings of "what Lorillard already knew, that cigarettes were addictive and may cause cancer"). This allegation falls within Plaintiffs' "failure to warn" claims, though Reynolds confined its argument to other counts of the Amended Complaint.

378 Pl. Gerald's November 9, 2015, Am. Compl. ¶¶ 51-55; Pl. Brown's November 9, 2015, Am. Compl. ¶¶ 48-52.

379 Def.'s Mot. for Summ. J. (*Gerald*), p. 29; Def.'s Mot. for Summ. J. (*Brown*), p. 24.

380 Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., pp. 38-45; Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., pp. 26-31.

381 *Compare Gov't of the United States Virgin Islands v. Takata Corp.*, 2017 V.I. LEXIS 125, *115 (V.I. Super. Ct. June 19, 2017) *with Merchs. Commercial Bank v. Oceanside Vill., Inc.*, 64 V.I. 3, 21-22 (Super. Ct. 2015).

382 *Big Bear Construction, Inc. v. Hoford*, 2016 V.I. LEXIS 2, *14-15 (V.I. Super. Ct. Jan. 15, 2016) (citing *Merchs. Commercial Bank*, 64 V.I. at 17-22) (conducting the requisite analysis mandated in *Banks* with respect to a claim for fraudulent misrepresentation). Recently, the Supreme Court of the Virgin Islands cited its opinion in *Pollara v. Chateau St. Croix, LLC*, 58 V.I. 455 (V.I. 2013) as delineating the elements of a fraudulent misrepresentation claim in the Virgin Islands. *Mills-Williams v. Mapp*, 2017 V.I. Supreme LEXIS 35, at *15 (V.I. July 14, 2017) (citing *Pollara v. Chateau St. Croix, LLC*, 58 V.I. 455, 471 (V.I. 2013)). However, *Pollara* involved a claim for fraudulent misrepresentation against the maker of a contract, while the Supreme Court cited the Restatement (Second) Contracts §

A claim for fraudulent concealment modifies these elements, while "retaining the elements of reliance, injury, and damages[,]"[383] and requires a plaintiff to plead and prove that:

> (1) the defendant concealed or suppressed a material fact; (2) the defendant had a duty to disclose the fact to the plaintiff; (3) the defendant knew or had reason to know that the material fact had been concealed or suppressed; (4) the defendant concealed or suppressed the material fact for the purpose of inducing the plaintiff to act or refrain from acting; and (5) the plaintiff suffered pecuniary loss caused by ... his or her justifiable reliance on the concealed or suppressed material fact.
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> ...
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> Whether the defendant had a duty to disclose is determined by the facts and circumstances of the case, through an application of the following factors: (1) the relationship of the parties; (2) the relative knowledge of the parties; (3) the value of the particular fact; (4) the plaintiff's opportunity to ascertain the fact; (5) the customs of the trade; and (6) other relevant circumstances.[384]

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162 through a rote application of 1 V.I.C. § 4, which had since been implicitly repealed by the Supreme Court's ruling in *Banks*, 55 V.I. 967. *Pollara*, 58 V.I. at 471 & n. 10 (citations omitted). Unlike *Pollara*, Plaintiffs' fraudulent misrepresentation claims are not based on the making of a contract and, therefore, it would be inappropriate to apply RESTATEMENT (SECOND) CONTRACTS § 162 here. Therefore, notwithstanding the uncertainty regarding whether the Supreme Court must conduct a *Banks* analysis in the same manner as the Superior Court, the Court finds that the Superior Court's definition of a fraudulent misrepresentation claim in the general tort setting, as adopted in *Merchs. Commercial Bank*, 64 V.I. at 21-22, pursuant to *Banks* applies here. *See Remak v. V.I. Water & Power Auth.*, 2017 V.I. LEXIS 115, *3 (V.I. Super. Ct. July 21, 2017) ("[T]he Supreme Court [of the Virgin Islands] has not definitely stated that, after *Banks*, [55 V.I. 967,] the Supreme Court must perform *a Banks* analysis in order to establish binding precedent"). Moreover, even if *Pollara* did apply in these case, both *Pollara* and *Merchs. Commercial Bank* require justifiable reliance, the element at issue here and, therefore, would involve the same or similar analysis. *Compare Mills-Williams*, 2017 V.I. Supreme LEXIS 35, at *15 ("[T]o state a claim for ... [fraudulent misrepresentation], a plaintiff must — in addition to all the other elements of the cause of action — allege that a fact was misrepresented, and that the plaintiff relied on that misrepresentation to her detriment ... 'puffery cannot be the basis of any misrepresentation claim,' for 'whether the misrepresentation was made negligently or intentionally, a reasonable person would not rely on it'") (citing *Pollara*, 58 V.I. at 471) (internal and other citations omitted) *with Merchs. Commercial Bank*, 64 V.I. at 22.

[383] *Takata Corp.*, 2017 V.I. LEXIS 125, at *116-17.

[384] *Id.* at *115-117 (conducting the requisite analysis mandated in *Banks*, 55 V.I. 967 with respect to a claim for fraudulent concealment).

Because Reynolds' argument pertains to the reliance element, which is reflected in both claims for fraudulent misrepresentation and fraudulent concealment, the Court will address the claims together.

In arguing there is an absence of any issues of material fact regarding Decedents' detrimental and justifiable reliance, Reynolds asserts that the evidence "plainly establish[es] that [Decedents] ... chose to start smoking, and to continue smoking, for reasons other than Lorillard's alleged statements about smoking and health[,]" and recounts excerpts of Decedents' deposition testimony.[385] Reynolds summarizes England's testimony, as follows:

> When [England] ... lived in New York, ... England recalled seeing Newport advertisements on busses and in the subway, but the only impact they had on him was that their depiction of a beach reminded him of home in St. Thomas.[386] After [England] ... moved to St. Thomas in 1965, ... England did not see or hear any cigarette advertising in print, on television, or on the radio."[387] [England] admitted he could not recall any statements by Lorillard that cigarette smoking was not addictive or that cigarettes were not dangerous.[388] Indeed, the only statement that cigarettes were not addictive that he could recall seeing was the 1994 congressional testimony by tobacco company executives, but by that time ... England knew that he was addicted to cigarettes, so those statements could not have misrepresented or concealed that fact from him.[389] ... England further admitted he bore the responsibility for continuing to smoke, and that, while he could have quit, he made the decision to keep on smoking.[390]

As to Decedent Brown, Reynolds contends that her testimony establishes the following:

> [Decedent] Brown's decision to smoke her first cigarette in 1960 had nothing to do with Newport advertising or any cigarette advertising; she started smoking because

[385] Def.'s Mot. for Summ. J. (*Gerald*), pp. 29-30; Def.'s Mot. for Summ. J. (*Brown*), p. 25.
[386] Def.'s Mot. for Summ. J. (*Gerald*), p. 29 (citing Def.'s Ex. D (*Gerald*), England Disc. Dep., at 180:02-12; Def.'s Ex. E (*Gerald*), England Preserv. Dep., at 33:04-35:04).
[387] Def.'s Mot. for Summ. J. (*Gerald*), pp. 29-30 (citing Def.'s Ex. D (*Gerald*), England Disc. Dep., at 180:20-181:05, 195:17-24, 210:07-18).
[388] Def.'s Mot. for Summ. J. (*Gerald*), p. 30 (citing Def.'s Ex. D (*Gerald*), England Disc. Dep., at 419:24-420:03, 422:6-424:02).
[389] Def.'s Mot. for Summ. J. (*Gerald*), p. 30 (citing Def.'s Ex. D (*Gerald*), England Disc. Dep., at 420:04-421:02).
[390] Def.'s Mot. for Summ. J. (*Gerald*), p. 30 (citing Def.'s Ex. D (*Gerald*), England Disc. Dep., at 424:04-18; Def.'s Ex. E (*Gerald*), England Preserv. Dep., at 72:17-73:02).

> her high school roommate was smoking.[391] ... [Decedent] Brown had no recollection of any statements Lorillard made about smoking and health, including the health risks of cigarette smoking or addiction (aside from the federally mandated warning labels on her cigarette packages, which she ignored).[392]

Further, Reynolds contends that "[a]ny statements that ... [Decedent] Brown heard after 1976 could not establish reasonable reliance because after 1976 the evidence is undisputed that she no longer smok[ed] cigarettes manufactured by Lorillard."[393]

Reynolds also asserts that Decedents cannot establish justifiable reliance because: (1) Decedents were "aware of the health risks of smoking throughout [their] ... lifetime[,]" which "was constantly reinforced by [their] ... family, friends, the media, and other sources";[394] (2) Decedents testified that they "consciously ignored the warnings and messages [they] ... received about the health risks of cigarettes, including" the government mandated warnings and "would have continued smoking regardless of what Lorillard may have said about its cigarettes";[395] and (3) because both Decedents testified that they knew they were addicted to cigarettes, Plaintiffs cannot demonstrate that Decedents justifiably relied on "any allegedly false statements [or omissions] by Lorillard about addiction" after that point.[396] Finally, Reynolds indicates that, even if Plaintiffs could demonstrate Decedents' reliance, Plaintiffs' claims still fail as a matter of law

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391 Def.'s Mot. for Summ. J. (*Brown*), p. 25 (citing Def.'s Ex D (*Brown*), Brown Disc. Dep., at 49:11-51:14, 52:11-19; Def.'s Ex. F (*Brown*), Brown Preserv. Dep., at 109:23-111:07).
392 Def.'s Mot. for Summ. J. (*Brown*), p. 25 (citing Def.'s Ex D (*Brown*), Brown Disc. Dep., at 353:08-354:13, 356:05-357:12).
393 Def.'s Mot. for Summ. J. (*Brown*), p. 25 (citing Def.'s Ex D (*Brown*), Brown Disc. Dep., at 176:02-24).
394 Def.'s Mot. for Summ. J. (*Gerald*), p. 31; Def.'s Mot. for Summ. J. (*Brown*), p. 26.
395 Def.'s Mot. for Summ. J. (*Gerald*), pp. 31-32 (citing Def.'s Ex. D (*Gerald*), England Disc. Dep., at 424:4-25; Def.'s Ex. E (*Gerald*), England Preserv. Dep., at 31:23-32:5, 72:17-73:2, 105:10-15); Def.'s Ex. H (*Gerald*), Webster Dep., at 61:12-62:3); Def.'s Mot. for Summ. J. (*Brown*), p. 27 (citing Def.'s Ex D (*Brown*), Brown Disc. Dep., at 142:14-145:09, 359:23-360:12; Def.'s Ex. F (*Brown*), Brown Preserv. Dep., at 117:06-09, 118:18-22).
396 Def.'s Mot. for Summ. J. (*Gerald*), p. 31 (citing Def.'s Ex. D (*Gerald*), England Disc. Dep., at 39:1-11, 172:22-173:6; Def.'s Ex. E (*Gerald*), England Preserv. Dep., at 54:24-55:14); Def.'s Mot. for Summ. J. (*Brown*), p. 25 (citing Def.'s Ex D (*Brown*), Brown Disc. Dep., at 139:09-17; Def.'s Ex. F (*Brown*), Brown Preserv. Dep., at 66:20-23).

because Plaintiffs cannot prove that Decedents' reliance on Lorillard's misrepresentations "was objectively reasonable in light of the common knowledge of the health risks of smoking, including addiction, and ... [Decedents'] actual knowledge of those risks."[397]

In response, Plaintiffs counter that they need only show that Lorillard's acts and omissions were a substantial factor in Decedents' smoking of cigarettes, not that "Lorillard's actions were the only reason [Decedents] ... smoked."[398] Both Plaintiffs refer to the opinions of Dr. Proctor, who Plaintiffs state testified, *inter alia*, that "Lorillard, like the other major cigarette manufacturers, participated in the perpetuation of doubt concerning the dangers of smoking[,]" "that widespread awareness of the dangers of smoking did not generally occur in the US until the 1980s[,]" long after Decedents became addicted to smoking, and that "most people start smoking without any awareness of the hazards of doing so[,]" particularly during the time period Decedents began smoking, "because of the 'massive culture' of influence[.]"[399] Plaintiffs also refer to Dr. Proctor's report, which "addresses the role tobacco advertising played in reassuring smokers that cigarettes were safe."[400]

Further, Plaintiffs point to excerpts of Decedents' deposition testimonies, which according to Plaintiffs, establish that Decedents were "directly exposed to Lorillard's campaign of concealment and misinformation."[401] On this point, Plaintiff Brown refers to Decedent Brown's

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397 Def.'s Mot. for Summ. J. (*Gerald*), p. 30; Def.'s Mot. for Summ. J. (*Brown*), pp. 25-26. In support of this contention, Reynolds refers to the Statement of Facts section of its respective motions, as well as Dr. Schaller's expert report. *See* Def.'s Ex. L (*Gerald*), Schaller Report; Def.'s Ex. L (*Brown*), Schaller Report.
398 Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 38; Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., p. 25.
399 Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., pp. 39-40; Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., pp. 26-27 (both citing Pls.' J.A., Proctor Dep., at 57:11-19, 32:16-22, 146:6-14).
400 Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 40; Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., p. 27 (both citing Pls.' J.A., Proctor Report, at p. 53).
401 Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 38; Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., p. 26.

testimony that "she heard about the controversy regarding the health effects of smoking and that she was confused by the mixed message[s] in the media[,]"[402] while Gerald points to England's testimony that suggests England saw, in the early 1990s, "something on the TV with a bunch of men ... and, you know, they said well, it's [(smoking)] not dangerous."[403]

Additionally, Plaintiffs contend that Decedents' testimonies demonstrate that Decedents "actually saw, heard, and read [Lorillard's] ... advertisements extolling virtues of their cigarettes" in that England testified "[h]e remembers the crystal blue waters used in Newport cigarette advertising of his youth[,]" which he liked and "made him think of home [(St. Thomas)]" and that "he recalled specific ads that he was shown that associated smoking with a healthy, fun, exciting lifestyle."[404] Plaintiff Brown assets that Decedent Brown testified "[s]he remembered the Newport ads in Life Magazine picturing beautiful sophisticated women with attractive boyfriends in Caribbean settings and thinking they were sophisticated and 'hunk magnets[,]'" and, having lived in St. Thomas, Decedent Brown was influenced by Lorillard's advertising because "she identified with the advertisements."[405]

A claim for fraudulent misrepresentation in the Virgin Islands "requires an express representation which is false or misleading at the time it is made.[406] As to fraudulent concealment, this claim takes into account "negative misrepresentations, such as the failure of a party to a

[402] Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., p. 26 (citing Pls.' J.A., Brown Preserv. Dep., at 62:20-63:11, 61:16-23).
[403] Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 39 (citing Pls.' J.A., England Disc. Dep., at 82:15-83:13).
[404] Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., pp. 40-41 (citing Pls.' J.A., England Preserv. Dep., at 38:10-39:15, 48:12-54:15, 40:11-41:22, 44:21-45:17).
[405] Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., pp. 27-28 (citing Pls.' J.A., Brown Preserv. Dep., at 28:13-23, 27:21-34:21).
[406] *Pollara v. Chateau St. Croix, LLC*, 2016 V.I. LEXIS 49, *24 (V.I. Super. Ct. May 3, 2016) (citing *Chestnut v. Goodman*, 59 V.I. 467, 475-76 (V.I. 2013)) (internal quotation marks omitted).

transaction to fully disclose facts of a material nature where there exists a duty to speak."[407] As discussed, as manufacturer of Newport cigarettes, Lorillard owed to users and consumers, including Decedents, a duty to warn under the Restatement (Third) of Torts: Products Liability § 2(c) until July 1, 1969, after which claims based on the inadequacy of the warnings through advertising or promotion are preempted. However, under the "predicate duty" analysis adopted by the Court, if the duty to disclose underlying Plaintiffs' fraudulent concealment claims is predicated on a general duty "not to deceive" that is unrelated to smoking and health, the fraudulent concealment claims are not preempted, even if they are based on alleged concealment that occurred through the advertising or promotion of Newport cigarettes.[408]

Here, the Court's determination of whether a defendant had a duty to disclose in the context of a fraudulent concealment claim is based on the general duty "not to deceive" inherent in all actions based on common law fraud and imposes no restrictions or limitations specific to smoking and health.[409] Further, this duty to disclose analysis in the context of a fraudulent concealment claim involves a factual inquiry based on six factors.[410] In its Motions for Summary Judgment, Reynolds does not address the sufficiency of the record as it relates to Lorillard's purported duty

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[407] 37 AM. JUR. 2d Fraud and Deceit § 194 (2017); *Takata Corp.*, 2017 V.I. LEXIS 125, at *116-17.
[408] *C.f. Lynn*, 2017 Del. Super. LEXIS 263, at *25-27.
[409] *See Takata Corp.*, 2017 V.I. LEXIS 125, at *116-17.
[410] *Id.* Duties to disclose arise in a variety of circumstances. For example, some courts have held that "'[a] party has a duty to speak and will be liable for non-disclosure: ... if the party fails to exercise reasonable care to disclose a material fact which may justifiably induce another pary [sic] to act or refrain from acting, and the non-disclosing party knows that the failure to disclose such information to the other party will render a prior statement or representation untrue or misleading.' ... The duty to speak is not dependent on 'the existence of a fiduciary relationship between the parties' and 'may arise where one party imposes confidence in the other because of that person's position, and the other party knows of this confidence.'" *Onyx Envtl. Servs., LLC v. Maison*, 407 F. Supp. 2d 874, 879-80 (N.D. Ohio 2005) (citing *Central States Stamping Co. v. Terminal Equipment Co., Inc.*,727 F.2d 1405, 1408-09 (6th Cir. 1984)); *See* AM. JUR. 2d *supra* n. 407, at § 194.

to disclose based on Lorillard's general duty "not to deceive" underlying Plaintiffs' claims for fraudulent concealment. Therefore, the Court will not address it on summary judgment.[411]

The record, including, *inter alia*, the deposition testimony and expert report of Dr. Proctor, reflects that Lorillard made express representations to the public through TIRC/CTR and the Tobacco Institute[412] that constitute objective viewpoints that could be proven false at the time they were made.[413] For example, the Frank Statement, published by TIRC and sponsored by Lorillard in 1954 stated "there is no proof that cigarette smoking is one of the causes [of lung cancer in human beings]'" and "[w]e believe the products we make are not injurious to health."[414] However, in 1946, "Harris Parmele, Director of Research at Lorillard, [had] point[ed] out that 'Certain scientists and medical authorities have claimed for years that the use of tobacco contributes to cancer development in susceptible people' and that 'Just enough evidence has been presented to justify the possibility of such a presumption[,]'"[415] and, in 1953, "Lorillard receive[d] results of the Ecusta Paper Corporation's secret experiments showing it was the tobacco, and not the paper, that was responsible for cigarettes causing cancer."[416] Further, the express terms of the Frank Statement easily permit the reasonable inference that the Frank Statement was intended to induce the public's reliance on the tobacco industry's position and research into the health risks associated with cigarette smoking.[417] And, nearly 40 years later, Lorillard was still publicly denying any link

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[411] *supra* n. 145.
[412] Pls.' J.A., Proctor Report, pp. 20, 22; Pls.' J.A., Proctor Dep., 57:8-25, 58:1-22; *See* Pls.' J.A., Proctor Report, p. 70, 71 ¶¶ 29, 32 (citations omitted).
[413] Pls.' J.A., Proctor Report, pp. 20, 22; Pls.' J.A., Proctor Dep., 57:8-25, 58:1-22; *See* Pls.' J.A., Proctor Report, p. 70 ¶ 29 (citations omitted).
[414] *supra* n. 293; Pls.' J.A., Proctor Report, p. 71 ¶ 32 (citations omitted).
[415] Pls.' J.A., Proctor Report, p. 68 ¶ 17 (citations omitted).
[416] Pls.' J.A., Proctor Report, p. 69 ¶ 25 (citations omitted).
[417] *See id.* Specifically, the Court notes the following excerpts from the Frank Statement, which stated, *inter alia*:

between cigarette smoking and cancer, as evidenced by "the 1994 congressional testimony by tobacco executives in which they denied the addictiveness of nicotine and in which CEO of Lorillard Andrew Tisch reaffirmed he did not believe cigarette smoking causes cancer."[418] This, as well as other evidence in the record, shows that disputed material facts remain with respect to whether Lorillard made express representations that Lorillard knew were false, and knowingly concealed material facts, regarding the health risks and addictiveness of cigarette smoking, for the purpose of inducing the public to smoke and/or continue smoking cigarettes.

Clearly, as the parties' briefs indicate, the issues here relate to whether Decedents justifiably relied on Lorillard's representations and concealment to their detriment. The reliance element requires actual reliance, *e.g.* that the recipient of the fraudulent misrepresentation ("recipient") relied "in fact ... upon the misrepresentation[,]" and that the reliance "be justifiable."[419] A recipient's reliance is justified even where the "falsity of the representation" could have been ascertained had the recipient "made an investigation"[420] unless the falsity is known by or obvious to the recipient.[421] In contrast to reasonable reliance, justified reliance "does not mean that [the recipient's] ... conduct must conform to the standard of the reasonable man[,]"

> ... We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business ... Many people have asked us what we are doing to meet the public's concern aroused by the recent reports. Here is the answer: ... We are pledging aid and assistance to the research effort into all phases of tobacco use and health. This joint financial aid will of course be in addition to what is already being contributed by individual companies. ... *Id.*

[418] Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 38 (citations omitted); Pls.' J.A., Proctor Report, p. 90 ¶ 124.

[419] RESTATEMENT (SECOND) OF TORTS § 537 cmt. b. In adopting the elements of a fraudulent misrepresentation claim, the Superior Court slightly modified the rule set forth in the RESTATEMENT (SECOND) OF TORTS § 525, but retained the concept of justifiable detrimental reliance provided in the Restatement provision. *Merchs. Commercial Bank*, 64 V.I. at 22. Because RESTATEMENT (SECOND) OF TORTS §§ 537-545A provide specifics regarding the element of reliance, as set forth in RESTATEMENT (SECOND) OF TORTS § 525 and adopted by the Superior Court, the Court will look to these Restatement provisions for guidance in analyzing Plaintiffs' claims for fraudulent misrepresentation. *Merchs. Commercial Bank*, 64 V.I. at 21-22.

[420] RESTATEMENT (SECOND) OF TORTS § 540.

[421] RESTATEMENT (SECOND) OF TORTS § 541.

rather "[j]ustification is a matter of the qualities and characteristics of the particular ... [recipient], and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases."[422] Nevertheless, "[j]ustifiability is not without some limits, [the recipient] ... 'cannot recover if he [or she] blindly relies upon a [false] misrepresentation'" in circumstances where the recipient is "capable of appreciating [the] falsity at the time by the use of his [or her] senses" and "the falsity ... would be patent to [the recipient] ... if he [or she] had utilized his [or her] opportunity to make a cursory examination or investigation."[423]

First, the dangers associated with cigarette smoking are not visible such that a "cursory" physical examination or inspection would reveal them. And, the Court has already found that genuine issues of material fact exist with respect to whether the health risks and addictiveness of cigarettes were generally known or obvious while Decedents smoked. While Reynolds submitted evidence, namely excerpts from the depositions of Decedents' friends and family, that suggests Decedents were aware of the health risks of smoking, this evidence is not definitive as to *when* Decedents became aware, much of which tends to suggest Decedents' became aware *after* they were already addicted to cigarettes.[424] On the other hand, portions of Decedents' deposition testimonies suggest that Decedents believed cigarette smoking was safe.[425] This contrasting

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[422] *Field v. Mans*, 516 U.S. 59, 70-71, 116 S. Ct. 437, 444 (1995) (interpreting "justifiable reliance" under the common law recognized by the RESTATEMENT (SECOND) OF TORTS § 537 *et seq.*) (citing RESTATEMENT (SECOND) OF TORTS § 545A cmt. b).
[423] *Id.* at 71 (citing RESTATEMENT (SECOND) OF TORTS § 541 cmt. a).
[424] Def.'s Mot. for Summ. J. (*Gerald*), pp. 6-8 (Statement of Facts) (citations omitted); Def.'s Mot. for Summ. J. (*Brown*), pp. 7-8) (Statement of Facts) (citations omitted).
[425] Pls.' J.A., England Preserv. Dep., at 72:23-25, 73:1-2 ("Well, I was still smoking, you know, from a child, coming up; and they said it wasn't addictive, you know, it wasn't dangerous. I could have stopped, you know, like they say, but I kept on"), 63:24-25, 64:1-2 (England stating that when he was a smoker he believed smoking cigarettes was safe); Pls.' J.A., Brown Preserv. Dep., at 68:8-19 (stating she did not believe cigarette smoking was bad for her health until 1984).

testimony must be weighed by the trier of fact, a task that the Court is precluded from performing on summary judgment.

With respect to Lorillard's representations and concealment regarding the addictive nature of cigarettes specifically, the Court declines Reynolds' invitation to rule that a recipient's reliance is unjustified as a matter of law the moment the recipient becomes aware of his or her addiction. Of course, it is natural for a person to recall past behavior, and, with the benefit of hindsight, identify it in terms of currently recognized notions. But justifiability requires a subjective analysis into the particular circumstances of each Decedent at the time of their reliance. The deposition testimonies of both Decedents tend to show that Decedents were not always subjectively aware of their addiction to cigarettes.[426] Approximately when Decedents became aware of their addiction to cigarettes, and whether, in light of the facts and circumstances of each particular case, this rendered Decedents' reliance on Lorillard's representations and concealment unjustified, are questions of fact that must be resolved by the trier of fact at trial. Therefore, genuine issues of

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[426] For example, Decedent Brown testified as follows:

> Q: Did you ever try and stop smoking while you were at Pinecrest?
> A: No.
> Q: Do you believe you were addicted to cigarettes while you were at –
> A: I didn't think about it then.
> ...
> Q: And did you ever try, before you graduated at Pinecrest, to stop smoking cigarettes?
> A: No.
> Q: Do you think you were addicted at Pinecrest?
> A: Later, you know, later, the second year, yes.
> ...
> Q: And so at age seventeen, after smoking for about two years, you felt you were addicted to cigarettes?
> A: I didn't really know what "addicted" meant.
> Q: And you hadn't tried to stop, correct?
> A: No, I didn't. You know, I didn't see there was any reason to.

Pls.' J.A., Brown Disc. Dep., at 67:9-14, 74:20-25, 75:1-11; *See* Pls.' J.A., England Preserv. Dep., at 58:15-25, 62:19-25, 63:1-7, 72:23-25, 73:1-2, (stating he tried to stop smoking many times before 2005 and was unsuccessful until "I got a hole in my throat, but later saying "I could have stopped, you know, like they say, but I kept on").

material fact remain as to whether Decedents' reliance on Lorillard's representations and concealment regarding the dangers of cigarette smoking was justifiable.

As to actual reliance, the Court agrees with the line of cases cited by Plaintiffs that, in the specific circumstances of this tobacco litigation, Plaintiffs are not required to "put on ... direct evidence showing [Decedents] ... relied on specific information put out by the tobacco companies omitting scientific findings on the harmful effects of smoking[,]" but rather that actual reliance may be "inferred from evidence of the pervasive conduct" of Lorillard and the tobacco industry regarding the safety of cigarettes, particularly "the false controversy created by the tobacco industry during the years ... [Decedents] smoked aimed at creating doubt among smokers that cigarettes were hazardous to health."[427] Moreover, Decedent Brown specifically testified that the conflicting information she heard from the tobacco industry regarding the dangers of smoking influenced her decision to continue to smoke.[428] Decedent Brown testified, as follows:

> Q: Did the conflicting information that you heard influence your decision to continue to smoke?
>
> ...
>
> A: Yes.
> Q: How so?

[427] *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1069 (Fla. Dist. Ct. App. 2010); *C.f. Bullock v. Philip Morris USA, Inc.*, 159 Cal. App. 4th 655, 676, 71 Cal. Rptr. 3d 775, 792 (Cal. Ct. App. 2008) ("A plaintiff need not prove that he or she directly heard a specific misrepresentation or false promise to establish actual reliance. Rather, actual reliance is established if the defendant made a misrepresentation to a third party, the defendant intended or had reason to expect that the substance of the communication would be repeated to the plaintiff and would induce the plaintiff's reliance, and the plaintiff was misled when the substance of the communication was repeated to the plaintiff") (citations omitted); *Burton*, 208 F. Supp. 2d at 1203.

[428] That Decedent Brown testified that she had not heard of "something called a frank statement[,]" which was published when she was ten years old, does not negate her testimony that demonstrates her actual reliance on the mixed messages given by the tobacco industry and Lorillard regarding the health risks associated with cigarette smoking. Pls.' J.A., Brown Disc. Dep., 344:7-25, 345:1-2.

> A: Well, there wasn't any definitive proof. I felt that if the cigarette companies were—if they were doing research and they found it to be harmful, that they would inform the public of that.
> Q: Did you believe that the manufacturer of Newport cigarettes would tell you if it knew that cigarette smoking was harmful?
>
> ...
>
> A: Yes.
> Q: Why?
>
> ...
>
> A: Because I couldn't believe that a cigarette company would dupe somebody about something that was so harmful.
> Q: Do you believe that the manufacturer of Newport cigarettes would tell you if it knew that cigarette smoking was addictive?
> A: Yes.
> Q: Why?
> A: For the same reason. You know, I thought that they would be honest with the public rather than continuing to produce a product that was lethal.[429]

Decedent Brown's testimony clearly suggests that she actually relied on Lorillard's misrepresentations and concealment regarding the health risks and addictiveness of cigarette smoking so as to create a genuine issue of material fact.

The deposition testimony of England is also relevant on this point. England testified as follows:

> Q: Did you ever try to stop smoking –
> A: Yes
> Q: – before 2005? How many times did you try to stop?
> A: Numerous.
>
> ...
>
> Q: Why did you try to stop?

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[429] Pls.' J.A., Brown Preserv. Dep., at 62:20-63:11, 61:16-23, 63:2-25, 64:1-9.

> A: Maybe I was confused. This person say it's good, this person say it ain't good. And I just said – confused. So I say, well, let me try it for myself, see if I can do without it.
> Q: Did you hear some stuff on the news or whatever that smoking was bad for you?
> A: No, they didn't say – well, I saw something on the news, and they just said it wasn't bad.
>
> …
>
> Q: And when did you finally stop [smoking cigarettes]?
>
> …
>
> A: When I got the hole in my throat.
>
> …
>
> Q: And while you were smoking, did you hear reports that maybe cigarette smoking was not harmful?
>
> …
>
> A: Yes, I did.
>
> Q: Do you believe when you were a smoker that smoking was safe?
>
> …
>
> A: Yes, I did.[430]

Additionally, England testified to the following:

> Q: And are you also responsible for the decision not to – the decision to continue to smoke?
> A: Yes.
> Q: … In what way do you think you're responsible for those decisions?
> A: Because I was still smoking, you know. They came and got ads – warnings on it, but I continued to smoke, *but there was no proof.*[431]

[430] England Preserv. Dep., at 58:15-25, 59:1-25, 60:1-25, 61:1-11, 63:4-25, 64:1-2.
[431] Def.'s Ex. D *(Gerald)*, England Disc. Dep., at 424:15-25 (emphasis added).

Reynolds frequently cites the latter excerpt from England's deposition, but ignores that England qualified his statement that he continued to smoke despite the warnings because "there was no proof." When considered in light of England's testimony that he believed cigarette smoking was safe, the Court can reasonably infer from this statement that England continued to smoke because he believed there was no proof that cigarette smoking was harmful—the exact message Lorillard and the tobacco industry sought to relay in their campaign to perpetuate "doubt concerning the dangers of smoking."[432] This conclusion is not negated by England's testimony that he attempted to *quit* smoking because he was confused by the conflicting information regarding the health risks of smoking. Rather, the Court can reasonably infer from this testimony that England was affected by Lorillard's message regarding the safety of cigarette smoking and attempted to quit once he learned of the dangers, which tends to show England's actual reliance on Lorillard's misrepresentations and concealment.[433] The Court is cognizant of the contrasting evidence submitted by Reynolds, but the foregoing makes clear that reasonable minds could differ on the issue of England's actual reliance, and, therefore, it is an issue that must be resolved by the trier of fact at trial.

Despite Reynolds' suggestion, these genuine issues of material fact with respect to Decedents' actual reliance are not resolved merely because Decedents testified, in hindsight, that

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[432] Pls.' J.A., Proctor Report, pp. 66-91 ("App. II: Chronology of Conspiracy"); *See generally id.*
[433] *Cf. Grill v. Philip Morris USA, Inc.*, 653 F. Supp. 2d 481, 496-97 (S.D.N.Y. 2009) ("The fact that Ann Grill continued smoking after she discovered that it was harmful to her health does not sever the link between Defendant's fraudulent concealment and her death, because she 'allegedly learned of the carcinogenic properties of cigarettes at a time when addiction allegedly prevented her from acting upon that knowledge.' Indeed, her repeated efforts to quit after she says she learned of the dangers supports her claim that she would not have started smoking had the dangers been clear to the public then. Thus, there is evidence sufficient to permit a reasonable jury to find that Defendant's fraudulent concealment was a substantial factor in her death as a result of lung cancer").

they "took responsibility" for smoking cigarettes. Those statements do not demonstrate, as a matter of law, that Decedents did not actually rely on Lorillard's message that smoking was safe, particularly when viewed in light of other portions of Decedents' deposition testimonies, as described above, which suggest otherwise.

Finally, the Court has already found that genuine issues of material fact remain with respect to whether Decedents' cancers were proximately caused by their smoking of Newport cigarettes. The development of fatal diseases as a result of Decedents' actual and justifiable reliance on Lorillard's message regarding the safety of cigarette smoking, for which genuine issues of material facts also remain, would clearly satisfy the "detrimental reliance" element of Plaintiffs' fraudulent misrepresentation and fraudulent concealment claims.

Consequently, when considering Decedents' deposition testimony in light of Dr. Proctor's deposition testimony and report, which details, *inter alia*, express representations and concealment by Lorillard that perpetuated "doubt concerning the dangers of smoking[,]"[434] a review of the record as a whole reveals that reasonable minds could differ with respect to whether Decedents actually, justifiably, and detrimentally relied on the representations and concealment of Lorillard that cigarette smoking was safe. For this reason, a grant of summary judgment is not warranted on Plaintiffs' claims for fraudulent misrepresentation and fraudulent concealment.

E. Civil Conspiracy (Count VI).

In Count VI of their Amended Complaints, Plaintiffs allege, *inter alia*, that Reynolds and Lorillard "acted in concert and joined together with other manufacturers in the tobacco industry,

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[434] Pls.' J.A., Proctor Report, pp. 66-91 ("App. II: Chronology of Conspiracy"); *See generally id.*

in an unlawful and unfair manner, pursuant to a common design to conceal or omit information regarding the health consequences of cigarettes and their addictiveness, with the intention that consumers, including … [Decedents], would rely on this information[,] … in order to misinform and deceive the government, the public, and consumers."[435]

Reynolds moves for summary judgment on Plaintiffs' civil conspiracy on the grounds that "[t]he existence of tortious conduct is a prerequisite for liability for civil conspiracy" and there is none here since Plaintiffs' "underlying fraud claim[s] fail[ ]."[436] While Reynolds accurately summarizes this point of law,[437] Reynolds' argument is moot because the Court has found that Plaintiffs' claims for fraudulent misrepresentation and fraudulent concealment do not fail as a matter of law.[438] As a result, summary judgment is not warranted on Plaintiffs' claims for civil conspiracy.

F. Wrongful Death and/or Survival Claims (Counts VII).

a. *Brown* and *Gerald*.

Reynolds also argues it is entitled to summary judgment on Plaintiffs' wrongful death claims because those claims are "wholly dependent upon the viability of [their] … underlying causes of action[,]" none of which are viable.[439] This argument is also moot since Plaintiffs' claims

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[435] Pl. Gerald's November 9, 2015, Am. Compl. ¶ 57; Pl. Brown's November 9, 2015, Am. Compl. ¶ 54.
[436] Def.'s Mot. for Summ. J. (*Gerald*), p. 32; Def.'s Mot. for Summ. J. (*Brown*), p. 28.
[437] *Isaac v. Crichlow*, 63 V.I. 38, 64 (Super. Ct. 2015) (adopting RESTATEMENT (SECOND) OF TORTS § 876(a) as the soundest rule for the Virgin Islands regarding a claim for civil conspiracy under the requisite analysis mandated in *Banks*, 55 V.I. 967); *Id.* at 65 ("There is no liability for civil conspiracy where there is no liability for the act or acts underlying the conspiracy") (citations omitted); *Donastorg v. Daily News Publ'g Co., Inc.*, 63 V.I. 196, 330 (Super. Ct. 2015) ("The existence of tortious conduct is a prerequisite for liability under this standard" for civil conspiracy).
[438] *Der Weer v. Hess Oil V.I. Corp.*, 2014 V.I. LEXIS 22, *11-13 (V.I. Super. Ct. 2014) ("A motion becomes moot when something occurs after a motion is filed that resolves the issues raised in that motion … In that instance, the motion should be dismissed or denied as moot because a decision will have no practical impact in the case however the court decides the motion") (internal and other citations omitted).
[439] Def.'s Mot. for Summ. J. (*Gerald*), p. 33; Def.'s Mot. for Summ. J. (*Brown*), p. 28.

have survived summary judgment.[440] Likewise, Reynolds' argument that "Plaintiff[s] cannot simultaneously maintain a survival claim ... as a matter of law where, as here, Plaintiff[s] ... allege[ ] that Lorillard's conduct caused Decedent[s'] injuries and death[s]" is moot,[441] the Court having already rejected it when ruling on Reynolds' Motions to Dismiss.[442]

b. *Gerald.*

Finally, Reynolds specifically argues that Gerald may not recover under the wrongful death statute as a matter of law with respect to England's laryngeal cancer because "Plaintiff's own experts admit that Mr. England's cause of death was renal failure resulting from his bladder cancer, and was in no way related to his laryngeal cancer."[443] Reynolds refers to excerpts from the depositions of Dr. Nelson and Dr. Hughes.[444] Dr. Nelson testified that England "death came as a result of his being in renal failure, and his renal failure was the result of his bladder cancer ... ."[445] Dr. Hughes, who provided treatment for England's bladder cancer beginning in 2012,[446] testified that England "did not have recurrence of his laryngeal cancer at the time I [(Dr. Hughes)] saw him[,]" and that the recurrence of England's bladder cancer "cause [England's] ... kidney failure which let to [England's] ... death."[447]

Gerald does not appear to contest this point in his Opposition, stating as follows:

> "England was diagnosed with bladder cancer on March 18, 2011. Although this cancer was also caused by smoking, it was a new primary cancer unrelated to his laryngeal cancer. Mr. England received appropriate treatment for the cancer,

[440] *supra* n. 438.
[441] Def.'s Mot. for Summ. J. (*Gerald*), p. 34; Def.'s Mot. for Summ. J. (*Brown*), p. 29.
[442] *See* July 5, 2017, Mem. Op.
[443] Def.'s Mot. for Summ. J. (*Gerald*), p. 34.
[444] Def.'s Mot. for Summ. J. (*Gerald*), p. 34 n. 84.
[445] Def.'s Ex. F (*Gerald*), Dr. Nelson Dep., at 164:15-25, 165:1-2.
[446] Pls.' J.A., Dr. Hughes Report, p. 1.
[447] Def.'s Ex. K *(Gerald)*, Deposition of Samuel Lee Hughes, M.D., dated February 23, 2016 ("Dr. Hughes Dep."), at 100:1-24, 101: 1-11.

> including chemotherapy and radiation, but nonetheless passed away as a result of his bladder cancer on November 30, 2012."[448]

Considering this and the lack of evidence produced by Gerald to refute Reynolds' contention, the record, even when viewed in a light most favorable to Gerald, indicates that there is no genuine issue of material fact that England's death was not caused by his laryngeal cancer. Consequently, Gerald's wrongful death claim may only be asserted with respect to England's bladder cancer. Therefore, the Court will grant Reynolds' summary judgment as to Gerald's wrongful death claim to the extent it is brought in relation to England's laryngeal cancer. Recovery for England's laryngeal cancer is properly sought, if at all, by way of Gerald's survival action.

II. Individual Issues Raised in Defendant's Motion for Summary Judgment in *Gerald*.

Reynolds moves for summary judgment on the grounds that Gerald's claims are time barred. Specifically, Reynolds argues Gerald's claim for breach of the implied warranty of merchantability is barred by the four-year statute of limitations set forth in 11A V.I.C. § 2-725(1) of the Virgin Islands U.C.C.,[449] while Gerald's "non-warranty claims" premised on the personal injuries sustained by England as a result of laryngeal cancer are barred by the two-year statute of limitations applicable to personal injury actions under 5 V.I.C. § 31(5)(A).[450] In opposition, Gerald

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[448] *See* Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 5 ¶ 11 (Statement of Disputed Facts); *Id.* at pp. 45-46.
[449] Def.'s Mot. for Summ. J. (*Gerald*), p. 10. This argument was also advanced with respect to Count IV of Plaintiff Brown's Amended Complaint. *See* Def.'s Mot. for Summ. J. (*Brown*), p. 23. However, Plaintiff Brown submits no argument in opposition to Reynolds' Motion for Summary Judgment on this point, noting that "Plaintiff has voluntarily dismissed his claim of negligent performance of a voluntary undertaking. Plaintiff in the *Brown* case further waives his Breach of Warranty claim." Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., pp. 3-4 n. 21. Therefore, the Court will dismiss Count IV of Plaintiff Brown's Amended Complaint without addressing Reynolds' argument.
[450] Def.'s Mot. for Summ. J. (*Gerald*), p. 11. Gerald also seeks damages for England's bladder cancer, which was purportedly diagnosed on March 18, 2011, but Reynolds' argument is limited only to the injuries sustained by England as a result of laryngeal cancer. *See* Def.'s Mot. for Summ. J. (*Gerald*), pp. 11-14; Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 5 ¶ 10 (Statement of Disputed Facts); Pl. Gerald's November 9, 2015, Am. Compl. ¶¶ 8, 20, 33, 72.

acknowledges that it is "obvious that this action was filed [after] … the two or four year periods provided for by these statutes[,]" but argues summary judgment is not appropriate because genuine issues of material fact remain as to whether "both statutes of limitation may be tolled by operation of the discovery rule."[451] In its reply, Reynolds argues the discovery rule does not apply to breach of warranty claims, and, even if the statute of limitations applicable to all claims was tolled under the discovery rule, the claims would still be time-barred because "the record evidence is undisputed: by May 2006, Mr. England had been diagnosed with laryngeal cancer and told by his physicians that smoking may have caused his cancer."[452] Because Reynolds raised the statute of limitations as an affirmative defense in its July 12, 2017, Answer to Gerald's Amended Complaint, Reynolds' motion with respect to the statute of limitations defense is properly before the Court.[453]

A. Gerald's wrongful death action is not time-barred.

As a threshold matter, the Court reiterates that Gerald's claim for damages stemming from England's personal injuries that did not cause England's death, including, *inter alia* England's laryngeal cancer, are brought under Gerald's survival action.[454] With respect to a survival action under 5 V.I.C. § 77, which permits a decedent's personal representative to recover "[d]amages a

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[451] Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 8.
[452] Def.'s Reply (*Gerald*), pp. 2, 4. Contradictorily, Reynolds also asserts in its initial motion that "the record establishes that Mr. England knew the purported cause of his laryngeal cancer—cigarette smoking—in as early as the Fall of 2005, and no later than July 2006." Def.'s Mot. for Summ. J. (*Gerald*), p. 13.
[453] *See* Def. Reynold's July 12, 2017, Answer, Defenses, and Jury Demand, ¶ 74; Lorillard's LLC's July 12, 2017, Answer, Defenses, and Jury Demand ¶ 74 (both raising the statute of limitations defense as to all of Gerald's claims). Having specifically pled the affirmative defense of statute of limitations "at the first opportunity," Reynolds has not waived the defense and Reynolds' Motion for Summary Judgment with respect to its statute of limitations defense is properly before the Court. *Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 536-538 (V.I. 2015) (the Superior Court "commit[s] error by adjudicating [a defendant's'] … statute of limitations defense on the merits notwithstanding the fact that this defense had been waived" by the defendant's failure to raise it "at the first opportunity") (citations omitted); V.I. R. CIV. P. 8(c) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including … statute of limitations").
[454] 5 V.I.C. § 77.

deceased person may have suffered from a personal injury" on behalf of the decedent's estate, the statute of limitations governing the decedent's underlying claim applies, unless the decedent "dies before the expiration" of the statute of limitations, in which case the survival action must be brought within one year of the decedent's date of death.[455]

On the other hand, the statute of limitations governing Gerald's wrongful death claim, which encompasses, *inter alia*, damages incurred as a result of England's bladder cancer, does not commence until the date of the decedent's death.[456] All of Gerald's claims, including that for breach of the implied warranty of merchantability under the Virgin Islands U.C.C., may be asserted as part of Gerald's wrongful death action under the wrongful death statute.[457] To the extent Reynolds asserts its statute of limitations defense in relation to Gerald's wrongful death action,

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[455] 5 V.I.C. § 37(a) ("If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his personal representatives, after the expiration of the time and within one year from his death"); 5 V.I.C. § 77 ("A thing in action arising out of a wrong which results in personal injury to the person ... shall not abate ... by reason of the death of the person injured"); *Der Weer*, 61 V.I. at 116 ("Read together, section 77 declares that personal injury claims do not abate when a person dies, but instead, pursuant to section 37(a), continue for a year after the person's death. ... The injured person has two years from the date of injury to file a lawsuit. If he dies before the two years has passed, section 37(a) gives his personal representative a year from the date of his death to pursue the claim. Depending on how long someone lives after being injured, the length of time to file a lawsuit may vary").

[456] The statute of limitations governing Gerald's wrongful death claim does not commence until the date of the decedent's death. *See* July 5, 2017, Mem. Op., pp. 33-36; *Richardson v. Knud Hansen Memorial Hospital*, 744 F.2d 1007, 1011-1012 (3d Cir. V.I. 1984) (rendered while sitting as the *de facto* court of last resort for the Virgin Islands); *C.f. Der Weer*, 61 V.I. at 101-02 (noting parenthetically that "[a]lthough both actions arise from a common tort, survival and wrongful death actions are separate and distinct. Each right arises at a different time and addresses itself to the recovery of damages for totally different injuries and losses") (citing *Taylor v. Giddens*, 618 So.2d 834, 840 (La. 1993)).

[457] 5 V.I.C. § 76(c) ("When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or water-craft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this section notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony").

summary judgment will be denied because it is undisputed that England died on November 30, 2012, well after the filing of this lawsuit in 2010.[458]

B. Timeliness of Gerald's survival action claims for strict products liability (Count I), negligence (Count III), and breach of the implied warranty of merchantability (Count IV).

a. Applicable statute of limitations.

As is typical of claims subject to 5 V.I.C. § 31(5)(A), the general rule that "[t]he injured person has two years from the date of injury to file a lawsuit"[459] applies to Gerald's survival action claims for strict products liability and negligence. Gerald concedes that this action was not filed within two years of his injury as required under 5 V.I.C. § 31(5)(A) because "England was diagnosed with laryngeal cancer in November 2005 and filed this action in December 2010."[460]

The statute of limitations governing Gerald's breach of the implied warranty of merchantability claim is set forth in 11A V.I.C. § 2-725 of the Virgin Islands U.C.C.[461] 11A V.I.C. § 2-725 provides, in pertinent part:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. ...
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

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[458] Pl. Gerald's November 9, 2015, Am. Compl. ¶ 8 (stating England died on November 30, 2012); Def.'s Mot. for Summ. J. (*Gerald*), p. 3 (stating England died on November 30, 2012); Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 5 ¶ 11 (same); *supra* n. 1.
[459] *Der Weer*, 61 V.I. at 116. The parties appear to agree that 5 V.I.C. § 31(5)(A) provides the applicable statute of limitations on these "non-warranty" claims. *See* Def.'s Mot. for Summ. J. (*Gerald*), p. 11; Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 8.
[460] Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 8.
[461] *See* July 5, 2017, Mem. Op., p. 12.

...

> (4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this title becomes effective.[462]

Under 11A V.I.C. § 2-725, Gerald's action for breach of the implied warranty of merchantability "must be commenced within four years after the cause of action has accrued[,]" which occurs in the context of a breach of warranty "when tender of delivery is made."[463] Reynolds submitted evidence, namely excerpts from England's depositions in 2012, that demonstrates England quit smoking in November of 2005.[464] Plaintiff presented neither argument nor evidence to refute this fact. Drawing all reasonable inferences in a light most favorable to Gerald, the record reflects that England purchased his last pack of Newport cigarettes in November of 2005. Applying the four-year statute of limitations set forth in 11A V.I.C. § 2-725(1), Gerald's claim for breach of the implied warranty of merchantability expired in November of 2009, but because this action was not filed until 2010, it is time-barred unless the statute of limitations period is tolled.[465]

Here, Gerald argues that the discovery rule applies to toll the statute of limitations under 11A V.I.C. § 2-725(1).[466] However, the Court previously concluded during the course of these proceedings that the discovery rule does not apply to toll the statute of limitations on this claim because 11A V.I.C. § 2-725(2) expressly mandates that "the breach occurs, regardless of the

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[462] 11A V.I.C. § 2-725.
[463] 11A V.I.C. § 2-725(1)-(2); *See* July 5, 2017, Mem. Op., pp. 9-13.
[464] *See* Def.'s Ex. D, England Dep., at 371:14-372:19; Def.'s Ex. E, England's Preserv. Dep., at 55:2-5, 150-8:10.
[465] *See Santiago*, 57 V.I. at 273 (citations omitted). Gerald concedes that this action, which was filed on November 10, 2010, was brought outside the four-year statute of limitations period under 11A V.I.C. § 2-725(1). Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 8.
[466] Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., pp. 10-16.

aggrieved party's lack of knowledge of the breach."[467] Nevertheless, the Court also concluded that this provision does not foreclose an application of the fraudulent concealment tolling doctrine, which is permitted under 11A V.I.C. § 2-725(4).[468] Therefore, the Court will only address the tolling issue on Gerald's claim for breach of the implied warranty of merchantability in terms of the fraudulent concealment tolling doctrine.

b. Tolling under the discovery rule with respect to Gerald's survival action claims for strict products liability and negligence.

"Once a cause of action has accrued and the statutory period for bringing the action has expired, an injured party is barred from bringing suit unless the statute of limitations has been tolled."[469] Gerald urges the Court to apply the "discovery rule," a tolling doctrine that "tolls the statute of limitations when . . . the injury [itself] or its cause is not immediately evident to the victim[,]"[470] as follows:

> Essentially, the discovery rule operates to delay the time when the statute of limitations on a plaintiff's claim begins to accrue. "Under the rule, the statute of limitations will start to run at the time that two conditions are satisfied: (1) when the plaintiff knew or should have known that he suffered harm and (2) when the plaintiff knew or should have known the cause of his injury."[471]

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[467] *See* July 5, 2017, Mem. Op., pp. 15-16.
[468] *See* July 5, 2017, Mem. Op., pp. 15-16. While Gerald's argument in Opposition to Reynolds' Motion for Summary Judgment is focused on the discovery rule, the Court will address the purported genuine issues of material fact raised by Gerald in terms of the fraudulent concealment tolling doctrine, as the concept is mentioned by Gerald in his Opposition and was addressed at length by Gerald in his Opposition to Reynolds' Motion to Dismiss. *See* Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 12 n. 33; Pl. Gerald's Opp'n to Def.'s Mot. to Dismiss.
[469] *Santiago*, 57 V.I. at 273 (citing *Bohus v. Beloff*, 950 F.2d 919, 924 (3d Cir. 1991)) (internal quotation marks omitted).
[470] *United Corp.*, 64 V.I. at 305-06 (citing *Santiago*, 57 V.I. at 273).
[471] *Santiago*, 57 V.I. at 298-299 (citing *Tutu Wells, In re Tutu Wells Contamination Litigation*, 909 F. Supp. 980, 985 (D.V.I. 1995); *Miller v. Fortis Benefits Ins. Co.*, 475 F.3d 516, 520 (3d Cir. 2007) ("Under this rule, a statute of limitations begins to run when a plaintiff discovers or should have discovered the injury that forms the basis of his claim."); *S.E.C. v. Gabelli*, 653 F.3d 49, 59 (2d Cir. 2011) ("Under the discovery rule, the statute of limitations for a particular claim does not accrue until that claim is discovered, or could have been discovered with reasonable diligence, by the plaintiff")).

In applying the discovery rule, the Supreme Court of the Virgin Islands has opined that:

> Under the discovery rule, the focus is not on the plaintiff's actual knowledge, but rather whether the knowledge was known, or through the exercise of diligence, knowable to the plaintiff. Because the application of the discovery rule rests on when a party knew or should have known of its injury, it is typically a question of fact.[472]

According to Gerald, while "England knew that he had been diagnosed with laryngeal cancer," a genuine issue of material fact exists with respect to when England should have discovered, in the exercise of reasonable care and diligence, that Lorillard's tortious conduct caused his injury, because "Lorillard went to great lengths to withhold the facts of its wrongdoing and to deny that there was any relationship between smoking and cancer"[473] and that a jury "would be entitled to find that Mr. England did not understand that his laryngeal cancer was caused by Lorillard's wrongful conduct until he met with Attorney Pate in November of 2010."[474]

In determining "when the statute of limitations begins to run in a product liability cause of action involving a latent or 'creeping' disease" such as cancer, the Florida Supreme Court, as well as courts in other jurisdictions, have concluded that "the cause of action accrues when the accumulated effects of the deleterious substance manifest themselves to the claimant in a way which supplies some evidence of a causal relationship to the manufactured product."[475] Additionally, Florida courts have concluded that "the question of when a plaintiff should have been on notice as to the causal relationship between his or her injury and exposure to the dangerous

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[472] *United Corp.*, 64 V.I. at 305-06 (citing *Santiago*, 57 V.I. at 273) (other citation omitted).
[473] Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 12; Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 5 ¶ 10 (Statement of Disputed Facts) ("Apart from the dates of his diagnoses and death, Defendant disputes these facts").
[474] Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., pp. 12-13.
[475] *Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932, 934 (Fla. 2000) (citing *Copeland v. Armstrong Cork Co.*, 447 So. 2d 922, 926 (Fla. 3d DCA 1984)).

product is [typically] a question of fact which the jury must decide[,]" because "it is difficult to pinpoint when and where [a latent disease] began" or what caused it.[476] However, this does not always create a genuine issue of material fact that must be decided by the fact finder at trial. The discovery rule requires the plaintiff exercise reasonable due diligence and establish that he or she "pursued the cause of his [or her] injury with those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others."[477] Stated another way, "the exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist."[478] It is at this time when the statute of limitations begins to run, "not when advice of counsel is sought or a full-blown theory of recovery developed."[479]

The Court agrees with Reynolds that the record reflects no factual dispute exists here. The record indicates that: (1) Dr. Adam Shapiro diagnosed England with laryngeal cancer after England underwent an emergency laryngectomy on or about October 29, 2005, in St. Thomas, U.S.V.I.; (2) England underwent a total laryngectomy in Ohio on or about December 17, 2005; and (3) Dr. Adam Shapiro informed England in October or November of 2005, that England's

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[476] *Roberts v. Bayer Corp. (In re Trasylol Prods. Liab. Litig.)*, 2010 U.S. Dist. LEXIS 145758, at *171-73 (S.D. Fla. Mar. 5, 2010) (citing *Carter*, 778 So. 2d 932); *C.f. United Corp.*, 64 V.I. at 306 ("Because the application of the discovery rule rests on when a party knew or should have known of its injury, it is typically a question of fact") (citing *Joseph v. Daily News Publ'g Co.*, 57 V.I. 566, 590 (V.I. 2012)) (other citations omitted).
[477] *Santiago*, 57 V.I. at 273.
[478] *Wiggins v. Edwards*, 314 S.C. 126, 442 S.E.2d 169, 170 (S.C. 1994) (quoting *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333, 334 (S.C. 1981)).
[479] *Id.*

laryngeal cancer could have been caused by smoking.[480] In fact, England himself testified that he was told in the fall of 2005 by Dr. Shapiro that "the problem in [his] … throat" could have been caused by cigarette smoking[481] and Michael Richards, England's brother, also testified that sometime between November 2005 and April or May of 2006, Richards was present when England was informed by a doctor that England's laryngeal cancer was caused by cigarette smoking.[482] England's co-worker, Morales Webster, also testified that, upon returning to work after undergoing the laryngectomy, England attributed "the hole in his throat" to England's smoking of cigarettes.[483] While the disability records of England, submitted by Reynolds, indicate that England was cleared to return to "with light duty" on July 19, 2006, following his laryngectomy,[484] the record does not indicate what date England actually returned to work in 2006.

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[480] *See* Def.'s Ex. D (*Gerald*), England Disc. Dep., at 371:14-372:04, 373:05-12, 395:20-396:15, 398:2-399:22; Def.'s Ex. E (*Gerald*), England Preserv. Dep., at 55:2-5; Def.'s Ex. F (*Gerald*), Dr. Nelson Dep., at 115:17-116:02; Def.'s Ex. DD (*Gerald*), Deposition of Adam Shapiro, M.D. dated February 25, 2016, ("Dr. Shapiro Dep."), at 197:1-15; Def.'s Ex. G (*Gerald*), England's Second Supp. Answers, Interrog. Answer No. 10 ("I am seeking damages in this action due to suffering from both throat cancer and bladder cancer. The date of the diagnosis of throat cancer was December 17, 2005; however it was not until November 2010 I realized my cancer was caused by the hidden wrongful conduct of the tobacco company. My bladder cancer was [sic] March 18, 2011"); *See also* Pls.' J.A., England Preserv. Dep.,10:23-25, 11:1; Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 5 ¶ 10 (Statement of Disputed Facts) ("England was initially diagnosed with laryngeal cancer after he had an emergency laryngectomy on or about October 29, 2005. ... He then traveled to Ohio where he underwent a total laryngectomy on December 17, 2005 … Apart from the dates of his diagnoses and death, Defendant disputes these facts") (citing "Interrog. Answer No. 10"); Pls.' J.A., England Preserv. Dep., 10:1-7.

[481] Def.'s Ex. D (*Gerald*), England Disc. Dep., at 398:2-399:22; Pls.' J.A., England Preserv. Dep., 10:1-7.

[482] Def.'s Ex. I (*Gerald*), Deposition of Michael Richards dated September 28, 2012 ("Richards Dep."), at 84:16-86:08.

[483] Def.'s Ex. H (*Gerald*), Deposition of Morales Webster, dated November 30, 2012 ("Webster Dep."), at 67:19-68:08. "As a general rule, inadmissible hearsay may not be used to support or defeat a motion for summary judgment." *Bertrand*, 63 V.I. at 782 (internal quotation marks and citations omitted). Although England's out of court statement is offered to prove the truth of the matter asserted, "[t]he statement is offered against an opposing party and … was made by the party in an individual capacity[.]" and, therefore, does not constitute hearsay under V.I. R. EVID. 801(d)(2)(A). *See* V.I. R. EVID. 801(d)(2)(A); *Edward v. Genoa Inc.*, 2017 V.I. LEXIS 9, *8 (V.I. Super. Ct. Jan. 20, 2017) (discussing FED. R. EVID. 801(d)(2)(A), the federal counterpart to V.I. R. EVID. 801(d)(2)(A)).

[484] Def.'s Ex. J (*Gerald*), England's Disability Records, at 2.

The record also reflects the following facts, which are particularly relevant to the Court's analysis: England began smoking Newport cigarettes in 1960, when he was a child;[485] throughout the forty-five years England smoked cigarettes, his "brand of choice" was Newport,[486] which England smoked continuously, but with varying frequency, from 1960 until he was diagnosed with laryngeal cancer in October of 2005;[487] and after numerous unsuccessful attempts to quit smoking over the years, England finally quit smoking in November of 2005.[488] This evidence makes clear that no genuine issues of material fact remain that would suggest England did not know *which* type of cigarette brand caused England's laryngeal cancer—the record clearly points to only one answer: Newport cigarettes, and thus, the manufacturer of Newport cigarettes, Lorillard.

The Court recognizes, and Gerald points out, that the Supreme Court of the Virgin Islands has found that "more than bare access to necessary information is required to start the statute of limitations running [under the discovery rule]. There must also be a suspicious circumstance to trigger a duty to exploit the access."[489] However, the Court agrees with Reynolds that the record clearly establishes that England had "more than bare access to necessary information."

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[485] Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 3 ¶ 7 (Statement of Disputed Facts) ("From the time Mr. England began smoking in 1960 ..."); Pls.' J.A., England Preserv. Dep., at 16:10-16:16 (England says he believes he became addicted to smoking when he was a child); Def.'s Ex. E (*Gerald*), England Preserv. Dep., at 11:2-17; 19:19-20:19, 21:17-22:23; Def.'s Ex. D (*Gerald*), England Disc. Dep., at 117:4-7; Def.'s Ex. G (*Gerald*), England's Second Supp. Answers, Interrog. Answer No. 13.

[486] *See* Def.'s Ex. E (*Gerald*), England Preserv. Dep., at 11:2-17, 19:19-20:19, 15:12-14, 21:17-22:23; Def.'s Ex. D (*Gerald*), England Disc. Dep., at 39:1-11, 172:25-173:6, 371:14-16; Def.'s Ex. G, England's Second Supp. Answers, Interrog. Answer Nos. 1, 13, 14; Pl. Gerald's November 9, 2015, Am. Compl. ¶¶ 8-9, 50, 33.

[487] Def.'s Ex. E (*Gerald*), England Preserv. Dep., at 11:18-20; Def.'s Ex. D (*Gerald*), England Disc. Dep, at 198:22-199:22, 238:10-239:05, 258:17-260:24, 294:16-295:24; Pl.s' J.A., England Preserv. Dep., 150:2-14, 152:1-9; *See generally* Pl.s' J.A., England Preserv. Dep. & England Disc. Dep.

[488] Def.'s Ex. G, England's Second Supp. Answers, Interrog. Answer No. 13 ("I tried to quit smoking many times during my life starting in the early 1990s but was unsuccessful in quitting for more than a relatively short period of time during any of these attempts to quit until November 2005"); England Preserv. Dep., at 58:15-25, 59:1-25, 60:1-25, 61:1-11, 63:4-25, 64:1-2.

[489] *United Corp.*, 64 V.I. at 310 (citing *Fujisawa Pharm. Co. v. Kapoor*, 115 F.3d 1332, 1335 (7th Cir. 1997)).

A diagnosis of cancer by a physician with an explanation that the cancer could have been caused by cigarette smoking would put a reasonable person, who has primarily smoked only one brand of cigarettes for forty-five years, on notice that some claim against the manufacturer of the particular brand of cigarettes may exist so as to trigger the running of the statute of limitations.[490] This also constitutes a "suspicious circumstance" that would trigger a reasonable person's duty to exploit access to information regarding the liability of those involved in the manufacturer, production, sale, or distribution of the particular cigarette brand, and, in turn, commence the running of the statute of limitations. Gerald contends that "there was no reason why Mr. England should have understood there was 'a suspicious circumstance' surrounding Lorillard's sale of a legal product—Newport cigarettes—that would warrant an inquiry into whether he had a basis to bring a lawsuit against Lorillard[,]" but the Court finds this logic leads to the contrary conclusion.[491] That a person's nearly life-long use of a legal product potentially caused a fatal disease would reinforce a reasonable person's suspicions that his or her rights have possibly been invaded. This is all that is required to begin the running of the statute of limitations under the discovery rule. By waiting until 2010 to contact an attorney and file suit, more than four years after being told his laryngeal cancer was caused by cigarette smoking—for which only one brand could be implicated—England cannot be said to have "pursued the cause of his injury with those qualities

[490] *See Donovan v. Philip Morris USA, Inc.*, 455 Mass. 215, 228, 914 N.E.2d 891, 903 (Mass. 2009) ("In the context of toxic torts, where the harm may not have been manifested by the onset of disease, notice of harm and cause in many cases may not occur until the plaintiff is so advised by a physician"); *Frazier v. Philip Morris USA Inc.*, 89 So. 3d 937, 945 (Fla. Dist. Ct. App. 2012) ("[T]he 'manifestations' that are pertinent are symptoms or effects that actually disclose that the prospective claimant is suffering from a disease or medical condition caused by tobacco use, and which are thus sufficient to assert a cause of action against the responsible manufacturer(s)").
[491] Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 13.

of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others."[492]

Viewing the record in a light most favorable to Gerald, the Court finds that there is no genuine issue of material fact that England knew, or should have known, that his laryngeal cancer was potentially caused by his smoking of Newport cigarettes in 2006, at which time the statute of limitations began to run under the discovery rule. Applying the two-year period set forth in 5 V.I.C. § 31(5)(A), the statute of limitations on Gerald's claims for strict products liability and negligence claims expired in 2008. England did not file his first Complaint until November of 2010, which was never served on Defendants, and was amended and re-filed on December 6, 2010.[493] Under either date, the action was instituted outside the two-year statute of limitations applicable to personal injury claims. Therefore, Gerald's survival action claims for strict products liability and negligence are time-barred unless another tolling doctrine applies to save the claims.

c. Tolling under the fraudulent concealment tolling doctrine with respect to Gerald's survival action claims for strict products liability, negligence, and breach of the implied warranty of merchantability.

The evidence and materials submitted in relation to the discovery rule are relevant to the fraudulent concealment tolling doctrine. While the parties do not directly address this tolling doctrine in their filings related to Reynolds' summary judgment motion,[494] the concept has been addressed at length in relation to the discovery rule by both parties and the Court during the course

[492] *Santiago*, 57 V.I. at 273.
[493] *supra* n. 1.
[494] While Gerald's argument in Opposition to Reynolds' Motion for Summary Judgment is focused on the discovery rule, the fraudulent concealment tolling doctrine is mentioned by Gerald in his Opposition to Reynolds' Motion for Summary Judgment. *See* Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., p. 12 n. 33.

of these proceedings.[495] In the interests of judicial economy and efficacy, the Court will consider the record in light of the fraudulent concealment tolling doctrine.

This Court has adopted the following iteration of the fraudulent concealment tolling doctrine "as the soundest rule for the Virgin Islands":

> In order to toll the statute of limitations for fraudulent concealment, the plaintiff must allege and prove: (1) that the defendant affirmatively concealed, or failed to disclose despite a duty to do so, material facts critical to plaintiff's cause of action; (2) that the defendant knew or had reason to know that the material fact had been concealed or suppressed; (3) that the defendant's conduct prevented plaintiff from discovering the nature of the claim within the limitations period; and (4) that the plaintiff could not have discovered sufficient facts to identify the particular cause of action despite reasonable care and diligence.[496]

Unlike the discovery rule, the fraudulent concealment tolling doctrine is "invoked in cases where a plaintiff is ignorant of his cause of action[,]" but not necessarily his or her injury, "because of the defendant's fraudulent concealment[.]"[497] However, the fraudulent concealment tolling doctrine and discovery rule are similar in that both require the plaintiff to exercise reasonable diligence to discover facts.[498] An application of the fraudulent concealment tolling doctrine requires the plaintiff do so in order to identify the particular cause of action, while a plaintiff under the discovery rule must do so to ascertain his or her injury and its cause.[499] Therefore, as the application of the discovery rule is typically a question of fact because it "rests on when a party

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[495] *See* Pls.' July 5, 2016, Joint Partial Opp'n to Def.'s Mot. to Dismiss, pp. 9-11; Def.'s July 22, 2016, Reply to Pls.' Joint Partial Opp'n to Def.'s Mot. to Dismiss, pp. 6-9; July 5, 2017, Mem. Op., pp. 16-24.
[496] July 5, 2017, Mem. Op., p. 20 (conducting the requisite analysis mandated in *Banks*, 55 V.I. 967).
[497] *See* July 5, 2017, Mem. Op., p. 20 (citations omitted).
[498] *See* July 5, 2017, Mem. Op., p. 21 (noting the similar standard governing the fraudulent concealment tolling doctrine and the discovery rule); *United Corp.*, 64 V.I. at 305-06 (discussing the discovery rule).
[499] *Id.*

knew or should have known of its injury[,]"[500] an application of the fraudulent concealment tolling doctrine is likewise a factual inquiry that usually must be resolved by the trier of fact at trial.

With respect to the applicability of the fraudulent concealment tolling doctrine, the relevant inquiry is not whether England knew or should have known of Lorillard's fraudulent concealment, but whether England knew or should have known of the *nature* of his claims for strict products liability, negligence, and breach of the implied warranty of merchantability. The nature of Gerald's claims for strict products liability and negligence, as discerned from Gerald's Amended Complaint, concern the liability of Lorillard for its acts and omissions in "designing, testing, manufacturing, marketing, promoting, selling and/or distributing Newport cigarettes[,]" specifically, *inter alia*, Lorillard's design of a defective cigarette that contained excessive levels of carcinogens and nicotine despite the availability of a reasonable alternative design, failure to warn of the health risks and addictiveness of Newport cigarettes despite having knowledge thereof, and "induc[ement of] minors, including, … [England], to smoke samples of Newport cigarettes" by giving "free giveaways [of samples] in his apartment building when [England] … was a child]."[501] Similarly, Gerald's claim for breach of the implied warranty of merchantability is premised on the allegation that Lorillard broke its implied warranty of merchantability by selling Newport cigarettes that were addictive and contained carcinogens, which rendered them unfit for the ordinary purposes for which they were used, namely smoking.[502]

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[500] *United Corp.*, 64 V.I. at 306 (citing *Joseph v. Daily News Publ'g Co.*, 57 V.I. 566, 590 (V.I. 2012)) (other citations omitted).
[501] Pl. Gerald's November 9, 2015, Am. Compl. ¶¶ 10, 14-21, 30-35, 50.
[502] Pl. Gerald's November 9, 2015, Am. Compl. ¶¶ 36-43.

Though the ultimate concern addressed by the fraudulent concealment tolling doctrine differs from the discovery rule, in the circumstances at issue in this case and in the absence of disputed material facts regarding information discovered by England, there is little practical difference in the Court's analysis under either tolling doctrine and, therefore, the Court's discussion under the discovery rule applies with equal force here. This is because the Court's conclusion under the discovery rule involved a determination that "a diagnosis of cancer by a physician with an explanation that the cancer could have been caused by cigarette smoking would put a reasonable person, who has primarily smoked only one brand of cigarettes for forty-five years, on notice that some claim against the manufacturer of the particular brand of cigarettes may exist."

While Gerald submitted evidence that demonstrates genuine issues of material fact exist with respect to whether Lorillard fraudulently concealed information regarding the dangers of cigarette smoking—as an independent basis for imposing tort liability on Lorillard—the Court cannot reasonably infer from the record that Lorillard's alleged fraudulent concealment would have prevented a reasonable person, in the exercise of reasonable care and diligence, from discovering sufficient facts to identify the *nature* of his claims for strict products liability, negligence claims, and breach of the implied warranty of merchantability. This is because the separate issue of Lorillard's fraudulent concealment of the health risks and addictiveness of cigarette smoking does not vitiate the link between England's smoking of Newport cigarettes for forty-five years and his understanding that his cigarette smoking could have caused his laryngeal cancer, which would have put a reasonable person on notice that he or she was not adequately warned of the danger associated with smoking Newport cigarettes, that Newport cigarettes were defectively designed, or that the conduct of Newport's manufacturer somehow fell below the standard of reasonable care. While a reasonable person with no legal education would not be able to articulate the specific legal concepts at issue, knowledge of the aforementioned information would be enough for a reasonable person to identify that his or her rights have been invaded in the manner addressed above, upon which Gerald's claims for strict products liability, negligence, and breach of the implied warranty of merchantability are based. Indeed, nothing in the record remotely suggests that Lorillard's fraudulent concealment would have prevented or precluded a reasonable person in these circumstances from contacting an attorney prior to 2010.

Consequently, viewing the record and drawing all reasonable inferences in favor of Gerald, the Court finds that England, in the exercise of reasonable care and diligence, possessed sufficient facts to identify his claims for strict products liability, negligence, and breach of the implied warranty of merchantability no later than 2006, which is the latest time frame within which the Court can reasonably infer that England received information regarding his diagnosis of laryngeal cancer and that it was potentially caused by cigarette smoking. Like the discovery rule, this triggered the running of the statute of limitations on England's strict products liability and negligence claims, which, under 5 V.I.C. § 31(5)(A), expired two-years later in 2008. Because this lawsuit was not brought until 2010, two years after the expiration of the statute of limitations, Gerald's survival action claims for strict products liability and negligence based on England's laryngeal cancer are time-barred.

The timeliness of Gerald's survival action claim for breach of the implied warranty of merchantability is less clear because that claim is subject to a four-year statute of limitations period, which would have expired in 2010, the year England commenced this lawsuit. In order to find this claim is time-barred as a matter of law, the Court must be convinced there is no genuine issue of material fact that England was informed that his laryngeal cancer was potentially caused by cigarette smoking prior commencing this litigation by filing his initial Complaint. As previously mentioned, the record is unclear as to the approximate date, or even month, England informed his co-worker that the "hole in his throat" was caused by cigarette smoking because nothing in the record indicates the date England actually returned to work following his laryngectomy. However, even when viewed in a light most favorable to England, the record indicates that there is no genuine issue of material fact that England was informed by a physician no later than May of 2006 that his laryngeal cancer was potentially caused by cigarette smoking,[503] at which point the four-year statute of limitations on England's survival action claim for beach of the implied warranty of merchantability began to run. As a result, the statute of limitations on this claim expired in May of 2010. Because this action was not commenced until November 10, 2010, at the earliest,[504] six

[503] *See supra* n. 480-482.

[504] According to the relevant procedural rules, November 10, 2010, appears to represents the date this action commenced for purposes of determining this statute of limitations issue. 5 V.I.C. § 31 ("Civil actions shall only be commenced within the periods prescribed below after the cause of action shall have accrued … ."); V.I. R. CIV. P. 3 ("A civil action is commenced by filing a complaint with the clerk of court"). As previously mentioned, England filed the first version of his Complaint on November 10, 2010, but filed a First Amended Complaint on December 6, 2010, for which a return of service for summons was received by the Court on January 5, 2011. Because the First Amended Complaint was served within 120 days of the commencement of the action on November 10, 2010, and "asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading[,]" the First Amended Complaint relates back to the filing date of the initial pleading on November 10, 2010. V.I. R. CIV. P. 4(c)(1) ("A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m)… ."); V.I. R. CIV. P. 4(m) ("If a defendant is not served within 120 days after the complaint is filed, the court … must dismiss the action without prejudice against that defendant or order that service be made within a specific time … ."); V.I. R. CIV. P. 15(c)(1)(B) ("An amendment to a pleading relates back to the date of the original pleading when: … the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading"). These provisions of the Virgin Islands Rules of Civil Procedure, as they are relevant and applied here, are essentially analogous to their counterparts under the Federal Rules of Civil Procedure or the Superior Court Rules that were applicable when this action was filed in 2010. *See* V.I. R. CIV. P. 1-1(c)(2)(A) and (B)). Note that prior to the 2015 amendments, FED. R. CIV. P. 4(m) provided for a 120-day period of service, which is reflected in the current version of V.I. R. CIV. P. 4(m).

months after the expiration of the statute of limitations, Gerald's survival action claim for beach of the implied warranty of merchantability is also time-barred.

In sum, the Court finds that, even when viewing the record in light most favorable to Gerald, no reasonable jury could return a verdict for Gerald that would toll the statute of limitations past May of 2006. Because this action was not commenced until November 2010, Gerald's strict products liability and negligence claims subject to 5 V.I.C. § 31(5)(A) were brought two-years late, and Gerald's breach of implied warranty of merchantability claim under 11A V.I.C. § 2-725(1) was brought six months late. Neither this conclusion nor the Court's conclusion with respect to the discovery rule are altered by reason of Gerald pursuing these claims in a survival action because England died in 2012,[505] after the expiration of the statute of limitations, and, therefore, the one-year grace period available in certain survival actions does not apply.[506]

Consequently, Reynolds' Motion for Summary Judgment will be granted with respect to Gerald's survival action claims for strict products liability, negligence, and breach of the implied warranty of merchantability, which are time-barred as a matter of law.

C. Timeliness of Gerald's survival action claims for fraudulent concealment and misrepresentation (Count V) and civil conspiracy (Count VI).

The two-year statute of limitations period set forth in 5 V.I.C. § 31(5)(A) also applies to Gerald's claims for fraudulent concealment and fraudulent misrepresentation.[507] However, unlike Gerald's claims for strict products liability and negligence, Gerald's claims for fraudulent

[505] *supra* n. 458.
[506] *supra* n. 455.
[507] *See Merchs. Commercial Bank*, 64 V.I. at 25 (citing *Martin*, 54 V.I. at 390-91).

misrepresentation and fraudulent concealment are subject to 5 V.I.C. § 32(c),[508] under which the statute of limitations "begins to run at the time the *fraud* was or should have been discovered."[509] 5 V.I.C. § 31(5)(A) and 5 V.I.C. § 32(c) also apply to Gerald's civil conspiracy claim since that claim is subject to the statute of limitations applicable to its underlying tort claim,[510] which here are Gerald's claims for fraudulent concealment and fraudulent misrepresentation.[511] According to the Supreme Court of the Virgin Islands, when 5 V.I.C. § 32(c) applies, the movant on summary judgment has the "initial burden of identifying evidence indicating 'that there is an absence of any issue of material fact'" regarding when the plaintiff "knew or should have known about any alleged fraud or misrepresentation[.]"[512]

In its Motion for Summary Judgment, Reynolds contends "there is no dispute that [England] … discovered (or should have discovered) the purportedly fraudulent misrepresentation or concealment of information by Lorillard no later than July 19, 2006, the latest conceivable date

[508] 5 V.I.C. § 32(c) ("In an action upon a new promise, fraud, or mistake, the limitation shall be deemed to commence only from the making of the new promise or the discovery of the fraud or mistake").
[509] *Merchs. Commercial Bank*, 64 V.I. at 25 (citing 5 V.I.C. § 32(c)) (emphasis added); *See Martin*, 54 V.I. at 391 ("Accordingly, the two-year period within which Norman was required to bring his claims for fraud and misrepresentation did not commence until he discovered or should have discovered the alleged fraud") (citing 5 V.I.C. § 32(c)).
[510] Courts in other jurisdictions that recognize a civil conspiracy claim similar to that in Virgin Islands apply the statute of limitations applicable to the underlying tort claim, which here is Gerald's claim for fraudulent concealment and misrepresentation. *See, e.g.*, *Mauvais-Jarvis v. Wong*, 987 N.E.2d 864, 894-95 (Ill. App. Ct. 2013) ("Because it is the underlying tortious acts performed pursuant to the agreement that give rise to a claim for civil conspiracy, it is logical that a conspiracy claim itself be governed by the statute of limitations for the underlying tort") (citing 15 C.J.S. Conspiracy § 26, at 1043 (2013)); *Rusyniak v. Gensini*, 629 F. Supp. 2d 203, 235 (N.D.N.Y. 2009) ("The statute of limitations for civil conspiracy is the same as that for the underlying tort") (citations omitted); *Prince George's Cty. v. Longtin*, 419 Md. 450, 480, 19 A.3d 859, 877 (Md. 2011) ("Civil conspiracy claims, moreover, share a statute of limitations with the underlying tort") (citations omitted); *Nader v. Democratic Nat'l Comm.*, 567 F.3d 692, 697, 386 U.S. App. D.C. 164 (D.C. Cir. 2009) ("a civil conspiracy claim incorporates not only every substantive element of the underlying tort, but also its statute of limitations") (citations omitted). Reynolds agrees, stating "Plaintiff's civil conspiracy claim is subject to the same statute of limitations as the underlying substantive fraud claim … ." Def.'s Mot. for Summ. J. (*Gerald*), p. 15. Plaintiff does not appear to address the issue. *See* Pl. Gerald's Opp'n to Def.'s Mot. for Summ. J., pp. 8-16.
[511] Pl. Gerald's November 9, 2015, Am. Compl. ¶¶ 56-64.
[512] *Martin*, 54 V.I. at 391 (internal quotation marks and citations omitted).

on which Decedent knew or should have known that his laryngeal cancer was caused by smoking."[513] Reynolds cites no authority for its proposition that the date England should have discovered his injury and its cause is the same date England should have discovered Lorillard's fraudulent misrepresentation and fraudulent concealment of the dangers associated with cigarette smoking under 5 V.I.C. § 32(c), and, apart from generally referring to the record as a whole, Reynolds fails to point to any evidence in the record to support its contention.[514] The Court recognizes that Reynolds later argues that Gerald's claims for fraudulent misrepresentation and fraudulent concealment fail as a matter of law, but the burden there is not equivalent to Reynolds' burden under 5 V.I.C. § 32(c). And, again, the Court reiterates that it will not take judicial notice of the fact that the health risks and addictiveness of cigarette smoking was "common knowledge,"[515] which, in any event, would still not satisfy Reynolds' burden of identifying evidence to show when England knew or should have known of Lorillard's fraudulent misrepresentations or fraudulent concealment.

As a result, the Court finds that Reynolds has failed to satisfy its "initial burden of identifying evidence indicating 'that there is an absence of any issue of material fact'" that England knew or should have known about any alleged fraudulent misrepresentation or fraudulent concealment by Lorillard, as required to trigger the running of the statement of limitations under 5 V.I.C. § 32(c).[516] Accordingly, the Court cannot find that Gerald's fraudulent misrepresentation

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[513] Def.'s Mot. for Summ. J. (*Gerald*), p. 15.
[514] *supra* n. 145.
[515] *supra* n. 125.
[516] *Martin*, 54 V.I. at 391 (citations omitted).

and fraudulent concealment claims are time-barred as a matter of law, and Reynolds is not entitled to summary judgment on this ground.

CONCLUSION

As to both Plaintiffs, genuine issues of material fact exist as to whether: (1) Newport cigarettes contained a design defect; (2) the alleged design defect of Newport cigarettes proximately caused Decedents' injuries; (3) Lorillard provided adequate warnings of the health risks and addictiveness of cigarette smoking prior to July 1, 1969; (4) Lorillard's purportedly inadequate warnings prior to July 1, 1969, were the proximate cause of Decedents' injuries; and (5) Decedents justifiably relied on Lorillard's purportedly fraudulent misrepresentations and fraudulent concealment to their detriment. As to Gerald, a genuine issue of material fact also remains with respect to when England knew or should have known about any alleged fraud or misrepresentation so as to trigger the running of the statute of limitations on Gerald's survival action claims for fraudulent misrepresentation, fraudulent concealment, and civil conspiracy.

As a result, Reynolds' Motion for Summary Judgment in *Brown* will be denied in its entirety. However, in accordance with Plaintiff Brown's representation that Plaintiff Brown "waives his Breach of Warranty claim[,]"[517] Count IV of Plaintiff Brown's Amended Complaint, which asserts a claim for breach of the implied warranty of merchantability, will be dismissed with prejudice.

As to *Gerald*, Reynolds' Motion for Summary Judgment will be granted in part as to Gerald's survival action claims for strict products liability (Count I), negligence (Count III), and

[517] Pl. Brown's Opp'n to Def.'s Mot. for Summ. J., pp. 3-4 n. 21 ("Plaintiff has voluntarily dismissed his claim of negligent performance of a voluntary undertaking. Plaintiff in the *Brown* case further waives his Breach of Warranty claim").

breach of the implied warranty of merchantability (Count IV), which are time-barred, and Gerald's wrongful death action as it relates to England's laryngeal cancer (Count VII). Reynolds summary judgment motion in *Gerald* will be denied on all other grounds and as to all other claims, including Counts I, III, and IV to the extent they are brought in relation to Gerald's wrongful death action.

An Order consistent with this Memorandum Opinion shall follow.

Dated: August 29, 2017

ATTEST: Estrella George
Clerk of Court

by:
Lori Boynes-Tyson
Court Clerk Supervisor 8/30/17

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