SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

JUSTIN D. TOMASINO, as the Administrator of the Estate of VIVIAN TOMASINO and JUSTIN D. TOMASINO, Individually.

Plaintiffs.

Sequence No.: *013 & 014*
Index No.: 027182/97

- against -

THE AMERICAN TOBACCO COMPANY, AMERICAN BRANDS, INC., LORILLARD, INC., LORILLARD TOBACCO COMPANY, PHILIP MORRIS INCORPORATED, PHILIP MORRIS COMPANIES, INC., RJR NABISCO, INC., R.J. REYNOLDS TOBACCO COMPANY, LIGGETT GROUP, INC., now known as BROOKE GROUP, LTD., LIGGETT & MYERS TOBACCO COMPANY, BROWN & WILLIAMSON INDUSTRIES, INC., BROWN & WILLIAMSON TOBACCO CORPORATION, THE TOBACCO INSTITUTE, INC. and THE COUNCIL FOR TOBACCO RESEARCH-USA, INC.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Notice of Cross-Motion and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

Defendants Phillip Morris Incorporated (hereinafter "Philip Morris"), R.J. Reynolds Tobacco Company, Brown and Williamson Holdings, Inc., the Council for Tobacco Research-U.S.A., Inc. and the Tobacco Institute, Inc. move and defendants Liggett Group, Inc. and Ligget & Myers Tobacco Company (hereinafter collectively the "Ligget defendants") cross-move for leave to serve amended answers. Upon reading the papers submitted and due deliberation having been had herein, the motion and cross-motion are both denied.

The instant matter is one in which plaintiff maintains causes of action for 1) failure to warn of the dangers of tobacco consumption prior to the enactment of the Public Health Cigarette Act of 1969; 2) fraud; 3) negligent and defective design; 4) strict product liability; 5) wrongful

death; and 6) loss of consortium. The moving parties all seek leave to serve amended answers which contain an affirmative defense that based upon the doctrine of res judicata that plaintiff may not seek punitive damages against these defendants herein as well as other proposed amendments which will be discussed below.

At the outset defendants Philip Morris, R.J. Reynolds, Brown and Williamson, the Council for Tobacco Research and the Tobacco Institute all collectively move together for this relief, said motion being prepared by Philip Morris' attorneys, Winston & Strawn, LLP. This court in deciding the various motions for summary judgment herein noted in no less than six short form orders each dated March 31, 2004 that these defendants all submitted multiple motions for summary judgment in which individual defendants' attorneys prepared and submitted the motions on behalf of all of the defendants and that the attorneys separately handled distinct issues. What disturbed the court then, as now, was that defendants with potentially differing interests were being represented by attorneys who had not been retained by those defendants. The court issued separate decisions based upon the overall interests of each defendant in the summary judgment motion. As these particular moving defendants appear to have disregarded this court's expression of this concern in its prior orders, the court shall not extend that same courtesy to these defendants in determining the instant motion. The court shall only determine this motion as submitted on behalf of Philip Morris, given that its attorney prepared and submitted the motion. To the extent defendants R.J. Reynolds, Brown and Williamson, Council for Tobacco Research and Tobacco Institute seek this relief the motion is denied. This does not apply to the properly prepared and submitted cross-motion.

Philip Morris and the Ligget defendants move for the relief set forth above upon the grounds that in an action filed by the New York State Attorney General in *parens patriae* against several cigarette manufacturers, including each of the defendants herein, a master settlement agreement was executed between the manufacturers and forty-six other states who maintained similar proceedings in an amount in excess of $200,000,000.00. Said master settlement agreement was thereafter reduced to consent decree and final judgment in this state which resolved, *inter alia*, the issue of punitive damages. Defendants assert that they should be permitted leave to serve amended answers which assert the affirmative defense of *res judicata* upon the grounds that where, as here, an action *parens patriae,* resolves an issue, that issue should not be litigated again. Such an action is maintained on behalf of the people of the state and punitive damages are designed to prevent harms against the public. Thus, movants contend that the issue is resolved and may not be raised again herein.

In opposition plaintiffs first assert that the motion should be denied because the so-ordered consent decree and judgment, by its own operation, may not be "received in evidence in any action or proceeding for any purpose other than in an action or proceeding arising under or relating to this consent decree and final judgment." (See, consent decree and final judgment §VII(G). Further, asserts plaintiff, the release contained in the master settlement agreement to which this state and forty-five others are signatories, does not include plaintiff and individuals similarly situated as plaintiff in the class of individuals who are releasing their claims against the defendants herein. Said agreement provides at section II(pp):

> "Releasing Parties means each Settling State and any of its past, present and future agents, officials acting in their official capacities, legal representatives, agencies, departments, commissions, divisions, and also means, to the full extent of the power of the signatories hereto to release past, present and future claims, the following: (1) any Settling State's subdivisions (political or otherwise, including but not limited to municipalities, counties, parishes, villages, unincorporated districts, and hospital districts), public entities, public instrumentalities and public educational institutions; and (2) person or entities acting a parens patriae, sovereign, quasi-sovereign, private attorney general, qui tam, taxpayer, or any other capacity, whether or not any of them participate in this settlement, (A) to the extent that any such person or entity is seeking relief on behalf of or generally applicable to the general public in such Settling State or the people of the State, as opposed solely to private or individual relief for separate and distinct injuries or... "

In the event the court accepts the settlement and finds that plaintiff is embodied in that group of individuals who released defendants, plaintiff contends that the doctrine of *res judicata* is inappropriate in these circumstances. Specifically, plaintiff claims that there was never a final determination on the merits made in the *parens patriae* action, but that same was merely settled by the parties thereto. Plaintiff further contends that another element of the doctrine of *res judicata*, that the issues determined in the other matter are identical to those in the instant one, is not present here. According to plaintiff, the instant action is based upon defendants' fraud, failure to warn prior to 1969 and for their failure to properly design their product, resulting in personal injury to plaintiff's decedent. The action brought by the attorney general, however, is not based upon injury to any one individual.

Plaintiff finally argues that the consent decree does not by its own terms prohibit plaintiff herein from maintaining a claim for punitive damages. Specifically, asserts plaintiff, plaintiff was not a party in the action brought by the attorney general and therefore should not be bound by a determination to which it was not a party. Such position was set forth in several decisions cited by plaintiff.

Generally, leave to amend pleadings should be freely given. CPLR 3025(b); Edenwald Contracting Co., Inc. v. City of New York, 60 N.Y.2d 957 (1983). The merits of the proposed amended pleading will not be reviewed "... unless the insufficiency or lack of merit is clear and free from doubt." Norman v. Ferrara, 107 A.D.2d 740, 741 (2nd Dep't 1985). "In cases where the proposed amendment is palpably insufficient or is totally devoid of merit, leave should be denied." Norman v. Ferrara, supra, 741.

In determining herein whether the lack of merit of the proposed pleadings are clear and free from doubt the court must determine whether a *res judicata* defense may be pled herein. In order for the doctrine of *res judicata* to apply and prohibit the relitigation of an issue, the following three part test must be satisfied: 1) a final judgment on the merits; 2) arising out of the same transaction or series of transactions; 3) involving the same parties or privies. See, O'Brien v. City of Syracuse, 54 N.Y.2d 353 (1981).

In the amended complaint in the *parens patriae* action plaintiff State of New York set forth the following causes of action: (1) fraud, misrepresentation and illegal conduct under Executive Law §63 (12); (2) deceptive acts and practices in violation of General Business Law §349; (3) unlawful marketing and targeting of minors in violation of General Business Law §349; (4) false advertising in violation of General Business Law §350; (5) and (6) conspiracy in restraint of trade in violation of the Donnelly Act (General Business Law §340 *et seq.*); (7) and (8) violation of the Not-For-Profit Corporation Law by defendant Tobacco Institute, Inc., in its formation and operation; (9) and (10) violation of the N-PCL by defendant The Counsel For Tobacco Research - U.S.A., Inc., in its formation and operation; (11) indemnity; (12) restitution; (13) public nuisance; (14) negligent entrustment; (15) undertaking of and wilful failure to perform a special duty; and (16) aiding and abetting. See, State of New York v. Philip Morris, Incorporated, 179 Misc.2d 435 (Sup. Ct. N.Y. Cty 1998). Said complaint sought compensatory, punitive and treble damages.

Having reviewed the causes of action set forth above upon which the State entered the settlement agreements, the court notes that none of these assert claims based upon personal injury on the behalf of either an individual (much less plaintiff and/or plaintiff's decedent herein) or on behalf of all individuals in this state as a class who suffered personal injury as a result of their use of the products manufactured, marketed and advertised by defendants. Further, the state, in bringing a *parens patriae* action may not so do in order to redress the wrongs of individuals, but only to redress wrongs against the people of the state as a whole. See, People v. Albany S.R. Co., 57 N.Y. 161 (1874); State v. New York City Conciliation & Appeals Board, 123 Misc.2d 47 (Sup. Ct. N.Y. Cty 1984). Further, while punitive damages are generally designed to vindicate wrongs against the public, plaintiffs may recover punitive damages based upon private interests where defendant's breach constitutes "a high degree of moral turpitude and criminal indifference to civil obligations." See, Malone Housing Authority v. Jardine Insurance Brokers, Inc. 140 A.D.2d 917, 918 (3rd Dep't 1988).

The court sees no way in which defendants herein can assert that the claims brought by the state in the *parens patriae* action arise out of the same transaction or series of transactions upon which the instant matter is based. The state commenced its action based upon wrongs to the state as a whole and upon wholly different claims of malfeasance on defendants' part. Thus, the court concludes that the proposed amended pleading to the extent it seeks to add the affirmative defense of *res judicata* is devoid of merit.

In a footnote in counsel's affirmation Philip Morris asserts that it is seeking leave to serve an amended answer which contains amendments other than the above mentioned affirmative defense. Counsel affirms in said footnote as follows:

> "The other amendments include changes reflecting the Court's Orders on Moving Defendants' summary judgment motions dismissing certain claims, severing and dismissing claims of other plaintiffs originally named in the Complaint in this action, updating Defendants' corporate status and similar information, and conforming the Answers to more recent answers served on Plaintiff's counsel in other, similar individual smoker cases. (True and correct copies of Justice Martin's March 31, 2004 Orders are

annexed hereto as Ex. F). Additionally, Moving Defendants have withdrawn the affirmative defense of comparative fault. (True and correct copies of Moving Defendants' Notices of Withdrawal are annexed hereto as Ex. G)."

As counsel fails to set forth the need for said amendments to the answers and indeed what those amendments are, the court denies this branch (if branch a footnote could be called) of the motion also. While the proposed amended answers are annexed to the motion and cross-motion, the court shall not cull through same, compare them to the original answers and then rule on whether same are not clearly devoid of merit.

Accordingly, the motion and cross-motion are both denied.

So Ordered.

A.J.S.C.

Dated: September 17, 2007