IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

REPUBLIC OF PANAMA,	)
	)
Plaintiff,	)
	)
v.	**C.A. No. 05C-07-181-RRC**
	)
THE AMERICAN TOBACCO COMPANY, et al.	
	)
Defendants.	)
	)
	)
	)
THE STATE OF SAO PAULO, BRAZIL,	)
	)
Plaintiff,	)
	)
v.	**C.A. No. 05C-07-180-RRC**
	)
THE AMERICAN TOBACCO COMPANY, et al.	
	)
Defendants.	)

Submitted: April 7, 2006
Decided: June 23, 2006
Modified: July 13, 2006

On "Certain Defendants' Motions to Dismiss."
GRANTED.

MEMORANDUM OPINION

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Paul J. Lockwood, Esquire, Skadden, Arps, Slate, Meagher & Flom, LLP, Wilmington, Delaware, Attorney for U.S. Smokeless Tobacco Co. (f/k/a United States Tobacco Co.), and UST, Inc.

John E. James, Esquire, Potter, Anderson & Corroon, LLP, Wilmington, Delaware, Attorney for Liggett Group, Inc., and Liggett & Myers, Inc.

COOCH, J.

I. INTRODUCTION

Pending before this Court is Moving Defendants'[1] Motion to Dismiss for failure to state a claim upon which relief can be granted.[2] Plaintiffs, the

[1] The defendants originally named by the plaintiffs were: The American Tobacco Company; American Brands, Inc.; Fortune Brands, Inc.; Brown & Williamson Tobacco Corp.; Reynolds American, Inc.; R.J. Reynolds Tobacco Company; RJR Nabisco, Inc.; BATUS, Inc.; BATUS Retail Services, Inc.; BATUS Holdings, Inc.; Philip Morris, Inc.; Phillip Morris Companies, Inc.; Phillip Morris USA, Inc.; Altria Group, Inc.; B.A.T.

Republic of Panama and the State of São Paulo, Brazil (collectively "the Foreign Governments") seek to recover medical expenses they say they have incurred for decades in treating their citizens' health problems, allegedly caused by their citizens' consumption of Moving Defendants' tobacco products. In their own words, the Foreign Governments "do not seek damages for personal injuries suffered by smokers; [we] seek damages for separate injuries to plaintiffs' property and national patrimony that is wholly distinct from the harms suffered by individuals."[3]

To that end, the Republic of Panama pleads negligence, strict liability, and unjust enrichment under Panamanian civil law.[4] The State of São Paulo,

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Industries; Lorillard Tobacco Co.; Lorillard, Inc.; Loews Corp.; United States Tobacco Co.; UST, Inc.; Liggett Group, Inc.; Liggett & Myers, Inc.; Tobacco Institute, Inc.; Quaglino Tobacco and Candy Co., Inc.; and J & R Vending Services, Inc.

Moving Defendants are: Philip Morris USA Inc.; R.J. Reynolds Tobacco Company; R.J. Reynolds Tobacco Holdings, Inc. (f/k/a RJR Nabisco, Inc.); Brown & Williamson Tobacco Corp. (individually and as successor by merger to The American Tobacco Company); BATUS Retail Services, Inc. (individually and as successor by merger to BATUS, Inc.); BATUS Holdings, Inc.; Fortune Brands, Inc. (f/k/a American Brands, Inc.); U.S. Smokeless Tobacco Co. (f/k/a United Stated Tobacco Co.); UST, Inc.; Liggett Group, Inc.; and Liggett & Myers, Inc.

The non-moving defendants are: B.A.T Indus., Tobacco Institute, Inc., Quaglino Tobacco and Candy Co., Inc., and J&R Vending Services, Inc.

The defendants that have been voluntarily dismissed, pursuant to Super. Ct. Civ. R. 41(a)(1)(II), are: Lorillard Tobacco Co., Lorillard, Inc., and Loews Corp.

[2] Super. Ct. Civ. R. 12(b)(6).

[3] Plaintiffs' Response to the Motion to Dismiss at 3.

Brazil claims breach of public health obligations, strict liability, and unjust enrichment under Brazilian civil law.[5] Also, both Foreign Governments appear to assert negligence, breach of voluntary undertaking, unjust enrichment, fraud, and civil conspiracy under Delaware law.

The issue in the pending motion to dismiss is whether the Foreign Governments have sufficiently pled, as a matter of law, that the particular allegations concerning Moving Defendants' manufacture and distribution of tobacco products were potentially a proximate cause of the Foreign Governments' economic injuries. The Court further finds that Delaware law will apply to the claims made by the Foreign Governments. Accepting, on this motion to dismiss, the Foreign Governments' facts as true, this Court concludes that the Foreign Governments cannot, as a matter of law, establish proximate causation of their injury. Therefore, Moving Defendants' Motion to Dismiss is granted.

II. FACTS AND PROCEDURAL BACKGROUND

The relevant facts of this case are excerpted from the Foreign Governments' complaint and, for the purposes of this motion, accepted as

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[4] *Id.* at 15-17.

[5] *Id*. at 17, 18. No party has suggested that the potentially applicable law of the State of São Paulo, Brazil, is different than Brazilian law generally. The Court thus understands the pertinent laws of the State of São Paulo, Brazil to be the same as the laws of Brazil.

true.[6] Moving Defendants are the primary manufacturers, distributors, and marketers of tobacco products in Panama and the State of São Paulo, Brazil.[7] Human consumption of tobacco causes cardiovascular disease, lung and other cancers, emphysema, complications to pregnancy, low birth weight in newborn children of smoking mothers, and many other health problems regardless of the manner or method of consumption. The World Health Organization, the United States Surgeon General's Office, the Delaware Department of Health and Social Services, the American Medical Association, and numerous other governmental, medical, and public health entities recognize that tobacco is both harmful to the user's health, harmful to non-users breathing second-hand smoke, and addictive. The Foreign Governments fund nonprofit health care systems that are responsible for providing health care to their citizens. Consequently, the Foreign Governments pay for the medical care of their citizens who have acquired illnesses resulting from their tobacco consumption. Treatment for these illnesses can take many years and is very costly.

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[6] *Plant v. Catalytic Construction Co.*, 287 A.2d 682, 686 (Del. Super. 1972) *aff'd* 297 A.2d 37 (Del. 1972) (stating that for 12(b)(6) motions, the plaintiff's facts are accepted as true).

[7] For purposes of this litigation the specific tobacco products manufactured, distributed, sold and marketed by Moving Defendants are indistinguishable.

For many years, the complaint alleges, Moving Defendants worked in collusion with each other in order to conceal accurate medical evidence, which proved that tobacco is harmful to a user's health and can be potentially fatal. At the same time, the Foreign Governments assert, Moving Defendants intentionally misled consumers about the true nature of the health consequences to tobacco.[8] Allegedly, Moving Defendants had the ability to manufacture and distribute safer cigarettes, but chose not to, for the sake of preserving stability within the industry.[9] Also, the Foreign Governments allege that Moving Defendants intentionally manipulated the quantity and quality of nicotine in their products in order to maximize its addictive properties, making it difficult for their citizens to quit using

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[8] The Foreign Governments rely on the following documents that were not attached to the complaint: A 1953 business strategy agreed to by at least two Defendants, Phillip Morris and Brown & Williamson, which stated, among other things, that tobacco companies would deny knowledge that smoking was dangerous and suppress any efforts to develop safer or healthier cigarettes, Plaintiffs' Complaint ¶ 64; a report by Arthur D. Little, Inc., that was concealed by Defendant Liggett, duplicated Dr. Wynder's 1953 study, and produced scientifically accurate results proving that cigarette smoking causes cancer, Plaintiffs' Complaint ¶ 35; a 1963 statement by Addison Yeaman, then general counsel of Defendant Brown & Williamson, who wrote that smoking cigarettes "cause, or predispose, lung cancer." Plaintiffs' Complaint ¶ 78. The Foreign Governments contrast that quote with 1994 Congressional testimony by tobacco executives who testified that they did not believe that there was conclusive scientific evidence that smoking was harmful to a user's health. Plaintiffs' Complaint ¶ 68.

[9] In 1968 Liggett began the 'XA' project, which neutralized cigarette tar, but the project was abandoned pursuant to a 1954 industry-wide agreement. Plaintiffs' Complaint ¶ 82.

tobacco.[10] The Foreign Governments also assert that Moving Defendants intentionally misled the public by denying the addictive nature of their products.[11]

This litigation apparently began in 1998 in the Civil District Court for the Parish of Orleans, State of Louisiana.[12] The Louisiana court dismissed the case based upon forum non conveniens principles. However, prior to that dismissal, the parties stipulated to venue in the State of Delaware. The Foreign Governments then filed their complaint against Moving Defendants in this Court in July 2005. The instant motion to dismiss soon followed.

In opposition to Moving Defendants' motion to dismiss, the Foreign Governments submitted two affidavits to the Court. One affiant was Camillo Alleyne Marshall, the acting Minister of Health in the Republic of Panama, and the other affiant was Luiz Roberto Barradas Barata, the acting

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[10] Plaintiffs' Complaint ¶ 43-59.

[11] Foreign Governments cite, inter alia, two statements to support this claim. First, a 1963 statement made by Addison Yeaman, then general counsel of Defendant Brown & Williamson, "[w]e are, then, in the business of selling nicotine, an addictive drug." Plaintiffs' Complaint ¶ 41. Second, statements made before Congress in 1994 by the then CEO of Defendant Brown & Williamson that nicotine was not addictive. Plaintiffs' Complaint ¶ 68. Taken together, the Foreign Governments claim, these statements show that the Defendants gave misleading statements or intentionally lied and misled the public about the real addictive qualities of their tobacco products.

[12] Defendants Reynolds American, Inc., Phillip Morris USA, Inc., Altria Group, Inc., and BATUS Retail Services, Inc. did not exist at the time of the initial filing in 1998 and have been subsequently added. Plaintiffs' Complaint ¶ 1.

Secretary of Public Care of the State of São Paulo. Neither of the Foreign Governments' purported experts on Panamanian or Brazilian law are lawyers or law professors. However, both affiants stated, inter alia, that under Panamanian and Brazilian law, the Foreign Governments have respectively stated valid causes of action.

In response, and in support of their motion to dismiss, Moving Defendants submitted two affidavits to the Court seeking to establish the substance of Panamanian and Brazilian law as that law applies in support of their motion. One affiant was Narciso Jose Arellano Moreno, the Dean of Universidad Santa Maria La Antiqu, a Panamanian law school. The other affiant was Luis Roberto Barroso, a law professor at the State University of Rio de Janeiro. Both affiants stated, inter alia, that under Panamanian and Brazilian law, the Foreign Governments have not stated valid causes of action.

III. STANDARD OF REVIEW

When deciding a motion to dismiss, "all factual allegations of the complaint are accepted as true."[13] A complaint will not be dismissed under Superior Court Civil Rule 12(b)(6) "unless it appears to a certainty that

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[13] *Plant*, 287 A.2d at 686.

under no set of facts which could be proved to support the claim asserted would the plaintiff be entitled to relief."[14] Therefore, the Court must determine "whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint."[15]

IV. CONTENTIONS OF THE PARTIES

A. Moving Defendants' Contentions

The gravamen of Moving Defendants' argument is that the Foreign Governments' claims are too "remote" and indirect to provide any legal basis to justify recovery. Moving Defendants advise the Court that:

> [The Foreign Governments] do not dispute that thirty-four identical suits by other foreign governments have been dismissed, and that all twenty appellate courts that have considered such claims by foreign governments, hospitals, insurers, union health and welfare funds, and even United States' states have ruled that the claims are barred because the alleged losses are too remote and indirect.[16]

Moving Defendants claim that in this lawsuit, the Foreign Governments are acting as nothing more than third party payors of medical expenses and should seek subrogation claims on behalf of actual citizens. Since, however, the Foreign Governments are not seeking subrogation

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[14] *Id.*

[15] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

[16] Defendant's Reply Memorandum at 1.

claims, Moving Defendants argue that the Foreign Governments' claims should be dismissed pursuant to the common law doctrine of proximate cause. Moving Defendants argue that the Foreign Governments have failed to establish, as a matter or law, that their actions, even if true, could be the proximate cause of the Foreign Governments' injury. Further, Moving Defendants argue that any potential damages arising from the Foreign Governments' claims would be so speculative that the Court could not accurately calculate them, apportion the damages between the plaintiffs, nor prevent the possibility of duplicative recovery. Moving Defendants also assert that the "Master Settlement Agreement" the tobacco companies entered into with forty six United States' states and most United States territories, is not evidence of liability in this litigation.

With respect to the choice of law issues, Moving Defendants urge the Court to reject the Foreign Governments' argument that Panamanian and Brazilian law should be applied for four reasons. Moving Defendants argue (1) the Foreign Governments have failed to meet their burden of demonstrating the content of the foreign law; (2) the Foreign Governments have not shown that a conflict of law exists; (3) when this litigation was still in Louisiana the Foreign Governments conceded in the Louisiana court that "[m]ost of the activities relating to liability occurred within the United

States"[17]; and (4) the factors of Delaware's "most significant relationship"[18] test favor the application of Delaware law where choice of law is at issue. Alternatively, the Moving Defendants assert that the "federal common law of foreign relations" should govern this action.[19]

B. Foreign Governments' contentions

The Foreign Governments assert that, but for Moving Defendants' intentional distortion and concealment of medical evidence, they would have enacted significant public health measures, thus enabling them to reduce their medical expenses by educating their citizens. The Foreign Governments allege that Moving Defendants' refusal to take remedial action, by decreasing the adverse physical effects of tobacco, caused great physical harm to their citizens, thus increasing the amount of medical care necessary to treat that harm. This allegedly increased the aggregate cost of medical care, and thus created greater economic injury. Furthermore, the Foreign Governments maintain that, but for Moving Defendants' intentional manipulation of nicotine levels, their tobacco cessation programs would be

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[17] Defendants' Reply Memorandum, Ex. F at 7 (citing Foreign Governments' Louisiana Memorandum in Opposition to Motion to Dismiss Under Forum Non Conveniens at 7).

[18] *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 44-47 (Del. 1991) (holding that the most significant relationship test will be used in determining choice of law issues).

[19] Defendants' Memorandum in Support of Motion to Dismiss at 6, n.3.

more successful, reducing their number of tobacco users, and decreasing their medical expenses.

The Foreign Governments also argue that under Delaware's "most significant relationship" test,[20] Panamanian and Brazilian law should apply. Applying this test, the Foreign Governments argue that their claims should be analyzed under foreign law because, although the evidence of liability is in the United States, the injuries complained of occurred in Panama and the State of São Paulo, Brazil. Also, the Foreign Governments claim to have significant public policy concerns, such as improving the social, economic, and environmental damages caused by tobacco, which would require the claims to be governed by those jurisdictions' respective laws.

The Foreign Governments assert that many of the Moving Defendants entered into a "Master Settlement Agreement" with forty six United States' states, including Delaware. The Foreign Governments argue that they are making essentially the same argument against the Moving Defendants that Delaware and other states made against the tobacco companies, and if Delaware's claim was not too remote, their claims should not be too remote either. Furthermore, the Foreign Governments argue that remoteness considerations are just initial factors of the proximate cause analysis, not

[20] *Travelers*, 594 A.2d at 44-47.

necessarily a complete bar to recovery, and have "no place in a 21st century world."[21]

The Foreign Governments further argue that proximate cause is merely a judicial tool, so that the Court, where justice demands, can relax the standard. From this, the Foreign Governments deduce that because the injuries were "foreseeable" to Moving Defendants, they have made a sufficient showing to establish that Moving Defendants' actions were the proximate cause of their injury. The Foreign Governments argue further that the proximate cause test can also be relaxed because they have a quasi-sovereign interest, thus giving them *parens patriae* standing.

V. DISCUSSION

The issue in the pending motion to dismiss is whether the Foreign Governments have sufficiently pled, as a matter of law, that the particular allegations concerning Moving Defendants' manufacture and distribution of tobacco products were potentially a proximate cause of the Foreign Governments' economic injuries. In resolving this question, the Court must initially determine whether the laws of Delaware will control the substantive claims brought by the Foreign Governments, or whether the laws of Panama

[21] Plaintiff's Response to the Motion to Dismiss at 1.

and Brazil will control the claims of each respective Foreign Government. For the following reasons, the Court concludes that Delaware law will control all claims brought by the Foreign Governments, and that Moving Defendants' conduct, as a matter of Delaware law, could not have been the proximate cause of the Foreign Governments' injury.

A. Delaware law will control all claims made by the Foreign Governments because the Foreign Governments have not established that Panamanian or Brazilian law potentially applies.

The Court need not reach the substantive issues regarding the possible application of foreign law[22] because the Foreign Governments have failed to meet their threshold procedural burden in establishing the substantive applicable law of Panama and Brazil. In order for the Court to consider the application of foreign law, the party seeking the application of foreign law

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[22] The Republic of Panama asserts that, under Article 1644 of the Panamanian Civil Code, the Defendants are joint and severaly liable for negligence and breach of duty of care. Marshall Affidavit at 4. Also, the Republic of Panama argues that Article 1643(a) establishes a cause of unjust enrichment, which the Defendants breached when they neglected to meet their obligation to pay for the health costs of Panamanian smokers. *Id*. at 6.

The State of São Paulo, Brazil argues that, under Article 196 of the Federal Constitution of Brazil and Article 219 of the Constitution of the State of São Paulo, health is a protected right, and the Defendants violated that right. Barata Affidavit at 2. Furthermore, the State of São Paulo, Brazil asserts that under Article 186 of the Brazilian Civil Code, the Defendants have, "committed a tort since the substances contained in the cigarettes cause damages to the smokers' health and increase the State's health care costs." *Id*. at 4. They further argue that they have stated valid claims of strict liability under Article 927 of the Brazilian Civil Code and unjust enrichment under Article 884 of the Brazilian Civil Code. *Id*. at 4, 6.

has the burden of not only raising the issue that foreign law applies, but also the burden of adequately proving the substance of the foreign law. [23]

In order to apply foreign law, Superior Court Civil Rule 44.1 provides that the Court "may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Delaware Rules of Evidence."[24] Typically, the movant will submit enough "relevant material" to the Court to sufficiently establish the content of

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[23] *See* 9 James Wm. Moore et al., *Moore's Federal Practice*, § 44.1.04[1] (3d ed. 2006) (stating that "the party that wishes to rely on foreign law has the responsibility of demonstrating its content"); Jeffery F. Ghent, Annotation, *Pleading and Proof of Law of Foreign Country,* 75 A.L.R.3d 177, 2a (2004) (stating that "the courts appear to be in agreement on the general rule that the burden of proving the law of a foreign country is on the party relying on it"); Richard P. Shafer, Annotation, *Federal Constitution Limitations, Under Full Faith and Credit Clause (Art IV §1) And Fourteenth Amendment's Due Process Clause, On Forum's Application of Its Own Law to Litigation Having Multistate Aspects*, 66 L. Ed. 2d 948, § 2b (1982) ("The traditional common-law view is that foreign law is a fact that must be pleaded and proved by the party seeking its application, and this approach still applies in jurisdictions where it has not been altered by statute, court rule, or judicial law") (citing *Talbot v. Seeman*, 5 U.S. 1 (1801)); *Integral Res. (PVT) Limited v. ISTIL Group, Inc*., 155 Fed. Appx. 69, 73 (3d Cir. 2005) (quoting *Bel-Ray Co. v. Chemrite Ltd*., 181 F.3d 435, 440-41 (3d Cir. 1999) (stating that "the parties . . . generally carry both the burden of raising the issue that foreign law may apply in an action, and the burden of adequately proving foreign law to enable the court to apply it in a particular case")).

[24] Super. Ct. Civ. R. 44.1:

> "A party who intends to raise an issue concerning the law of a foreign country shall give notice in the party's pleadings or other reasonable written notice. The Court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Delaware Rules of Evidence. The Court's determination shall be treated as a ruling on a question of law."

foreign law.[25] The problem in this case is that the Foreign Governments' affiants on Panamanian and Brazilian law, Mr. Barata and Mr. Marshall, apparently have no formal legal training.

Both affiants head their respective governments' health agencies and, of course, it is inevitable that in that capacity they will gain some understanding of their countries' laws. Their governments are each a party to this action, and their governments are seeking to recover the medical expenses incurred by the very same agencies the affiants head. However, neither of these two affiants have proffered that they have an expertise in law of their jurisdictions. The affiants are not attorneys, law professors, or judges. Moving Defendants appropriately point out that when this litigation was in Louisiana, the Foreign Governments submitted affidavits from Jorge Fabrega, a law professor at the University of Panama, and Jose Jorge Tannus, a law professor at the Law School of the University of São Paulo, in their opposition to the motion to dismiss on grounds on the forum non conveniens at issue in the Louisiana court.[26]

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[25] *Kostolany v. Davis*, 1995 WL 662683, *1 (Del. Ch. 1995) (noting that issues of foreign law were fully developed by expert witnesses).

[26] Defendants Reply Memorandum at 5 n.2. The Court further notes that the Foreign Governments have been on notice since at least March 13, 2006, the date the Moving Defendants filed their Reply Memorandum, that the Moving Defendants challenge the legal sufficiency of their affiants on these grounds.

While courts have, on occasion, accepted a non-lawyer's testimony or affidavit as to the basis of foreign law,[27] the courts have "'wide latitude' in determining what evidence to take on the [foreign law] and in what form."[28] Given the far-reaching relief sought by the Foreign Governments in this case, and their emphatic assertions that Panamanian and Brazilian law should apply to their substantive claims, at the very least the Foreign Governments should have submitted affidavits from legal experts. This Court concludes that the Foreign Governments have not satisfied their threshold requirement of establishing the substance of Panamanian or Brazilian law because they have insufficiently articulated the substance of the foreign law.[29] Therefore, the Court does not reach the issue of, assuming that the substance of Panamanian and Brazilian law was properly

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[27] Ghent, supra note 23, at § 2a

> "The broad proposition that the testimony of qualified experts is admissible to prove foreign law has been expressly stated in some form in a number of cases involving, or allegedly involving, the law of a foreign country, and the courts have sometimes further recognized that a person familiar with the foreign country's law may qualify as an expert on it even though he is not a member of the bar (of that country)."

[28] *9* James Wm. Moore et al., *Moore's Federal Practice*, § 44.1.04[1] (3d ed. 2006).

[29] Ghent, supra note 23 at § 3

> "[O]ne who submits to the court foreign law which he claims is applicable should do more than merely allege conclusions or short excerpts from the allegedly pertinent statute; he should set out the substance of the alleged foreign law to such an extent that the court may judge whether it has the effect that he ascribes to it."

established, whether the foreign law would apply. For all the preceding reasons, Delaware law will control all claims made by the Foreign Governments.[30]

B. The Foreign Governments' claims fail because they cannot, as a matter of law, establish proximate cause.

1. Proximate cause considerations generally.

Delaware will generally apply the common law, except where the General Assembly has provided otherwise.[31] The General Assembly has not enacted any statute defining proximate cause; therefore, in Delaware, proximate cause is controlled by the common law. The Supreme Court of Delaware has stated "proximate cause exists if a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred."[32] Specifically, "[p]roximate cause is [the] cause that directly produces the harm."[33] "Most

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[30] While Moving Defendants argued that the "federal common law of foreign relations" should independently apply in addition to Delaware law, the Court declines to apply it because the federal common law of foreign relations and Delaware common law both appear to use the same proximate cause standard. Furthermore, other courts have declined to apply the federal common law of foreign relations in similar litigation, preferring to apply state common law. *Republic of Venez. v. Philip Morris, Inc*., 287 F.3d 192, 195 (D.C. Cir. 2002).

[31] *Wilson v. State*, 305 A.2d 312, 317 (Del. 1973) (holding that "Delaware follows the common law except when changed by statute").

[32] *Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1097 (Del. 2000).

simply stated, proximate cause is that direct cause without which the accident would not have occurred."[34] For this reason, "a plaintiff who complains of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover."[35]

Proximate cause is a judicial mechanism used to limit the liability for the consequences of an actor's actions. It is a rule of exclusion decided under considerations for social policy.[36] Nevertheless, proximate cause is a necessary rule because if courts employed only a but for, or cause in fact, analysis, the line of liability would go back so far that it would consume the courts. Two leading scholars on tort law have stated:

> [T] he consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would "set society on the edge and fill the courts with endless litigation." As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy. [37]

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[33] Delaware Superior Court Civil Pattern Jury Instruction § 21.1 (2000).

[34] *Chudnofsky v. Edwards*, 208 A.2d 516, 518 (Del. 1965).

[35] *Holmes v. Sec. Investor Prot. Corp*., 503 U.S. 258, 268-69 (U.S. 1992).

[36] *Palsgraf v. Long Island R. Co*., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) ("What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point").

With this concern in mind, the Court can extend potential liability only to those causes that directly result in the plaintiffs' harm.

2. Proximate cause considerations in tobacco litigation.

At least two federal courts have dismissed tobacco related claims similar to the claims in the case at hand by foreign governments because their claimed injuries were held too "remote" to establish proximate cause.[38] In a suit brought by the Republic of Venezuela, the court stated that "settled common-law principles establish that one who pays for the medical expenses of another[] may not bring a direct, independent action to recover those expenses from the alleged tortfeasor."[39] That court found that "the government of Venezuela does not have a direct independent cause of action against the tobacco companies to recover for smoking-related medical expenses incurred by its citizens."[40] Similarly, in litigation brought by the

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[37] Prosser & Keeton, *The Law of Torts* § 41 (5th ed. 1984) (quoting *North v. Johnson*, 59 N.W. 1012, 1012 (Minn. 1894).

[38] *Republic of Venez. v. Philip Morris Cos*., 827 So. 2d 339 (Fla. Dist. Ct. App. 2002) (finding the tobacco claims were too "remote" and indirect, and that damages were too speculative to be recovered independently of the physically injured parties); *Republic of Guat. v. Tobacco Inst., Inc*., 83 F. Supp. 2d 125 (D.D.C. 1999) (finding that the plaintiff's tobacco claims were too remote to establish proximate cause).

[39] *Republic of Venez.*, 827 So. 2d at 341.

[40] *Id.*

Republic of Guatemala, the court ruled that "the common law notions of proximate cause and directness of injury cannot support the claims asserted in this case because there is no 'direct relation between the injury asserted and the injurious conduct alleged.'"[41] The court ultimately concluded that "Guatemala's alleged injury is too remote to permit suit."[42]

The Foreign Governments argue that, at least on one occasion, a health insurance company's claims survived tobacco defendants' motion to dismiss at the trial court level.[43] However, Moving Defendants have cited numerous cases to this Court showing that on at least eighteen previous occasions, states of the United States, hospitals, insurance companies, ERISA health plans and a Native American tribe brought claims, similar to the Foreign Governments' claim, against the tobacco companies, but the cases were all eventually dismissed because, despite possible foreseeable injuries, the plaintiffs were held not to have been able, as a matter of law, to

[41] *Republic of Guat.*, 83 F. Supp. 2d at 130 (quoting *Holmes*, 503 U.S. at 268).

[42] *Id.* at 133.

[43] Plaintiffs' Response to the Motion to Dismiss at 34 (quoting *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 36 F. Supp. 2d 560, 579 (D.N.Y. 1999) (finding "[t]he analysis of proximate cause is driven by considerations of policy, fairness, and practicability, not a blind adherence to ancient rigid legal classifications and abstractions"). This Court notes that this decision was later vacated and eventually every one of Blue Cross' claims were dismissed.

establish the proximate causation of their injuries.[44] The Foreign Governments' assertion that the tobacco companies' "Master Settlement Agreement" with forty six states, including Delaware, somehow imposes

[44] *Perry v. Am. Tobacco Co*., 324 F.3d 845 (6th Cir. 2003) (finding no proximate causation of injury); *Al-Coushatta Tribe of Tex. v. Am. Tobacco Co*., 46 Fed. Appx. 225 (5th Cir. 2002), *cert. denied*, 537 U.S. 1159 (2003) (decision without published opinion); *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc*., 241 F.3d 696 (9th Cir. 2001), *cert. denied*, 534 U.S. 891 (2001) (finding no proximate cause and that there was a potential for duplicative recovery); *Regence Blueshield v. Philip Morris, Inc*., 5 Fed. Appx. 651 (9th Cir. 2001) (finding claimed damages not proximately caused by defendant's actions); *UFCW v. Philip Morris, Inc*., 223 F.3d 1271 (11th Cir. 2000) (finding alleged conspiracy was not the proximate cause of plaintiff's increased medical expenses); *Lyons v. Philip Morris, Inc*., 225 F.3d 909 (8th Cir. 2000) (finding that plaintiffs had no standing under RICO and federal anti-trust laws); *Allegheny Gen. Hosp. v. Philip Morris, Inc*., 228 F.3d 429 (3d Cir. 2000) (finding no proximate cause because injuries too remote from alleged misconduct); *Texas Carpenters Health Benefit Fund v. Philip Morris, Inc*., 199 F.3d 788 (5th Cir. 2000) (loss of plaintiffs was too remote to justify recovery); *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.,* 185 F.3d 957 (9th Cir. 1999), *cert. denied*, 528 U.S. 1075 (2000) (finding injury too remote for recovery, possibility of duplicative recovery, and complex apportionment of damages warranted dismissal); *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc.,* 196 F.3d 818 (7th Cir. 1999) (finding that without subrogation of smokers' rights, plaintiffs' injuries were too remote to justify recovery); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000) (finding plaintiffs failed to plead fraudulent and conspiratorial conduct that proximately caused their injuries); *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc*., 191 F.3d 229 (2d Cir. 1999), *cert. denied*, 528 U.S. 1080 (2000) (finding plaintiffs' injuries were wholly derivative of harm to a third party and too remote to recover damages); *Owens Corning v. R.J. Reynolds Tobacco Co*., 868 So. 2d 331 (Miss. 2004) (finding that plaintiff's claims failed to allege direct injury); *State ex rel. Miller v. Philip Morris, Inc*., 577 N.W.2d 401 (Iowa 1998) (finding the claims too remote because the State made no subrogation claim and had no common law right of indemnity); *State v. Philip Morris, Inc.,* 551 N.W.2d 490 (Minn. 1996) (finding plaintiff had no claim in tort because the injury was too remote from the cause of the harm); *County of Cook v. Philip Morris, Inc*., 353 Ill. App. 3d 55 (Ill. App. Ct. 2004), *appeal denied*, 829 N.E.2d 786 (Ill. 2005) (finding plaintiff could not sufficiently allege proximate cause); *A.O. Fox Mem'l Hosp. v. Am. Tobacco Co*., 754 N.Y.S.2d 368 (N.Y. App. Div. 2003), *appeal denied*, 793 N.E.2d 410 (N.Y. 2003) (finding plaintiffs' causes of action were too derivative to recover); *Steamfitters Local Union No. 614 Health & Welfare Fund v. Philip Morris, Inc*., 2000 Tenn. App. LEXIS 644 (Tenn. Ct. App. 2000) (finding plaintiff's injuries too indirect as a matter of law to recover).

potential liability on Moving Defendants is erroneous because prior settlements do not generally implicate future liability.[45] The Foreign Governments have come to Delaware asking this Court to grant relief where numerous other state and federal courts analyzing the same issues have not. In essence, and in the words of a Florida state court rejecting Venezuela's claims in that court, the Foreign Governments have asked Delaware to become a potential "courthouse for the world."[46]

The Foreign Governments do not seek damages on behalf of individual smokers, but seek compensation for the economic losses they incurred paying for the smokers' medical expenses for many decades. Therefore, the Foreign Governments are essentially making a claim as a health care provider. However, "[t]he usual common law rule is that a health-care provider has no direct cause of action in tort against one who injures the provider's beneficiary, imposing increased costs upon the

[45] *Litman v. Prudential-Bache Properties*, 1994 Del. Ch. LEXIS 3, *20 (finding that a prior settlement agreement by the Defendant with another party was not evidence of misconduct in the case at hand).

[46] *Republic of Venez.*, 827 So. 2d at 341 (stating that it is "inappropriate for Venezuela to attempt to turn Miami-Dade County into the 'courthouse for the world,' especially with regard to claims that have been uniformly rejected by other courts throughout the country) (citing *Kinney Sys., Inc. v. Continental Ins. Co*., 674 So. 2d 86 (Fla. 1996)).

provider."[47] The Foreign Governments' argument that this rule should not apply here because they operate a nonprofit healthcare system is unpersuasive. No Delaware statute or case law exempts non-profit entities from establishing proximate cause in tort claims. Moreover, the Foreign Governments cite no Delaware case where a health-care provider, without subrogation or its equivalent, was allowed to proceed with a negligence claim against a third party who injured the provider's beneficiary.

Acting as a healthcare provider, the Foreign Governments cannot establish proximate causation of their injury because their injury is only related to Moving Defendants via the actions or inactions of their citizens. Standing between Moving Defendants' alleged tortious conduct and the Foreign Governments' injury are their citizen smokers. The smokers break the chain of causation and disrupt the "natural and continuous sequence"[48] between the act and the injury.[49] "When an injury is indirect, remote, and

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[47] *UFCW v. Philip Morris, Inc*., 223 F.3d 1271, 1274 (11th Cir. 2000) (citing *Anthony v. Slaid,* 52 Mass. 290, 290-91 (1846) (finding that the plaintiff, who had contracted to support indigent citizens, could not recover from the defendant, whose wife assaulted a town pauper, because the damage was "too remote and indirect" from the conduct)).

[48] *Wilmington Country Club,* 747 A.2d at 1097.

[49] *See Allegheny Gen. Hosp. v. Philip Morris, Inc*., 228 F.3d 429, 444 (3d Cir. 2000) (quoting *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc*., 171 F.3d 912, 933 (3d Cir. 1999) (stating "[I]f the Hospitals are allowed to sue, the court would need to determine the extent to which their increased costs for smoking-related illnesses resulted from the tobacco companies' conspiracy to suppress health and safety information, as opposed to smokers' other health problems, smokers' independent (i.e.,

many steps away from alleged cause, it is unadvisable to allow a case to proceed."[50] The Foreign Governments correctly point out that remoteness is not the only factor in analyzing proximate cause; however, the influence of the other factors are not enough, by themselves, to potentially constitute proximate cause in this action.

The United States Supreme Court has ruled that direct injury, as opposed to remoteness, "is not the sole requirement of [proximate] causation, it has been one of its central elements."[51] Courts have concluded that "to plead a direct injury is a key element for establishing proximate causation, independent of and in addition to other traditional elements of proximate cause."[52] The Foreign Governments' argument that the Court should find proximate cause because their injury was foreseeable is not persuasive. In order for the Court to find that Moving Defendants' actions

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separate from the fraud and conspiracy) decisions to smoke**,** smokers' ignoring of health and safety warnings, etc. . . . This causation chain is much too speculative and attenuated to support a RICO claim");*Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris*, *Inc*., 185 F.3d 957, 963 (9th Cir. 1999) (finding "[A]ll of plaintiffs' claims rely on alleged injury to smokers - without any injury to smokers, plaintiffs would not have incurred the additional expenses in paying for the medical expenses of those smokers. Thus, there is no "direct" link between the alleged misconduct of defendants and the alleged damage to plaintiffs").

[50]*Allegheny Gen. Hosp. v. Philip Morris, Inc*., at 445 (citing *Palsgraf*., 162 N.E. at 103).

[51] *Holmes*, 503 U.S. at 268.

[52] *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc*., 191 F.3d 229, 235 (2d Cir. 1999)

were the proximate cause of the Foreign Governments injury, the Foreign Governments must show directness of their injury. This is because "the other traditional rules requiring that defendant's acts were a substantial cause of the injury, and that plaintiff's injury was reasonably foreseeable, are additional elements, not substitutes for alleging (and ultimately, showing) a direct injury."[53]

Moving Defendants contend that if the Foreign Governments were allowed to proceed, any potential damages would be highly speculative, would be difficult to apportion, and would result in a probable risk of duplicative recovery.[54] The United States Supreme Court stated that each of these concerns can be used to determine the directness or remoteness of an injury while addressing proximate cause in the context of anti-trust litigation.[55] The Foreign Governments argue that *Holmes* is not controlling here because that case involved an antitrust RICO action and that decision was not intended to "set forth an all-purpose test for determining

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[53] *Id*. at 235-36.

[54] Defendant's Memorandum in Support of Motion to Dismiss at 10-11.

[55] *Holmes*, 503 U.S. at 269-70 (finding that in a RICO action, directness of an injury in an alleged violation of the Clayton Act is analogous to proximate cause considerations of directness, and will be analyzed under a three part test: (1) the difficultly in assessing the plaintiff's damages; (2) complications of apportioning damages; and (3) the ability of injured victims to act as private attorneys general).

'remoteness' in all instances."[56] While the *Holmes* Court noted that it did not intend to announce the "blackletter rule that will dictate the result in every case," the Court specifically stated that "our use of the term 'direct' should merely be understood as a reference to the proximate-cause enquiry."[57] Although the three complications involved with damages can be used to establish directness or remoteness of an injury, this Court finds that the Foreign Governments have failed to establish proximate cause on other grounds. Therefore, any further discussion of damages is omitted because establishing proximate cause is a condition precedent to recovering damages.[58] Proximate cause is an essential element to the Foreign Governments' additional and related claims of negligence, fraud, and breach of voluntary undertaking,[59] and as such, each other related claim fails.

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[56] Plaintiffs' Reply to Motion to Dismiss at 39.

[57] *Holmes*, 503 U.S. at 274 n.20.

[58] *Id.* at 286-87 (Scalia, J., concurring) (finding "it has always been the practice of common-law courts (and probably of all courts, under all legal systems) to require as a condition of recovery, unless the legislature specifically prescribes otherwise, that the injury have been proximately caused by the offending conduct").

[59] *See, e.g.*, *Allegheny Gen. Hosp.*, 228 A.2d at 445-46 (finding that the plaintiffs' fraud, negligence, and special duty claims all fail because proximate cause could not be established); *Laborers Local 17 Health & Benefit Fund*, 191 F.3d at 242 (finding that the plaintiffs' inability to establish proximate cause prevented common law fraud and special duty claims from proceeding beyond the pleading stage); *Oregon Laborers-Employers Health & Welfare Trust Fund*, 185 F.3d at 968 (finding that an insufficient showing of proximate cause barred the plaintiffs from bringing negligence and fraud claims).

3. The Foreign Governments' other related non-tort based claims also fail for insufficiently establishing proximate cause.

The Foreign Governments' unjust enrichment claim fails for an insufficient showing of proximate cause.[60] While proximate cause is traditionally not an element of unjust enrichment, "in the tort setting, an unjust enrichment claim is essentially another way of stating a traditional tort claim (i.e., if defendant is permitted to keep the benefit of his tortious conduct, he will be unjustly enriched)."[61] Therefore, once it has been determined that the tort claims have properly been dismissed, there is no reason to allow the unjust enrichment claim to proceed.[62]

The Foreign Governments' civil conspiracy claim also fails because the prima facie civil conspiracy case is predicated upon an underlying tort supporting the conspiracy.[63] In other words, "[a] claim for civil conspiracy

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[60] *Perry v. Am. Tobacco Co*., 324 F.3d 845, 851 (6th Cir. 2003) (finding that unjust enrichment claims brought by the plaintiffs in a class action against the tobacco companies, "should be dismissed on remoteness grounds."); *see also SEIU Health & Welfare Fund v. Philip Morris Inc*., 249 F.3d 1068, 1076 n.6 (D.C. Cir. 2001) (stating that plaintiffs could not proceed with common law claims, including unjust enrichment, once the Court found that they had failed to establish proximate causation of their injury).

[61] *Steamfitters Local Union No. 420 Welfare Fund*, 171 F.3d at 936.

[62] *Allegheny Gen. Hosp.*, 228 A.2d at 446-47 (quoting *Steamfitters Local Union No. 420 Welfare Fund*, 171 F.3d at 936-37).

[63] *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 150 (Del. 1987) (stating that there must be an independent tort supporting the conspiracy).

can proceed only when there is a cause of action for an underlying act."[64] The Foreign Governments have failed to successfully plead any tort supporting their civil conspiracy claim; therefore, that claim must be dismissed.

4. The Foreign Governments cannot assert *parens patriae* standing.

If the Foreign Governments, acting as a third party payor, want to recover from a party who injures their beneficiaries, the General Assembly has provided an avenue for recovery through subrogation.[65] Subrogation is statutorily defined as "the doctrine of law which enables insurers to recover payments from any third party who is responsible for an injury."[66] However, instead of making a subrogation claim, the Foreign Governments argue that they have a quasi-sovereign interest and should be granted *parens patriae* standing[67] to recover on behalf of their citizens.[68]

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[64] *Allegheny Gen. Hosp.,* 228 F.3d at 446 (quoting *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 884 F. Supp. 181, 184 (E.D.Pa. 1995)).

[65] This Court does recognize the practical difficulties of any foreign government seeking to bring individual subrogation claims on behalf of individual citizens in the courts of any state.

[66] Del. Code. Ann. tit. 31, § 522(a) (2005).

[67] Guatemala argued in the *Guatemala* case that it had a quasi-sovereign interest and should be granted *parens patriae* standing. The *Guatemala* Court found that "[e]ven if the Court were to find that Guatemala had asserted some cognizable quasi-sovereign interest, the fact that there are individual Guatemalan smokers capable of bringing suit to

Parens patriae is a "doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen."[69] However, "*parens patriae* standing should not be recognized in a foreign nation (by contrast with a State in this country) unless there is a clear indication by the [United States] Supreme Court or one of the two coordinate branches of government to grant such standing."[70] Furthermore, a government seeking *parens patriae* standing must still assert all the elements of a prima facie tort case in the same manner as the citizens on whose behalf they are acting.[71]

Instead of citing an "indication" from any one of the three co-equal branches of government that *parens patiae* should be recognized in tobacco cases brought by foreign nations, or instead of sufficiently pleading directness of their injury, the Foreign Governments make a policy argument. The Foreign Governments argue, apparently in response to *Guatemala*, that "developing" countries should be allowed to recover in a *parens patriae* standing because their citizens are too impoverished to seek redress by

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redress these injuries in the courts of Guatemala would prevent Guatemala from bringing suit as *parens patriae*." *Republic of Guat*., 83 F. Supp. 2d at 134.

[68] Foreign Governments' Response to Motion to Dismiss at 37.

[69] BLACK'S LAW DICTIONARY 1137 (7th ed. 1999).

[70] *SEIU Health & Welfare Fund*, 249 F.3d at 1073.

[71] *Id.* (explaining that *parens patriae* is merely a status for procedural standing but does not relieve the obligation of showing proximate cause).

themselves in their local jurisdictions.[72] Along those lines, the Foreign Governments asserted at oral argument that "developing countries," such as Panama and Brazil, they asserted, should be allowed to proceed with *parens patriae* standing because there would be little risk of duplicative recovery from Moving Defendants. The Foreign Governments conceded that the risk of duplicative recovery would be greater in claims possibly brought by more "developed countries," which might prevent such nations from successfully seeking *parens patriae* standing, because those citizens have greater access to their courts. If this Court accepted the Foreign Governments' argument, that *parens patriae* standing might be applicable in Delaware Superior Court to some countries in this world, but not to others (because of considerations of whether or not a particular country seeking *parens patriae* standing was sufficiently "developed" or not) that would create a near-impossible burden for this Court to determine the availability of *parens patriae* standing on a country-by-country basis.

The Court finds the logic employed in the *Guatemala* and *Venezuela* and in the other cases persuasive. Both cases involved foreign governments seeking relief for medical costs incurred paying for their citizens' tobacco

[72] Plaintiff's Response to Motion to Dismiss at 1 (citing Brian S. Appel, *The Developing World Takes on the Tobacco Industry: An Analysis of Recent Litigation and its Future Implications*, 16 Am. U. Int'l L. Rev. 809, 841-42 (2001) (arguing that the doctrine of parens patriae would enable the "poorest of developing nations" to obtain standing against tobacco companies while preventing duplicative recovery).

related health problems. Those courts found that a foreign government's claims could not proceed beyond the pleadings because the injuries were too remote and indirect from the alleged tortious conduct to constitute proximate cause. Similarly, this Court finds that the Foreign Governments have failed to set forth a claim that could result in a finding of proximate cause.

VI. Conclusion

This opinion dismisses all claims against all defendants, for the substantive reasons set forth in this opinion, even though not all defendants joined in the Motion to Dismiss. For the foregoing reasons, Moving Defendants' motion to dismiss the Foreign Governments' complaint for failure to state a claim upon which relief can be granted is **GRANTED**.

IT IS SO ORDERED.

Richard R. Cooch

oc: Prothonotary