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28UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

NIKKI POOSHS,

Plaintiff,

No. C 04-1221 PJH

v.

**FIFTH FINAL PRETRIAL ORDER**

PHILLIP MORRIS USA, INC., et al.,

Defendants.

Pursuant to Rule 16(e) of the Federal Rules of Civil Procedure, this fifth final pretrial order is hereby entered and shall control the course of the trial, along with the December 5, 2012 preliminary final pretrial order, the February 13, 2013 second final pretrial order, the July 19, 2013 third final pretrial order, and the February 20, 2014 fourth final pretrial order, as revised on April 2, 2014, unless modified by a subsequent order.

## 1. Amended fourth final pretrial order

Concurrently with the filing of this fifth final pretrial order, the court files an amended fourth final pretrial order to correct the typographical errors in the February 20, 2014 fourth final pretrial order (which shall be designated as stricken on the docket), pertaining to CACI 430 and 435.

## 2. Remaining disputed jury instructions

## a. Elements of concealment

As stated at the March 27, 2014 pretrial conference, the court will give the 2014 versions of CACI 1907 and CACI 1908 (which incorporates combines the 2013 versions of CACI 1905 and 1908).

1 The parties will submit a proposed revised instruction as to CACI 1901  
2 (Concealment), subject to plaintiff's submission of an offer of proof and the court's ruling on  
3 the evidence, as directed at the March 27, 2014 pretrial conference. The proposed  
4 instruction must be filed within 30 days of the court's ruling on the offer of proof.

5 b. Express preemption

6 The court will give the following instruction on express preemption:

7 Pursuant to the Surgeon General's directive, warnings appeared on all  
8 cigarette packages starting July 1, 1969, advising the public of the health  
9 consequences of smoking. You therefore may not base any verdict you  
10 reach on any claim that after July 1, 1969, the defendant should have  
11 provided any additional or more clearly stated warnings on its packages or in  
12 its advertising or promotional materials.

13 c. Punitive damages – second phase

14 The court will give CACI 3949 unmodified, including the last sentence.

15 3. Plaintiff's offer of proof

16 No later than May 27, 2014, plaintiff shall file an offer of proof as to the specific  
17 evidence supporting the post-1969 concealment claim.

18 4. Joint summary of rulings

19 As directed at the hearing, the parties shall meet and confer, and shall submit, no  
20 later than May 27, 2014, a joint list of each ruling in the orders at Docs. 229, 288, 289, 310,  
21 319, 320, 337, and 364, which are potentially relevant to admissibility of evidence at trial.

22 If the parties are unable to agree on a joint list, they shall submit separate versions.  
23 The list or lists shall be submitted to the court on a disk (accompanied by a paper  
24 chambers copy).

25 5. Categorical objections

26 As directed at the hearing, no later than May 27, 2014, the parties shall submit  
27 categorical objections – with representative examples – to the witness lists, exhibit lists,  
28 written deposition designations, and written discovery designations. The court will advise  
the parties thereafter whether it will hold a half-day hearing on the parties' categorical  
objections, as plaintiff has requested.

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6. Final jury instructions

This order resolves all remaining disputes regarding jury instructions, with the exception of those pertaining to the concealment instruction. No later than 30 days after the court's ruling on the offer of proof regarding post-1969 concealment, the parties shall file, along with a revised concealment instruction, a final set of jury instructions, numbered sequentially, and omitting references to authorities or to the party submitting the instruction.

7. Verdict form

The parties shall jointly prepare a verdict form, to be submitted with the final set of jury instructions. As discussed at the March 27, 2014 pretrial conference, the verdict form shall include an explanatory instruction regarding the two types of failure to warn – strict liability failure to warn, and negligent failure to warn.

8. Further final pretrial conference

Before the trial date is set, the court will convene a further final pretrial conference.

**IT IS SO ORDERED.**

Dated: April 2, 2014



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PHYLLIS J. HAMILTON  
United States District Judge