

[Oral Argument Not Yet Scheduled]

Nos. 06-5267, 06-5268, 06-5269, 06-5270
06-5271, 06-5272, 06-5332, 06-5367, 07-5102, 07-5103
(Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

TOBACCO-FREE KIDS ACTION FUND, *et al.*,
Intervenors,

v.

PHILIP MORRIS USA INC., (f/k/a Philip Morris, Inc.), *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia

**AMICUS CURIAE BRIEF OF THE TOBACCO
CONTROL LEGAL CONSORTIUM IN SUPPORT OF
PLAINTIFF-APPELLEE URGING AFFIRMANCE**

David C. Vladeck
Georgetown University Law Center
Institute for Public Interest Representation
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9540

November 26, 2007

Counsel for Amicus Curiae Tobacco
Control Legal Consortium

**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

(A) Parties and Amici:

The following parties and amici appeared before the district court:

Parties: Plaintiff United States of America; defendants Philip Morris USA Inc., Altria Group, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp., Lorillard Tobacco Company, British American Tobacco (Investments) Ltd., The Council for Tobacco Research-U.S.A., Inc., The Tobacco Institute, Inc., and Liggett Group, Inc.

Intervenors: Tobacco-Free Kids Action Fund, American Cancer Society, American Heart Association, American Lung Association, Americans for Nonsmokers' Rights, National African American Tobacco Prevention Network, Elan Corporation, PLC, Glaxosmithkline Consumer Healthcare, L.P., Impax Laboratories, Inc., Pfizer, Inc., Pharmacia Corporation, and Smithkline Beecham Corp.

Amici: Citizens' Commission to Protect the Truth, Regents of the University of California, Tobacco Control Legal Consortium, Essential Action, City and County of San Francisco, Asian-Pacific Islander American Health Forum, San Francisco African American Tobacco Free Project, Black Network in

Children’s Emotional Health, Arkansas, Connecticut, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Tennessee, Vermont, Washington, Wisconsin, Wyoming, and the District of Columbia.

The following parties and amici have appeared or are seeking to appear before this Court:

Parties: Appellants/cross appellees Philip Morris USA Inc., Altria Group, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Holdings, Inc., Lorillard Tobacco Company, British American Tobacco (Investments) Ltd., The Council for Tobacco Research-U.S.A., Inc., and The Tobacco Institute, Inc.; appellee/cross appellant United States of America.

Intervenors: Tobacco-Free Kids Action Fund, American Cancer Society, American Heart Association, American Lung Association, Americans for Nonsmokers’ Rights, and National African American Tobacco Prevention Network.

Amici: Chamber of Commerce of the United States of America, Washington Legal Foundation, National Association of Manufacturers, and National Association of Convenience Stores.

Movants Seeking to Appear as Amici: Tobacco Control Legal

Consortium, Public Citizen, American College of Preventive Medicine, American Public Health Association, Association of Maternal and Child Health Programs, National Association of Local Boards of Health, and Oncology Nursing Society.

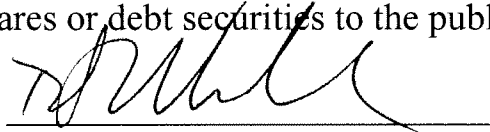
(B) Rulings Under Review: The rulings under review are listed in the Brief for Defendants-Appellants.

(C) Related Cases: References to related cases appear in the Brief for Defendants-Appellants.

(D) Statutes and Regulations: Relevant statutes and regulations are contained in the Brief for Defendants-Appellants.

DISCLOSURE STATEMENT

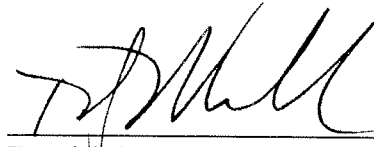
Amicus Curiae Tobacco Control Legal Consortium is a program of the Tobacco Law Center, which is a non-profit organization that has no parents, subsidiaries, or affiliates that have issued shares or debt securities to the public.

A handwritten signature in black ink, appearing to read "D. Vladeck", is written over a horizontal line.

David C. Vladeck

CERTIFICATE OF COUNSEL

In accordance with Circuit Rule 29(d), undersigned counsel certifies that it would not have been practicable for amicus Tobacco Control Legal Consortium to join any other amicus brief filed in support of the United States in this case. The brief on behalf of this amicus addresses only one issue — defendants’ argument that the First Amendment insulates them from the findings of fraud and remedies ordered by the district court. Amicus believes that no other amicus brief addresses this topic.



David C. Vladeck

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES	i
CORPORATE DISCLOSURE STATEMENT	iv
CERTIFICATE OF COUNSEL	v
TABLE OF AUTHORITIES	vii
GLOSSARY	ix
INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT	1
BACKGROUND	5
ARGUMENT: THE DISTRICT COURT’S FINDINGS OF FRAUD AND THE REMEDIES ORDER TO AVERT ONGOING AND FUTURE INJURY DO NOT VIOLATE THE FIRST AMENDMENT	9
I. The First Amendment Does Not Protect False, Misleading or Deceptive Commercial Speech	10
II. The Remedies Imposed by the District Court Advance, Not Subvert, First Amendment Interests	17
A. The District Court’s Injunctive Remedies are Not Unduly Burdensome or Vague	18
B. The Corrective Communications Ordered by the District Court are Constitutional	21
III. The <i>Noerr-Pennington</i> Doctrine Does Not Immunize Fraud	27
CONCLUSION	31
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases:

<i>*Allied Tube & Conduit Corp. v. Indian Head, Inc.</i> , 486 U.S. 492 (1988)	4, 28, 29
<i>Bolger v. Youngs Drug Products Corp.</i> , 463 U.S. 60 (1983)	15
<i>Bristol-Myers Co. v. FTC</i> , 738 F.2d 554 (2d Cir. 1984)	4
<i>Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.</i> , 365 U.S. 127 (1961)	28
<i>FDA v. Brown & Williamson</i> , 529 U.S. 120 (2000)	26
<i>*Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.</i> , 447 U.S. 557(1980)	3, 10, 15, 18, 19, 21, 26
<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568 (1942)	12
<i>Edenfield v. Fane</i> , 507 U.S. 761(1993)	12, 19
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)	12
<i>Gulf Oil Corp. v. Brock</i> , 778 F.2d 834 (1985)	21
<i>In re R.M.J.</i> , 455 U.S. 191 (1982)	12, 18
<i>Kraft, Inc. v. FTC</i> , 970 F.2d 311 (7th Cir. 1992)	4
<i>Lorillard Tobacco Co. v. Reilly</i> , 533 U.S. 525 (2001)	19, 26
<i>Mine Workers v. Pennington</i> , 381 U.S. 657 (1965)	28

* Authorities chiefly relied on are marked with an asterisk.

<i>*Novartis Corp. v. FTC</i> , 223 F.3d 783 (D.C. Cir. 2000)	4, 23
<i>N.Y. Times v. Sullivan</i> , 376 U.S. 254 (1964)	12, 14
<i>Pearson v. Shalala</i> , 164 F.3d 650 (D.C. Cir. 1999)	27
<i>Pittsburgh Press Co. v. Human Relations Comm'n</i> , 413 U.S. 376 (1973)	11
<i>Rubin v. Coors Brewing Co.</i> , 514 U.S. 476 (1995)	19
<i>Thompson Med. Co. v. FTC</i> , 791 F.2d 189 (D.C. Cir. 1986)	4
<i>Thompson v. Western States Medical Center</i> , 535 U.S. 357 (2002)	2, 11
<i>United States v. Poindexter</i> , 951 F.2d 369 (D.C. Cir. 1991)	30
<i>*Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.</i> , 425 U.S. 748 (1976)	2, 10, 12, 21
<i>Venetian Casino Resort, LLC v. NLRB</i> , 484 F.3d 601 (D.C. Cir. 2007)	29, 30
<i>*Warner-Lambert Co. v. FTC</i> , 562 F.2d 749 (D.C. Cir. 1977)	4, 22, 25
<i>Zauderer v. Office of Disciplinary Counsel</i> , 471 U.S. 626 (1985)	27
Miscellaneous:	
18 U.S.C. § 1001	5, 30
David C. Vladeck, <i>Lessons from a Story Untold: Nike v. Kasky Reconsidered</i> , 54 Case W. Res. L. Rev. 1049 (2004)	12

* Authorities chiefly relied on are marked with an asterisk.

GLOSSARY

JD Br.	Brief for Joint Defendants
RICO	Racketeer Influenced & Corrupt Organizations Act, 18 U.S.C. §§ 1961 <i>et seq.</i>
TCLC	Tobacco Control Legal Consortium

INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

This amicus curiae brief in support of the United States is submitted by the Tobacco Control Legal Consortium (“TCLC”), a national network of legal centers providing technical assistance to public officials, health professionals, and advocates in addressing legal issues related to tobacco and health, and supporting public policies that will reduce the harm caused by tobacco use in the United States. TCLC grew out of a collaboration among specialized legal resource centers serving six states and is supported by national advocacy organizations, voluntary health organizations, and others.¹ In addition, TCLC prepares legal briefs as amicus curiae in cases in which its experience and expertise may assist courts in

¹ TCLC’s coordinating office is located at the Tobacco Law Center of the William Mitchell College of Law in St. Paul, Minnesota. Other affiliated legal centers include the Technical Assistance Legal Center at the Public Health Institute of California, in Oakland, California; the Tobacco Advocacy Resource Partnership of the American Lung Association in Greenwood Village, Colorado; the Legal Resource Center for Tobacco Regulation, Litigation & Advocacy at the University of Maryland School of Law in Baltimore, Maryland; the Smoke-Free Environments Law Project at the Center for Social Gerontology in Ann Arbor, Michigan; the Tobacco Control Policy and Legal Resource Center at New Jersey GASP in Summit, New Jersey; and the Tobacco Public Policy Center at Capital University Law School in Columbus, Ohio. One of TCLC's affiliated legal centers, the Tobacco Control Resource Center, a division of the Public Health Advocacy Institute at Northeastern University School of Law in Boston, Massachusetts, does not join this motion because it is preparing a separate motion for leave to file an amicus brief with respect to this appeal.

resolving tobacco-related legal issues of national significance. TCLC has submitted amicus briefs in recent cases before the United States Supreme Court; the Supreme Courts of California, Delaware, Florida, Kentucky, Montana, South Carolina, and Washington; and the United States Court of Appeals for the Fifth Circuit. TCLC also was granted leave to submit an amicus brief to the district court in this case.

Amicus files this brief to make three points in response to defendants' First Amendment arguments that do not stand out in the government's more comprehensive treatment of the issues:

First, commercial speech warrants constitutional protection only when it enables consumers to make "intelligent and well-informed" decisions. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). False, misleading and deceptive information subverts that value. For that reason, the one thread that ties together the Supreme Court's commercial speech cases — from the Court's first ruling in *Virginia State Board of Pharmacy* to its most recent decision in *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002) — is the Court's hostility to untruthful commercial speech.

The district court's liability ruling is solidly grounded in the court's factual findings. Those findings, based mainly on defendants' own records,

overwhelmingly establish that defendants' marketing communications were false, misleading and deceptive, and therefore entitled to no constitutional protection at all. Defendants' effort to portray their speech as core speech relating to matters of public concern, and thus deserving of full-bore constitutional protection, falls of its own weight. The district court found, as a matter of fact, that defendants' statements were made as part of advertising and marketing campaigns. The Supreme Court has long held that simply because "many, if not most, products may be tied to public concerns about . . . individual health and safety" does not transform commercial speech into core speech deserving of heightened First Amendment protection. *See, e.g., Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 562-63 n.5 (1980).

Second, the remedies imposed by the district court to prevent ongoing and future injury easily pass muster under the First Amendment. The district court enjoined defendants from continuing to use false and misleading product descriptors and from continuing to make material false and misleading statements about the health risks associated with smoking. Defendants have no First Amendment right to mislead the American people, and an injunction restricting false and deceptive speech raises no First Amendment concerns. For the same reason, there is no constitutional infirmity in the district court's order requiring

defendants to disseminate corrective statements regarding the health risks that attend “light” and “low tar” cigarettes, the health risks posed by smoking and environmental tobacco smoke, and the addictiveness of smoking and nicotine. This Court has frequently approved such orders to prevent ongoing and future injury, and should do so here. *See, e.g., Novartis Corp. v. FTC*, 223 F.3d 783 (D.C. Cir. 2000); *Thompson Medical Co. v. FTC*, 791 F.2d 189 (D.C. Cir. 1986); *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977)(on rehearing); *see also Kraft, Inc. v. FTC*, 970 F.2d 311 (7th Cir. 1992); *Bristol-Myers Co. v. FTC*, 738 F.2d 554 (2d Cir. 1984).

Third, defendants’ attempt to take shelter in the *Noerr-Pennington* doctrine misses the mark for two distinct reasons. First, as the district court found, only a handful of the communications at issue were in fact directed at governmental entities, and the court ruled that those communications — and those communications alone — were protected by the doctrine. But the vast bulk of defendants’ communications, propelled by billions of advertising dollars, were aimed at consumers, not governmental entities, and, as the Supreme Court has made clear, the *Noerr-Pennington* doctrine affords those communications no protection. *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 507 (1988). Second, and equally as fundamental, *Noerr-Pennington* does not

immunize fraud; rather, it protects corporations from liability when they petition the government for redress. Nothing in *Noerr-Pennington* confers on corporations a generalized right to lie to the government, let alone insulates *fraudulent* speech from government sanction. *See, e.g.*, 18 U.S.C. § 1001.

For these reasons, the district court's order should be affirmed.

BACKGROUND

By the early 1950s, evidence began to mount linking cigarette smoking with lung cancer. In 1964, the United States Surgeon General issued his Report on Smoking and Health announcing that a scientific consensus had been reached that cigarette smoking causes disease and death. As the district court found, even before the public began to understand the link between smoking and disease, defendants “knowingly and intentionally engaged in a scheme to defraud smokers and potential smokers, for the purpose of financial gain, by making false and fraudulent statements, representations and promises” to counteract that understanding. *U.S. v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 852 (D.D.C. 2006). Defendants “coordinated their public relations, research, cigarette design and marketing efforts in order to advance their scheme to defraud.” *Id.* at 854. The district court found, as a matter of fact, that defendants deceived the American people by making false and misleading statements:

(1) Denying the Adverse Health Effects of Smoking. As the district court put it, “[f]rom at least 1953 until at least 2000, each and every one of these defendants repeatedly, consistently, vigorously — and falsely — denied the existence of any adverse health effects from smoking. Moreover, they mounted a coordinated, well-financed, sophisticated public relations campaign to attack and distort the scientific evidence demonstrating the relationship between smoking and disease, claiming that the link between the two was still an ‘open question.’” *Id.* at 208.

(2) Denying the Addictiveness of Nicotine and Smoking. The district court found that defendants “recognized, decades before the scientific community did, that nicotine is an addictive drug, that cigarette manufacturers are in the drug business, and that cigarettes are drug delivery devices.” *Id.* Defendants exploited nicotine’s addictiveness “in order to develop new products and increase sales.” *Id.* Nonetheless, defendants “have publicly denied and distorted the truth as to the addictive nature of their products for several decades.” *Id.* at 209.

(3) Denying that they Manipulated the Nicotine Content of Cigarettes. The district court found that defendants “researched, developed, and implemented many different methods and processes to control the delivery and absorption of the optimum amount of nicotine which would create and sustain smokers’ addiction.”

Id. at 383. Nonetheless, defendants “repeatedly made vigorous and impassioned public denials — before Congressional committees, in advertisements in the national print media, and on television — that neither smoking nor nicotine is addictive, and that they do not manipulate, alter, or control the amount of nicotine contained in the cigarettes they manufacture.” *Id.* The district court found “overwhelming evidence” that these denials were false. *Id.*

(4) Misrepresenting the Health Risks of “Light” and “Low Tar”

Cigarettes. Defendants have known for decades that “light” and “low tar” cigarettes are no less deadly than conventional cigarettes. *Id.* at 560. “Despite this knowledge, defendants extensively — and successfully — marketed and promoted their low tar/light cigarettes as less harmful alternatives to full-flavor cigarettes.” *Id.* Defendants did so “to further their overarching economic goal: to keep smokers smoking; to stop smokers from quitting; to encourage people, especially young people, to start smoking; and to maintain or increase corporate profits.” *Id.* at 431.

(5) Denying Marketing to Youth. Over 400,000 smokers die each year from smoking-related disease in the United States. Defendants thus need “to bring new, young, and hopefully long-lived smokers into the market in order to replace those who die (largely from tobacco-caused illnesses) or quit.” *Id.* at 691.

Defendants targeted young people, and conducted extensive research on their attitudes, preferences and habits. *Id.* at 691, 862. As a result of that research, defendants “knew that youth were highly susceptible to marketing and advertising appeals, would underestimate the health risks and effects of smoking, would overestimate their ability to stop smoking, and were price sensitive.” *Id.* at 691. To exploit these vulnerabilities, defendants created “highly sophisticated and appealing marketing campaigns . . . to lure them into starting smoking and later becoming nicotine addicts.” *Id.* The court concluded that the “evidence is clear and convincing — and beyond any reasonable doubt — that Defendants have marketed to young people twenty-one and under while consistently, publicly, and falsely, denying they do so.” *Id.*

(6) Denying the Adverse Health Effects of Environmental Tobacco

Smoke. At least since the late 1960s, scientists have been concerned about the health effects of environmental tobacco smoke (ETS). *Id.* at 800. A “consensus” on the dangers of ETS was “reached in 1986 with the Surgeon General’s Report.” *Id.* Despite this consensus, and “despite the fact that Defendants’ own scientists were increasingly persuaded of the strength of the research showing the dangers of ETS to nonsmokers, Defendants mounted a comprehensive, coordinated, international effort to undermine and discredit this research.” *Id.* Indeed,

defendants “still continue to deny the full extent to which ETS can harm nonsmokers and smokers.” *Id.* at 801.

The district court based these factual findings on a massive evidentiary record compiled during nine months of trial. Much of the evidence the court relied on comes from defendants’ own documents — the best, and in this case, the most damning, source of what defendants knew, when they knew it, and what steps they took to conceal or distort unfavorable health and safety information. The district court’s factual findings may not be disturbed unless they are clearly erroneous. *See* Rule 52(a), Fed. R. Civ. P. Although defendants quibble at the margins with some of the district court’s factual findings, they concentrate their fire on claims of legal error, not errors of fact-finding.

ARGUMENT

THE DISTRICT COURT’S FINDINGS OF FRAUD AND THE REMEDIES ORDERED TO AVERT ONGOING AND FUTURE INJURY DO NOT VIOLATE THE FIRST AMENDMENT.

Among defendants’ many challenges to the district court’s ruling are a number of arguments based on the First Amendment. Aside from the irony of the tobacco industry — long condemned for its deceptive advertising practices — seeking a safe haven in the First Amendment, its arguments have no merit. The First Amendment is not an all-purpose shield against liability for fraud. To the

contrary, although the First Amendment protects commercial speech, that protection is wholly contingent on whether the speech is false, misleading or deceptive. *See generally Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 563-66 (1980). If it is, then the First Amendment provides no shield at all, just as the First Amendment provides no defense to government regulation of speech that proposes an illegal transaction, solicits securities fraud, constitutes fighting words, reveals intelligence sources or methods, or is libelous or defamatory. In this case, the district court concluded, as a matter of fact, that defendants' speech was not simply false, misleading and deceptive, but was in fact fraudulent. For that reason, defendants' First Amendment arguments fail.

I. The First Amendment Does Not Protect False, Misleading or Deceptive Commercial Speech.

The Achilles' heel in defendants' First Amendment argument is that they simply brush aside the district court's ruling that the defendants "made public statements, often directly to consumers, which were flatly contradicted by their internal correspondence, knowledge, and understanding." 449 F. Supp. 2d at 888. The court concluded that "the evidence of Defendants' fraud" is "overwhelming." *Id.* That factual finding alone disposes of defendants' First Amendment arguments.

The commercial speech doctrine dates back to *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). There, the Court abandoned its prior understanding that speech proposing a commercial transaction was outside of the protection of the First Amendment. The Court reasoned that individuals have a “keen interest” in access to “information as to who is producing and selling what product, for what reason, and at what price.” *Id.* at 763, 765. Armed with accurate commercial information, consumers can “perceive their own best interests,” *id.* at 770, and make decisions that are “intelligent and well informed.” *Id.* at 765. “To this end, the free flow of commercial information is indispensable.” *Id.*

Since *Virginia State Board of Pharmacy*, there has been one fixed star in the constellation of First Amendment law — the commercial speech doctrine affords no protection to speech that is false, misleading, or deceptive or proposes an illegal transaction. *Id.*; see also *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002) (false and misleading speech “is not protected by the First Amendment”); *Central Hudson*, 447 U.S. at 563-66 (“there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity”); *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 388 (1973) (speech proposing an unlawful transaction may be

suppressed).² The reason for this bright-line rule is obvious: “the elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection — its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking.” *Virginia State Board of Pharmacy*, 425 U.S. at 781 (Stewart, J., concurring). Or as the Court put it, the overarching purpose of the First Amendment’s protection for commercial speech is to ensure that “the stream of commercial information flow[s] cleanly as well as freely.” *Edenfield v. Fane*, 507 U.S. 761, 768 (1993); *In re R.M.J.*, 455 U.S. 191, 201 n.12 (1982); *Virginia State Board of Pharmacy*, 425 U.S. at 771-72.³

To avoid the obvious impact of the doctrine, defendants try two evasive maneuvers, neither of which succeeds.

² The Court has made this point in other contexts as well. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate of public issues.”) (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 279 (1964)); *see also Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (“[F]alsehoods are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”).

³ For a brief but comprehensive overview of the evolution of the commercial speech doctrine, *see* David C. Vladeck, *Lessons From a Story Untold: Nike v. Kasky Reconsidered*, 54 Case W. Res. L. Rev. 1049, 1052-60 (2004).

First, defendants contend that most of the statements found by the district court to be factually false are “more than mere ‘commercial’ speech” because they address matters of public concern, including the health effects of smoking, the addictiveness of nicotine, and the effects of ETS. Defendants maintain that because these statements were made as part of an ongoing public “debate” on these subjects, they are entitled to full First Amendment protection. *See* JD Br. 112, 118-19. This argument is triply flawed.

1. The vast majority of defendants’ statements meet the textbook definition of commercial speech. As the district court found, this case concerns the 13.4 billion dollars of advertising the tobacco industry spends each year – 36 millions dollars each day — to promote its products. These advertisements falsely claimed that “light” and “low tar” cigarettes are safer than others; falsely downplayed the risks of nicotine addiction and exposure to ETS; or were “clearly designed to target and entice youth” to use defendants’ products. 449 F. Supp. 2d at 864. It would take an act of alchemy to transform hard-core selling messages about cigarettes with youth-appealing flavors such as Kauai Kolada and Twista Lime into something more than commercial speech. *See id.*

2. Although the First Amendment may protect false ideas, it does not protect

false assertions of fact, except in the rarest instances not relevant here.⁴ Thus, even if there were some truth to defendants’ claim that their statements contained both *opinions* and *false factual assertions* about matters of public concern — and defendants offer no concrete examples — that would not inhibit the government from enjoining defendants from deliberately spreading falsehoods that poison, rather than advance, public debate on these issues.

3. Finally, the precise argument defendants raise here has repeatedly been rejected in the commercial speech context. Anticipating this precise kind of attack, the Court in *Virginia State Board of Pharmacy* acknowledged that, at times, there might be a convergence of commercial speech and speech on important social matters. 425 U.S. at 764-65. These communications, the Court said, must nonetheless be judged under the commercial speech doctrine. *Id.* The Court drove home this point in *Central Hudson*, observing that “many, if not most, products may be tied to public concerns about the environment, energy, economic policy, or individual safety and health,” and holding that a linkage between a product and a matter of public debate does not transform commercial speech into core speech deserving of full First Amendment protection. 447 U.S. at 562-63 n.5; *accord Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-68 (1983) (pamphlets

⁴ See *N.Y. Times v. Sullivan*, 376 U.S. 254, 279 (1964).

distributed by condom manufacturers which discussed value of condoms in preventing venereal disease found to be commercial speech). Were that not the case, defendants' argument would "grant broad constitutional protection to any advertising that links a product to a current public debate," and would perversely sanction the dissemination of misleading information for the products the public finds most controversial. *Central Hudson*, 447 U.S. at 562-63 n. 5; *see also Bolger*, 463 U.S. at 68.

Second, defendants argue that even if their statements were false and misleading, they are not subject to government sanction because they were not "material." JD Br. 93. Once again, the first and most intractable problem with this argument is that the district court found, as a matter of fact, that defendants' false and misleading statements concerning the health issues surrounding cigarettes were material and had a direct impact on consumer decision-making. *See* 449 F. Supp. 2d at 898-900.

The district court's conclusion here is unassailable for two main reasons. One is that defendants used their superior resources to dominate the public debate over the health consequences of smoking:

Defendants were the primary source of information regarding cigarette smoking and tobacco addiction. The public health community had a far less sophisticated understanding of the

health hazards associated with smoking and far fewer resources to disseminate the information it did have. It would have been reasonable, therefore, for consumers to believe that Defendants' statements accurately reflected current knowledge about the dangers of smoking.

Id. at 899 (internal citations omitted). A second reason is that defendants *wanted* consumers to believe that they were the authoritative source for accurate and up-to-date scientific information on smoking. For example, in 1981, the Tobacco Institute published a document titled "On Smoking -- 21 questions and answers," which stated: "The tobacco industry has committed more than \$91 million for independent research on smoking and health questions. . . . The tobacco industry remains committed to advancing scientific inquiry into the gaps in knowledge in the smoking controversy." *Id.* at 199. Defendants' repeated promises to provide consumers with accurate and current information about smoking and health encouraged consumers to rely on defendants' representations on these issues. This point takes on additional force because defendants' enormous advertising budget enabled it to drown out health warnings from the government and public health organizations. For these reasons, the district court concluded that, "[f]or Defendants to now deny that the 'disinformation' they were spending millions on to deceive the public would not have been of import to a reasonable person in

determining his or her choice of action is the height of disingenuousness.” *Id.* at 899.

II. The Remedies Imposed by the District Court Advance, Not Subvert, First Amendment Interests.

The district court held that, in light of the massive fraud committed by the defendants, they should be enjoined from continuing their efforts to distort the information available to the American public by making false, misleading and deceptive statements of fact. To achieve that end, the district court ordered defendants (a) to cease making false factual claims minimizing the health risks that attend smoking and using false descriptors like “light” and “low tar,” and (b) to make corrective statements to dispel the false impression, inculcated over decades, about the adverse effects of smoking and exposure to ETS, the addictiveness of smoking and nicotine, the lack of a health benefit from smoking “light” or “low tar” cigarettes, and defendants’ manipulation of nicotine to ensure optimum nicotine delivery. Defendants now claim that, notwithstanding the Herculean efforts they undertook to instill these false impressions, the First Amendment forbids the court from imposing injunctive relief. Defendants are wrong.

A. *The District Court's Injunctive Remedies are Not Unduly Burdensome or Vague.*

Defendants raise two main First Amendment arguments against the injunction imposed by the district court. First, defendants claim that the ban on health descriptors is unnecessarily broad and burdensome. Second, defendants argue that the court's general injunction against making false claims about the health risks of cigarettes chills their First Amendment right to engage in public debate on these issues. Both of these arguments miss the mark.

1. Defendants attack the court's "health descriptors" remedy, claiming that it is not narrowly tailored. Narrow tailoring is not the issue. Defendants leap over *Central Hudson's* threshold question, which asks whether the speech is false or misleading. 447 U.S. at 563. If so, the inquiry ends and the government may ban the speech outright and need not worry about tailoring. *Id.*; see also *In re R.M.J.*, 455 US at 203. As the Court stressed, "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it." *Central Hudson*, 447 U.S. at 564.

Here, the district court found, as a matter of fact, that defendants' use of health descriptors was part of a scheme to dissuade smokers from quitting by disseminating false information:

As their internal documents reveal, Defendants engaged in massive, sustained, and highly sophisticated marketing and promotional campaigns to portray their light brands as less harmful than regular cigarettes, and thus an acceptable alternative to quitting, while at the same time carefully avoiding any admission that their full-flavor cigarettes were harmful to smokers' health. Defendants knew that by providing worried smokers with health reassurance, they could keep them buying and smoking cigarettes.

449 F. Supp. 2d at 860. In light of the district court's finding, based on defendants' own records and statements, an injunction barring the continued use of such misleading descriptors is fully in accord with the First Amendment.

This conclusion stands even if the Court analyzes the injunction under the remaining elements of the *Central Hudson* test. After all, the government's interest in ensuring the accuracy of commercial information in the marketplace is, as a general rule, substantial, *see Edenfield*, 507 U.S. at 769, and is especially strong where the public's health, safety, and well-being hang in the balance. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (accepting without question the importance of the

state's interest in preventing the use of tobacco products by minors). The injunction directly serves these interests. Over 80% of smokers buy "light" and "low tar" cigarettes and many do so because they wrongly believe these cigarettes *are* safer. Eliminating health descriptors that hold out this false hope will end the deception and force smokers and potential smokers to face the truth: There is no "safe" or "safer" cigarette.

Nor is there an alternative to the injunction. The district court found that the false impression that "light" or "low tar" cigarettes are less deadly than others is too firmly embedded to be dislodged by counter-advertising alone. Defendants "knowingly convey the false impression that cigarettes with those labels are less harmful than other cigarettes," and "[c]onsumers' false belief is so pervasive and longstanding, and has been exploited and promoted by Defendants for so long," that the "only way to restrain Defendants from their longstanding and continuing fraudulent efforts to deceive smokers, potential smokers, and the American public about 'light' and 'low tar' cigarettes is to prohibit them from using any descriptor which conveys a health message." 449 F. Supp. 2d at 924.

2. Defendants' claim that the court's general injunction against making false or misleading claims about the health effects of smoking is unconstitutionally vague and "chill[s] defendants' exercise of First Amendment rights," JD Br. 138,

should be also rejected out of hand. Defendants can harbor no serious doubts about the kind of false and misleading statements the court has enjoined. The district court's final opinion sets forth in meticulous detail every statement and action by defendants upon which liability rests. As this Court noted in *Gulf Oil Corp. v. Brock*, "the context of the litigation itself may sometimes be specific enough to provide notice to the parties of the acts the court seeks to restrain." 778 F.2d 834, 843 (D.C. Cir. 1985). This is just such a case.

The nature of the speech at issue here further undermines defendants' argument. Misstatements of fact may, at times, be unavoidable in a political debate. But misstatements of fact are hardly unavoidable when corporations are making factual representations (or here, misrepresentations) about their own products. No guesswork should be involved. Defendants "know[] more . . . than anyone else" about the health risks associated with their products; their statements on those matters should be "easily verifiable." *Virginia State Board of Pharmacy*, 425 U.S. at 772 n.24; *see also Central Hudson*, 447 U.S. at 564 n.6 ("commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity."). For these reasons, defendants' complaints about the injunctive relief imposed by the district court should be rejected.

B. *The Corrective Communications Ordered by the District Court Are Constitutional.*

The district court recognized that although injunctive relief is crucial to avert ongoing harm, it is not enough to cure the deeply-rooted false impressions planted by defendants' fifty-year disinformation campaign. The court determined that to prevent ongoing and future injury, these false impressions had to be countered, and the only way to do that effectively was to require defendants to undo the harm they have caused. For that reason, defendants' claim that the corrective statements ordered by the district court were imposed to "correct the effects of *past* conduct," JD Br. 129 (emphasis in original), is incorrect. These corrective statements were ordered to avoid future harm — especially to young people — who may act on the false information conveyed to them by defendants.

Corrective statements have often been imposed to counteract ongoing deception created by false advertising. In *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), this Court upheld an FTC Order requiring the manufacturer of Listerine mouthwash to stop claiming that Listerine cured the common cold and to include corrective statements in future advertising. Corrective statements were warranted, the Court found, because allowing "consumers to continue to buy the product on the strength of the impression built up by prior advertising — an

impression which is now known to be false — would be unfair and deceptive.” *Id.* at 761. Corrective statements also prevent the defendant from continuing to reap the benefits of its prior falsehoods. Indeed, without corrective statements as a remedy:

[A]dvertisers [would] remain free to misrepresent their products to the public through false and deceptive claims, knowing full well that even if the FTC chooses to prosecute they will be required only to cease an advertising campaign which by that point will, in all likelihood, have served its purpose by deceiving the public...

Id. at 770 (quoted from supplemental opinion on petition for rehearing).

More recently, this Court upheld a corrective advertisements order against Novartis, the maker of Doan’s pills. *Novartis Corp. v. FTC*, 223 F.3d 783 (D.C. Cir. 2000). For years, Doan claimed that it contained a special ingredient making it a more effective remedy for back pain than other pain relievers. The FTC charged Doan with making “unsubstantiated claims of superior efficacy.” *Id.* at 786. This Court upheld the FTC’s order requiring corrective statements because of “the Commission’s finding that the advertisements’ effects are likely to linger,” and that, without a corrective statement, future advertisements by Doan would reinforce consumers’ false belief in Doan’s efficacy. *Id.* at 788.

In this case, requiring corrective communications is not just an appropriate remedy, it is an imperative one. Defendants have spent decades and billions of dollars to foster the false impression that “light” and “low tar” cigarettes are less deadly than other cigarettes, that nicotine and smoking are not addictive, that ETS is not harmful, and that defendants do not market to young people. Simply enjoining defendants from making false health claims will not prevent ongoing and future harm.

Consider one example: In the 1990s, Philip Morris began marketing Merit cigarettes by claiming:

New MERIT 100's. Only 12 mg. of tar. Yet packed with extra flavor. The kind of flavor that makes 'low tar, good taste' a reality for 100's smokers.

449 F. Supp. 2d at 519. The company knew that this, and similar advertisements, created a false heuristic in consumers' minds: Merit = safer cigarette. That heuristic lingers today. Over half of those who smoke “light” and “low tar” cigarettes believe that they are less hazardous than other cigarettes. *Id.* at 933. This dangerous and widespread association cannot be undone just by ordering defendants to stop disseminating false information about their products. Future “advertising which fails to rebut the prior claims . . . inevitably builds upon those

claims; continued advertising continues the deception, albeit implicitly rather than explicitly.” *Warner-Lambert*, 562 F.2d at 769.

There is one final point about the district court’s corrective advertising order that warrants mention. Defendants strenuously object to the requirement that corrective statements be made in convenience stores and retail outlets — especially the retail outlets heavily frequented by minors and young adults. The district court recognized that retail stores have “become one of Defendants’ central vehicles for communication of brand imagery and promotional offers” to young people. 449 F. Supp. 2d at 659. Defendants’ research shows that young people purchase their cigarettes at convenience stores. *Id.* at 592. As a result, “retail environments, such as convenience stores and gas retailers frequented by teenagers heavily promote tobacco use.” *Id.* at 660.

To protect young people from defendants’ one-sided and inaccurate selling messages, the district court ordered those retail outlets participating in defendants’ Retail Merchandising Programs (that is, those outlets that agree with defendants to use in-store advertising to promote tobacco products) (a) to have counter-top displays that set forth corrective statements and (b) to put corrective statements on in-store advertisements. 449 F. Supp. 2d at 939-40.

Defendants again argue that this remedy is unconstitutional because it fails *Central Hudson*'s narrow tailoring requirement. JD Br. 132-33. But defendants overstate the amount of constitutional protection to which their advertisements are due. As noted above, this Court has routinely approved the use of corrective statements to root out entrenched, but incorrect, understandings of product performance caused by false advertising. This is just such a case, and the remedy imposed by the district court is no different from the remedies this Court approved in *Warner-Lambert* and *Novartis*.

But the case for corrective statements is even more compelling in convenience store advertising. In these stores, defendants are using, and have for years successfully used, advertising to reach defendants' preferred target audience, impressionable minors (many of whom may not even lawfully purchase tobacco products), and to convey false information minimizing the risks of smoking and addiction. For this reason as well, defendants' claim to First Amendment protection rings especially hollow. *See Lorillard*, 533 U.S. at 564; *see also FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 161 (2000) ("tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States.").

The district court’s corrective advertising order is fully consistent with the record in this case and with First Amendment values. Indeed, the Supreme Court has long made clear that affirmative disclosures of the kind required by the district court are a *preferred* First Amendment remedy. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (“an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”); *see also Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999). Here, because the district court’s remedial order is based on an overwhelming record that defendants have deliberately sought to mislead the American public, defendants should not be heard to complain simply because it is now time for them to tell the truth.

III. The *Noerr-Pennington* Doctrine Does Not Immunize Fraud.

As a last-ditch attack, defendants contend that “statements concerning ETS, addictiveness, nicotine manipulation, and youth marketing were designed to respond to potential regulatory and legislative initiatives by legislators, the Clinton Administration, the FDA and similar agencies, as well as the torrent of regulatory and litigation initiatives by state and municipal governments,” and therefore are protected by the *Noerr-Pennington* doctrine. JD Br. 111. Defendants’ *Noerr-Pennington* argument suffers from two flaws: first, virtually all of the statements at

issue were directed at consumers, and not governmental entities, and thus the *Noerr-Pennington* doctrine does not apply; and second, *Noerr-Pennington* is not a license to engage in fraud. Fraud is no more protected by *Noerr-Pennington* than it is by the First Amendment.

1. The *Noerr-Pennington* doctrine provides that in certain contexts otherwise illegal conduct — such as concerted activity among business competitors — is protected by the First Amendment when it is part of a direct petition to government or “incidental” to a direct petition. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988).⁵

The district court carefully reviewed, and for the most part, rejected defendants’ *Noerr-Pennington* claim. The court found that six of defendants’ statements qualified for *Noerr-Pennington* protection, including statements made by tobacco company executives before a congressional subcommittee and a letter from Philip Morris to a Member of Congress. 449 F. Supp. 2d at 887. But the court concluded that all of defendants’ remaining statements were either advertisements or public relations material aimed at influencing smokers, potential smokers, and the general public and therefore did not constitute “attempt[s] to

⁵ The doctrine takes its name from two Supreme Court decisions: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *Mine Workers v. Pennington*, 381 U.S. 657 (1965).

persuade the legislature or the executive to take particular action.”” *Id.* (quoting *Noerr*, 365 U.S. at 136).⁶

Apparently conceding the point, defendants argue that, although these statements were directed at the public, and not governmental bodies, they were nonetheless “incidental to a valid effort to influence government action.” JD Br. 111 (quoting *Allied Tube*, 486 U.S. at 499); *see also Noerr*, 365 U.S. at 143-44. But this Court has rejected similar efforts to expand the scope of *Noerr-Pennington* through uncabined claims of “incidental” activity. For example, in *Venetian Casino Resort, L.L.C. v. N.L.R.B.*, 484 F.3d 601, 612 (D.C. Cir. 2007), the Court held that, in order to constitute an incidental activity, the activity must be “inextricably intertwined” with the activity protected by *Noerr-Pennington*. Efforts to persuade consumers to disregard government health warnings are hardly

⁶ The nature of defendants’ statements, and the context in which they were made, demonstrate that they were not efforts to *influence* government action, but were instead efforts to *counteract* the government’s efforts to alert the public about the hazards of smoking. For example, after the 1988 Surgeon General’s Report on nicotine addiction, one defendant issued a press release entitled “CLAIMS THAT CIGARETTES ARE ADDICTIVE CONTRADICT COMMON SENSE,” while another argued that the Surgeon General’s Report was “without medical or scientific foundation.” *Philip Morris*, 449 F. Supp. 2d at 283. These defendants were attempting to persuade the public to ignore the government’s warnings about the addictive nature of nicotine and smoking, not attempting to persuade the government to change its mind. *Allied Tube* makes clear that only statements intended to influence government decision-makers are eligible for *Noerr-Pennington* protection. *See* 486 U.S. at 507.

“incidental and inextricably intertwined” with any of the tobacco industry’s efforts to petition the government for redress.

2. Defendants’ reliance on *Noerr-Pennington* fails for yet another reason: *Noerr-Pennington* does not provide immunity for conduct that is illegal. Not only have defendants failed to cite a single case that even hints that *Noerr-Pennington* somehow immunizes fraud or other illegal activity, but the case law strongly points in the opposite direction. *See, e.g., Noerr*, 365 U.S. at 144 (noting that “[n]o one denies” that the conduct in question was “a genuine effort to influence legislation and law enforcement practices.”). This Court’s decision in *Venetian Casino Resort* illustrates the limits of *Noerr-Pennington* in protecting unlawful conduct. There, the National Labor Relations Board found that the Casino had committed an unfair labor practice by trying to break up a union demonstration on a public walkway. This Court squarely rejected the Casino’s claim that its illegal activity was a legitimate prelude to litigation and thus protected under *Noerr-Pennington*. 484 F.3d at 606-12. This case is no different. The district court found as a matter of fact that defendants’ communications were false, misleading and fraudulent. Nothing in *Noerr-Pennington* shields fraud from sanction.⁷

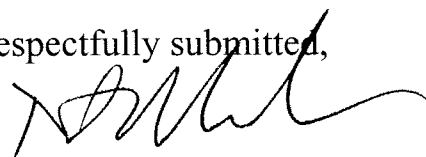
⁷ Nor does *Noerr-Pennington* confer any generalized right to lie to Congress or federal agencies, even as an incident to petitioning activities. *See, e.g.,* 18 U.S.C. § 1001; *cf. United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991).

CONCLUSION

For the foregoing reasons, the decision below and the remedies ordered should be affirmed.

November 26, 2007

Respectfully submitted,



David C. Vladeck
Georgetown University Law Center
Institute for Public Representation
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9540

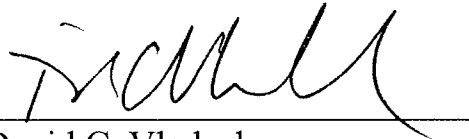
Counsel for Amicus Curiae
Tobacco Control Legal Consortium⁸

⁸ Counsel wish to acknowledge the assistance of Deanna Durrett, a third year student at Georgetown University Law Center, in the preparation of this brief.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), undersigned counsel states that this brief complies with the type-volume limitation set forth in this Court's Order of August 3, 2007. The brief is set in 14-point Times New Roman type and contains 6,599 words, not including the matter excluded by Rule 32(a)(7)(B)(iii), according to the word processing system used to prepare the brief.

November 26, 2007



David C. Vladeck

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of November, 2007, I caused two copies of the foregoing Amicus Curiae Brief of Amicus Tobacco Control Legal Consortium to be served by first-class mail on all parties required to be served, as follows:

Mark B. Stern
Alisa B. Stern
U.S. DEPARTMENT OF JUSTICE
Civil Division, Appellate Staff
950 Pennsylvania Avenue NW, Room 7235
Washington, DC 20530-0001

Counsel for Appellee United States of America

Murray R. Garnick
ARNOLD & PORTER LLP
555 Twelfth Street NW
Washington, DC 20004

Counsel for Defendant-Appellants Philip Morris USA Inc. and
Altria Group, Inc.

Robert F. McDermott, Jr.
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001-2113

Counsel for Defendant-Appellant R. J. Reynolds Tobacco Company

David E. Mendelson
KIRKLAND & ELLIS LLP
655 15th Street NW, Suite 1200
Washington, DC 20005

Counsel for Defendant-Appellant Brown & Williamson Holdings, Inc.

Joseph Kresse
COVINGTON AND BURLING LLP
1201 Pennsylvania Avenue NW
Washington, DC 20004

Counsel for Defendant-Appellant The Tobacco Institute, Inc.

Deborah Israel
WOMBLE CARLYLE SANDRIDGE & RICE PLLC
401 I Street NW, Suite 700
Washington, DC 20005

Counsel for Defendant-Appellant Council for Tobacco
Research-USA, Inc.

Guy Miller Struve
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
(212) 450-4192

Counsel for Defendant-Appellant Altria Group, Inc.

Michael B. Minton
THOMPSON COBURN LLP
One US Bank Plaza, Suite 3500
St. Louis, Missouri 63101-1693

Counsel for Defendant-Appellant Lorillard Tobacco Company

Bruce G. Sheffler
CHADBOURNE & PARKE LLP
30 Rockefeller Plaza, 34th Floor
New York, New York 10112-0219

Counsel for Defendant-Appellant British American Tobacco
(Investments) Limited

Michael Asher Schlanger
SONNENSCHNAIN NATH & ROSENTHAL LLP
1301 K Street NW
Suite 600, East Tower
Washington, DC 20005

Counsel for Defendant-Appellant British American Tobacco, PLC

Jack McKay
Alvin Bertram Dunn
PILLSBURY WINTHROP SHAW PITTMAN, LLP
2300 N Street NW
Washington, DC 20037-1122

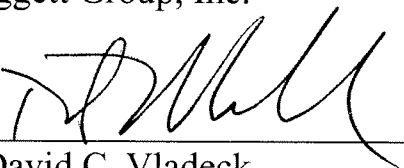
Counsel for Defendant-Appellant British American Tobacco Australia
Services, Ltd.

Katherine A. Meyer
Howard M. Crystal
MEYER GLITZENSTEIN & CRYSTAL
1601 Connecticut Avenue NW, Suite 700
Washington, DC 20009-1075

Counsel for Intervenors-Appellees

Leonard A. Feiwus
KASOWITZ, BENSON, TORRES & FRIEDMAN
1633 Broadway
New York, New York 10019

Attorney for Defendant Liggett Group, Inc.



David C. Vladeck