



IN THE SUPREME COURT OF THE STATE OF DELAWARE

_____)	
LORILLARD TOBACCO COMPANY,)	
a Delaware corporation,)	
) No. 579,2005	
Defendant-Below,)	
Appellant,)	
v.)	Appeal from:
) Court of Chancery of the	
AMERICAN LEGACY FOUNDATION, a)	State of Delaware in and
Delaware non-profit corporation,)	for New Castle County
Plaintiff-Below,)	
Appellee.)	
_____)	

**BRIEF OF AMICI CURIAE CAMPAIGN FOR TOBACCO-FREE KIDS,
 AMERICAN CANCER SOCIETY, AMERICAN COLLEGE OF
 OCCUPATIONAL AND ENVIRONMENTAL MEDICINE,
 AMERICAN DENTAL HYGIENISTS' ASSOCIATION,
 AMERICAN HEART ASSOCIATION, AMERICAN LUNG ASSOCIATION,
 AMERICAN MEDICAL ASSOCIATION, AMERICAN PUBLIC HEALTH
 ASSOCIATION, AMERICAN SCHOOL HEALTH ASSOCIATION,
 AMERICAN SOCIETY OF ADDICTION MEDICINE,
 ASSOCIATION OF SCHOOLS OF PUBLIC HEALTH,
 COMMUNITY ANTI-DRUG COALITIONS OF AMERICA,
 LUNG CANCER ALLIANCE, MEDICAL SOCIETY OF DELAWARE,
 NATIONAL AFRICAN AMERICAN TOBACCO PREVENTION NETWORK,
 NATIONAL ASSOCIATION OF COUNTY AND CITY HEALTH OFFICIALS,
 NATIONAL ASSOCIATION OF LOCAL BOARDS OF HEALTH,
 NATIONAL LATINO COUNCIL ON ALCOHOL AND TOBACCO PREVENTION,
 SOCIETY FOR RESEARCH ON NICOTINE AND TOBACCO, AND
 TOBACCO CONTROL LEGAL CONSORTIUM,
 IN SUPPORT OF PLAINTIFF-BELOW/APELLEE
AMERICAN LEGACY FOUNDATION**

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INTERESTS OF THE AMICI CURIAE

Amici are non-profit public health organizations and professional medical societies that for decades have confronted the devastating health and economic consequences of tobacco use. Hence, they are especially qualified to assist this Court in comprehending the unique effectiveness and importance of the counter-marketing advertisements at issue in this case.

Amicus Curiae the Campaign for Tobacco-Free Kids works to raise awareness that cigarette smoking is a public health hazard by advocating public policies to limit the marketing and sales of tobacco to children, and altering the environment in which tobacco use and policy decisions are made. Tobacco-Free Kids has over 100 member organizations, including health, civic, corporate, youth, and religious groups dedicated to reducing children's use of tobacco products. Among other activities, the organization has worked to counter public perception of "light" and "low tar" cigarettes.

Amicus Curiae American Cancer Society ("ACS") has over 2.3 million volunteers throughout the country, including over 50,000 physicians. ACS is committed to one goal: the control and elimination of cancer through research, education, advocacy and service. Research conducted and supported by ACS since the 1950's has played a pivotal role in identifying the use of tobacco products as a major cause of cancer.

Amicus Curiae the American College of Occupational and Environmental Medicine ("ACOEM"), based in Arlington Heights, Illinois, represents more than 6,000 physicians and other health care professionals specializing in the field of occupational and environmental medicine. Founded in 1916, ACOEM is the nation's largest medical society dedicated to promoting the health of workers through preventive medicine, clinical care, research, and education. ACOEM has been a strong advocate of policies and efforts that protect against exposure to environmental tobacco smoke in the workplace and elsewhere.

Amicus Curiae the American Dental Hygienists' Association ("ADHA") is the largest national organization representing the professional interests of dental hygienists. Dental hygienists are licensed health professionals dedicated to improving access to oral health care services. ADHA has long been active on tobacco control issues because regulation of tobacco products will help to prevent tobacco addiction and resulting morbidity and mortality. ADHA is the recipient of a grant from the Robert Wood Johnson Foundation's Smoking Cessation Leadership Center to launch a national campaign to promote smoking cessation.

Amicus Curiae American Heart Association ("AHA") is a voluntary health organization that, since 1924, has helped protect people of all ages and ethnicities from the ravages of heart disease and stroke. AHA is one of the world's premier

health organizations, with nearly 2,000 community organizations in the 50 states, as well as in Washington DC, and Puerto Rico. The association invested more than \$348 million in fiscal year 2002-03 for research, professional and public education, and advocacy so people across America can live stronger, longer lives. AHA has long been active before Congress and regulatory agencies on tobacco and other health-related matters and has petitioned the Food and Drug Administration ("FDA") on several occasions seeking regulation of cigarettes and other tobacco products under the Federal Food, Drug, and Cosmetic Act.

Amicus Curiae American Lung Association ("ALA") is the nation's oldest voluntary health organization, with volunteers and affiliates in all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands. ALA has nearly 400,000 volunteers. Since cigarette smoking is a major cause of chronic obstructive lung disease, ALA has long been active in research, education and public policy advocacy on the adverse health effects of tobacco products. ALA has advocated for the regulation of tobacco products for more than two decades.

Amicus Curiae the American Medical Association ("AMA"), an Illinois non-profit corporation founded in 1847, is an association of approximately 250,000 physicians, residents, and medical students. Its members practice in every state, including Delaware, and in all fields of medical specialization,

and it is the largest medical society in the United States. Its objects are to promote the science and art of medicine and the betterment of public health.

The AMA has long had an interest in the regulation of tobacco products and the tobacco industry. As an institution, it has developed expertise in the pharmacology of nicotine, the toxic effects of cigarette smoke, and the societal implications of tobacco usage. For many years, the AMA has been one of the leading anti-smoking organizations in the United States.¹

Amicus Curiae the American Public Health Association ("APHA") was founded in 1872 and is the oldest, largest and most diverse organization of public health professionals in the world. The association aims to protect all Americans and their communities from preventable, serious health threats and strives to assure community-based health promotion and disease prevention activities and preventive health services are universally accessible in the United States. APHA represents a broad array of health providers, educators, environmentalists, policy-makers and health officials at all levels working both

¹ The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition between the AMA and the medical societies of each state, plus the District of Columbia. It was formed to represent the viewpoint of organized medicine in the courts.

within and outside governmental organizations and educational institutions.

Amicus Curiae the American School Health Association ("ASHA") is a professional membership organization committed to promoting and protecting the health and well-being of children and youth through coordinated school health programs as a foundation for school success. ASHA's members include school nurses, physicians, health educators, school counselors, psychologists, social workers and others who work in or with schools on children's health issues.

Amicus Curiae the American Society of Addiction Medicine ("ASAM") is a national medical specialty society of over 3,000 physicians dedicated to improving the treatment of alcoholism and other addictions, educating physicians and medical students, promoting research and prevention, and informing the medical community and the public about these important issues.

Amicus Curiae Association of Schools of Public Health ("ASPH") is the only national organization representing the deans, faculty and students of the 37 accredited member schools of public health and other programs seeking accreditation as schools of public health. One of ASPH's functions is to assist in meeting national goals of disease prevention and health promotion. As tobacco use remains the leading preventable cause

of death in the United States, ASPH supports research, teaching, and practice in tobacco use prevention, control, and cessation.

Amicus Curiae Community Anti-Drug Coalitions of America ("CADCA") represents more than 5,000 coalition members nationwide. These coalitions bring multiple sectors of the community together, including businesses, parents, media, law enforcement, schools, faith organizations, health providers, social service agencies and the government. By acting in concert through the coalition, all of the partners gain a more complete understanding of the community's drug and alcohol related issues. Together, the partners organize and develop plans and programs to coordinate their anti-drug efforts. The result is a comprehensive, community-wide approach to substance abuse and its related problems. CADCA's mission is to build and strengthen the capacity of community anti-drug coalitions to create safe, healthy and drug-free communities. CADCA supports its members with technical assistance, training, public policy, media strategies, marketing programs, conferences and special events.

Amicus Curiae the Lung Cancer Alliance, founded in 1995, is the only national non-profit organization dedicated exclusively to support, education and advocacy for lung cancer patients, caregivers, survivors and for the 45 million former smokers and others at risk for developing lung cancer.

Amicus Curiae Medical Society of Delaware, incorporated by act of the Delaware legislature in February of 1789, has a mission of guiding, serving and supporting Delaware physicians to promote the practice and profession of medicine to enhance the health of Delaware communities. This is accomplished through advocacy, representation, education and advancement of public health. These functions, and the professionals and programs behind them, can each be applied to the Department of Public Health's mission of protecting and enhancing the health of the people of Delaware, and realizing the mission by creating an environment in which people in Delaware can reach their full potential for a healthy life. Nearly 1700 Delaware physicians, representing approximately 80 percent of the physician population in Delaware, are currently members of the Medical Society of Delaware.

Amicus Curiae the National African American Tobacco Prevention Network ("NAATPN") is a non-profit organization dedicated to facilitating the development and implementation of comprehensive and community tobacco control programs to benefit communities and people of African descent. The organization works to fill the gaps in technical assistance and training services traditionally not afforded to African American tobacco control advocates and others seeking to do tobacco control work with communities of color. NAATPN strives to provide the

organizational development, grassroots organizing, and tobacco control advocacy expertise necessary to take on a wide range of tobacco challenges facing communities of color.

Amicus Curiae National Association of County and City Health Officials ("NACCHO") is a national organization representing the nation's 2,800 local public health departments. Many local health departments are actively engaged in tobacco prevention and control programs to reduce the toll of tobacco use in their communities. NACCHO supports efforts that protect and improve the health of all people and all communities by promoting national policy, developing resources and programs, seeking health equity and supporting effective local public health practice and systems.

Amicus Curiae National Association of Local Boards of Health ("NALBOH") is the grassroots of public health and the national voice for effective and competent public health governance. Its mission is to strengthen and prepare local boards of health, enabling them to protect and promote the health of their communities, through education, technical assistance, and advocacy. NALBOH has been engaged in establishing a significant voice for local boards of health on matters of national public health policy, including tobacco use prevention and control. NALBOH's satellite office in Washington, D.C. has allowed it to have a permanent presence

with other national public health organizations, while maintaining its grassroots with its main office in Bowling Green, Ohio.

Amicus Curiae the National Latino Council on Alcohol and Tobacco Prevention ("LCAT") is a non-profit, national organization created in 1989 by a group of Latino public health professionals and community advocates from throughout the United States. LCAT is unique since it is the only Latino national organization dedicated solely to reducing the harm caused by alcohol and tobacco in the Latino community through research, advocacy, policy analysis, community education, training and information dissemination.

Amicus Curiae Society for Research on Nicotine and Tobacco ("SRNT") is the leading international organization for scientists doing work in the areas of nicotine and tobacco research. The mission of the Society is to stimulate the generation of new knowledge concerning nicotine in all its manifestations - from molecular to societal. The Society has three main aims: To sponsor scientific meetings and publications fostering the exchange of information on nicotine and tobacco; to encourage scientific research on public health efforts for the prevention and treatment of tobacco use; and to provide a means by which legislative, governmental, regulatory and other

public agencies can obtain expert advice and consultation on nicotine and tobacco.

Amicus Curiae the Tobacco Control Legal Consortium ("TCLC") is a national network of legal centers providing legal 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 collaboration among specialized legal resource centers servicing six states, and is supported by national advocacy organizations, voluntary health organizations and others.² In addition, TCLC prepares legal briefs as *amicus curiae* in cases where its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance. TCLC has submitted *amicus* briefs in recent cases before the Supreme

² TCLC's coordinating office is located at the Tobacco Law Center of William Mitchell College of Law in St. Paul, Minnesota. Other affiliated legal centers include: The Technical Assistance Legal Center (TALC) at the Public Health Institute of California, in Oakland, California; the Legal Resource Center for Tobacco Regulation, Litigation & Advocacy (TRC) at the University of Maryland School of Law in Baltimore, Maryland; the Tobacco Control Resource Center (TCRC) at Northeastern University School of Law in Boston, Massachusetts; the Smoke-Free Environments Law Project (SFELP) at the Center for Social Gerontology in Ann Arbor, Michigan; and the Tobacco Control Policy and Legal Resource Center at New Jersey GASP in Summit, New Jersey.

Courts of Florida, Kentucky, Montana, and New Hampshire, and the U.S. District Court for the District of Columbia.

Of the 20 *Amici Curiae* listed above, seven have received funding from the Legacy Foundation through grants (Campaign for Tobacco-Free Kids, AMA, APHA, Association of Schools of Public Health, Lung Cancer Alliance, LCAT and SRNT), four have received funding through contracts or were provided funds through sponsorships (ACS, AHA, NAATPN and NACCHO), and one has received both types of funding from Legacy (ALA). None of this funding is related to the Legacy truth® campaign at issue in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The central issue in this appeal is whether certain of the advertisements from the Legacy Foundation's national youth-oriented counter-marketing effort known as "the truth® campaign" violate the prohibition in the Master Settlement Agreement ("MSA") on advertisements that constitute a "personal attack" on, or "vilification" of, any person or company under the MSA. See MSA § VI(h). The parties have submitted extensive briefs on the legal issues in this case, and this brief will only address two matters about which the *Amici Curiae* have particular knowledge and expertise.

First, as demonstrated in Section I, tobacco use is a public health concern of devastating proportions and 82% of

cigarette users began before they were 18.³ In addition, children are inundated with tobacco industry advertisements and promotional activities that increase the risk of youth initiation. Therefore, any effective campaign to reduce tobacco use must educate children not to begin smoking and must counter the continuing influence of tobacco industry marketing.

Second, as demonstrated in Section II, although influencing children not to smoke is difficult, the Legacy truth® campaign has proven effective in preventing tobacco use among children. The approach adopted by the Legacy truth® campaign is supported by the scientific literature, is recognized as effective by this nation's leading experts, and has proven effective in other state-wide campaigns.

ARGUMENT

I. TOBACCO USE IS A DEVASTATING PUBLIC HEALTH PROBLEM AND EFFECTIVE PROGRAMS TO REDUCE TOBACCO USE BY CHILDREN ARE CRITICAL.

For at least 30 years, tobacco use has been the nation's leading, preventable cause of death.⁴ Tobacco kills more than

³ U.S. Department of Health and Human Services, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General*, at 65, Table 7 (1994).

⁴ U.S. Department of Health and Human Services, *The Health Consequences of Smoking: A Report of the Surgeon General* (1975), <http://www.cdc.gov/tobacco/sgr/index.htm>.

400,000 people each year in the United States:⁵ it causes nearly one out of every three deaths from cancer;⁶ nearly one out of every five deaths from heart disease;⁷ and 87 percent of all lung cancer deaths.⁸

Tobacco is the only legal product sold in the United States that, when used according to the manufacturer's expectations, is highly addictive and kills a high percentage of regular users. The addiction rate for smoking is higher than the addiction rates for marijuana, alcohol, or cocaine; and symptoms of serious nicotine addiction often occur only weeks and in some cases just days after youth "experimentation" with smoking first

⁵ U.S. Centers for Disease Control and Prevention, *Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Economic Costs -- United States 1995-1999*, Morbidity and Mortality Weekly Report (April 11, 2002), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5114a2.htm>.

⁶ American Cancer Society, *Cancer Facts & Figures 2005* (2005), <http://www.our.cancer.org/downloads/STT/CAFF200514PWSecured.pdf>.

⁷ U.S. Department of Health and Human Services, *The Health Consequences of Smoking: A Report of the Surgeon General* (2004), http://www.cdc.gov/tobacco/sqr/squ_2000/index.htm.

⁸ American Cancer Society, *Cancer Facts and Figures 2005* (2005), <http://www.our.cancer.org/downloads/STT/CAFF2005f4PWSecured.pdf>.

begins.⁹ Lifetime smoking and other tobacco use almost always begins by the time children graduate from high school.¹⁰ Young children who experiment with cigarettes frequently develop regular smoking habits, which typically turn into a strong addiction - well before the age of 18 - that can overpower the most well-intentioned efforts to quit. In fact, nearly 90 percent of adult smokers began smoking at or before age 18.¹¹

The Legacy Foundation's education campaign is vitally important to the nation's public health because virtually all long term smokers start as children (before the age of 18). Each day, more than 4,000 children try their first cigarette, and another 1,500 children under 18 years of age become regular,

⁹ U.S. Centers for Disease Control and Prevention, *Symptoms of Substance Dependence Associated with Use of Cigarettes, Alcohol, and Illicit Drugs - United States 1991-1992*, Morbidity and Mortality Weekly Report (Nov. 10, 1995), available at <http://www.cdc.gov/mmwr>; see also Joseph R. DiFranza, et al., *Initial Symptoms of Nicotine Dependence in Adolescents*, Tobacco Control, Vol. 9, at 313-19 (Sept. 2000), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0127.pdf>.

¹⁰ Substance Abuse and Mental Health Services Administration, *National Household Survey on Drug Abuse* (2001), <http://www.oas.samhsa.gov/facts.cfm>.

¹¹ Substance Abuse and Mental Health Services Administration, *National Household Survey on Drug Abuse* (2001), <http://www.oas.samhsa.gov/facts.cfm>.

daily smokers.¹² The U.S. Centers for Disease Control and Prevention ("CDC") estimates that over six million children who are alive today will ultimately die from smoking.¹³ Accordingly, any efforts to decrease future smoking levels among high school students, college-aged youths, or adults must include a major focus on reducing experimentation and regular smoking among children. Delaying the age when kids first experiment with cigarettes or first begin smoking reduces the risk that they will become regular or daily smokers. Put another way, to address this pressing public health problem, it is essential to stop kids from smoking before they start.¹⁴

Even after the MSA, children are, however, constantly exposed to tobacco industry advertisements and promotional activities that have the exact opposite effect: they increase

¹² Substance Abuse and Mental Health Services Administration, *Results from the 2004 National Survey on Drug Use and Health: National Findings*, Table 4.32a (2004).

¹³ U.S. Centers for Disease Control and Prevention, *Sustaining State Programs for Tobacco Control* (2004), <http://www.cdc.gov/tobacco/datahighlights/index.htm>.

¹⁴ Ursula E. Bauer, et al., *Changes in Youth Cigarette Use and Intentions Following Implementation of a Tobacco Control Program*, *Journal of the American Medical Association*, Vol. 284, No. 6, at 723 (Aug. 9, 2000) ("Because tobacco use often begins in adolescence and cessation is difficult once regular use is established, interventions to prevent and reduce youth tobacco use should be a focus of public health efforts to reduce overall tobacco use.").

the risk of youth initiation.¹⁵ Children are three times more affected by advertising than adults and they also purchase the most advertised tobacco brands. *Id.* For example, it has been estimated that, in California, 34% of youth experimentation with smoking between 1993 and 1996 "can be attributed to tobacco promotional activities." *Id.* The Surgeon General, in his 2000 Report, noted that "the Institute of Medicine concluded that the preponderance of evidence suggests that tobacco marketing encourages young people to smoke." U.S. Department of Health and Human Services, *Reducing Tobacco Use: A Report of the Surgeon General* ("2000 Surgeon General's Report") at 409 (2000).¹⁶ Furthermore, a 2002 monograph by the National Cancer Institute ("NCI") reviewed the research on tobacco advertising and promotion and its impact on youth smoking. It found that tobacco advertising and promotional activities are important catalysts in the smoking initiation process. The NCI report also found, based on a review of the extant research, that "the

¹⁵ U.S. Centers for Disease Control and Prevention, *Best Practices for Comprehensive Tobacco Control Programs* ("CDC, *Best Practices*") 22 (Aug. 1999), http://www.cdc.gov/tobacco/research_data/stat_nat_data/bpchap6.pdf.

¹⁶ See also CDC, *Best Practices* at 22 ("Today's average 14-year-old already has been exposed to more than \$20 billion in imagery advertising and promotions since age 6, creating a 'friendly familiarity' with tobacco products and an environment in which smoking is seen as glamorous, social, and normal.").

conclusion that there is a causal relationship between tobacco marketing and smoking initiation seems unassailable."¹⁷ These conclusions represent a consensus of the scientific community.

With the deluge of tobacco industry advertising and promotional activities (the major cigarette companies spend approximately \$15.5 billion per year to promote their products),¹⁸ which affects kids disproportionately and increases the risk of youth initiation, effective counter-marketing campaigns are essential to the achievement of the MSA's goals. See, e.g., CDC, *Best Practices* at 22 ("In light of the[] ubiquitous and sustained pro-tobacco-use messages, public education efforts of comparable intensity are needed to alter the environmental context of tobacco use.").

¹⁷ National Cancer Institute, *Changing Adolescent Smoking Prevalence*, Smoking and Tobacco Control Monograph No. 14, National Institutes of Health Pub. No. 02-5086 (Nov. 2001).

¹⁸ U.S. Federal Trade Commission, *Cigarette Report for 2003* (Aug. 2005) (discussing data for top six manufacturers), <http://www.ftc.gov/reports/index.htm>.

II. THE LEGACY CAMPAIGN IS BASED ON ESTABLISHED TECHNIQUES AND HAS PROVEN HIGHLY EFFECTIVE.

A. Important Precursors to Legacy's truth® Campaign Established the Effectiveness of the Counter-Marketing Techniques Adopted by Legacy.

1. A Broad Body of Scientific Opinion Establishes the Effectiveness of Counter-Marketing Using the Techniques and Tools Adopted by Legacy.

Counter-marketing campaigns have been shown to be an effective way to prevent youth initiation. The effectiveness of counter-marketing in reducing tobacco use has been recognized since the first - and, until the truth® campaign, the only - national counter-marketing campaign on tobacco was conducted in the late 1960s under the Fairness Doctrine, where the Federal Communications Commission required television stations that carried cigarette advertisements to offer anti-smoking public service announcements. The campaign conducted from mid-1967 through 1970 resulted in significant reductions in both youth and adult smoking.¹⁹ The evidence of the effectiveness of counter-marketing has been reinforced by subsequent studies and by the experience of large media campaigns in a number of individual states.

¹⁹ J.L. Hamilton, *The Demand for Cigarettes: Advertising the Health Scare, and the Cigarette Advertising Ban*, Review of Economics and Statistics, Vol. 54, No. 4, at 401-11 (1972); Kenneth Warner, *Clearing the Airways: the Cigarette Ban Revisited*, Policy Analysis, Vol. 5, No. 4, at 435-50 (1979).

The CDC, in its *Best Practices for Comprehensive Tobacco Control Programs*, concluded that public education campaigns, such as the programs that were implemented in Massachusetts and California, "have had the most success in reducing tobacco use among adults, slowing the initiation of tobacco use among young people, and protecting children from exposure to secondhand tobacco smoke." CDC, *Best Practices* at 22 (emphasis added). In addition, a panel of experts convened by the CDC that is known as the Task Force on Community Preventive Services ("the Task Force") reached a similar conclusion. Based on a "systematic review of published studies," the Task Force concluded that there was "strong evidence" that mass media campaigns are effective in "reducing initiation of tobacco use when combined with other actions . . . [and] may also decrease consumption of tobacco products and increase tobacco use cessation."²⁰

The *2000 Surgeon General's Report* reaffirmed the impact of well-designed, educational campaigns that are based on sound research, careful planning and that are rigorously implemented. *Surgeon's General Report* at 415. The most recent, thorough examination of the impact of counter-marketing and the elements

²⁰ Task Force on Community Preventive Services (appointed by the Director of the CDC), *The Effectiveness of Mass Media Campaigns to Reduce Initiation of Tobacco Use and to Increase Cessation*, *The Guide to Community Preventive Services* (Jan. 3, 2003), <http://www.thecommunityguide.org/tobacco/tobac-int.mass-media.pdf>.

of a successful counter-marketing program was published in 2003. Each of the successful state counter-marketing programs cited by the CDC in this exhaustive study used hard hitting, emotional themes with age appropriate culturally sensitive themes that are consistent with how the truth® campaign was developed.²¹

2. The Columbia Expert Panel and the Successful Florida "truth" Campaign Influenced the Legacy "truth" Campaign.

Truth® is further based on the conclusions of this nation's leading experts about how to effectively carry out a tobacco counter-marketing campaign targeting at risk youth. For example, in the Fall of 1995, an expert panel of leading youth marketing professionals was assembled by the Columbia University School of Public Health ("Columbia Expert Panel" or "Expert Panel") and was funded by the Office on Smoking and Health of the CDC. Columbia Expert Panel Report, Section II (September 30, 1996) at 1. The Columbia Expert Panel was tasked with evaluating tobacco marketing campaigns and counter-marketing campaigns directed towards youth and developing "concrete suggestions for a national counter-marketing initiative." *Id.* In doing so, the Expert Panel reviewed the counter-marketing efforts of California and Massachusetts. *Id.* at 14. Each of

²¹ U.S. Centers for Disease Control and Prevention, *Designing and Implementing an Effective Tobacco Counter-Marketing Campaign* (Oct. 2003).

these counter-marketing campaigns was launched before the Expert Panel was convened (the California advertisements were launched in 1990 and the Massachusetts advertisements were launched in 1994) and included advertisements that were confrontational with the tobacco industry and in certain cases addressed the duplicity of the industry.²²

The Columbia Expert Panel concluded that the following, purely educational messages do not work with children: "Smoking is bad, smoking is uncool, cigarettes smell gross, smoking affects looks, smoking costs a lot, smoking is for adults only." *Expert Panel Report* at 20. In addition, the Expert Panel rejected techniques that use "cool kid-talk" to try to reach kids and messages that come from above as opposed to from peers. *Id.* In other words, the panel concluded it is ineffective to lecture kids with facts of the health risks and ineffective to have adults tell kids that kids should not smoke. At the same time, the Expert Panel concluded that certain educational techniques are effective. *Id.* at 15. In particular, the Expert Panel determined that the following themes work in communicating to kids that they should not smoke: the tobacco industry is an

²² See, e.g., John J. Pierce, et al., *Has the California Tobacco Control Program Reduced Smoking?*, *Journal of the American Medical Association*, Vol. 280, No. 10, at 897 (Sept. 9, 1998); Lisa K. Goldman, et al., *Evaluation of Antismoking Advertising Campaigns*, *Journal of the American Medical Association*, Vol. 279, No. 10, at 772 (March 11, 1998).

adult institution and you are being manipulated by it, and the tobacco industry is lying to you and keeping information from you. *Id.* The panel recognized that counter-marketing must do more of what tobacco marketers have long done - use themes that take advantage of children's natural rebelliousness and desire for independence. The Expert Panel further recommended that a national non-smoking counter-marketing plan be developed, which would include the design of a non-smoking brand. *Id.* at 3.

In August 1997, as a result of the \$11.3 billion legal settlement between the State of Florida and the tobacco industry, the Florida Pilot Program on Tobacco Control ("FPPTC") was created.²³ The Florida "truth" campaign was the first campaign to rely on the recommendations of the Expert Panel. The stated mission of the FPPTC was "to prevent and reduce youth tobacco use by implementing an innovative and effective

²³ Ursula E. Bauer, et al., *Changes in Youth Cigarette Use and Intentions Following Implementation of a Tobacco Control Program*, *Journal of the American Medical Association*, Vol. 284, No. 6, at 724 (Aug. 9, 2000). Lorillard improperly argues that the Florida "truth" campaign was relevant to Section VI(h) of the MSA, which contains the "personal attack" and "vilification" restrictions. Lorillard Brief at 7. The MSA prohibits Lorillard from relying on the settlement negotiations as support for its arguments in this case. See MSA Section XVIII(f) ("[N]o evidence of negotiations or discussions underlying this Agreement shall be offered or received in evidence in any action or proceeding for any purpose."). The success of the Florida truth Campaign, however, supports Legacy's good faith efforts to **educate** children about the hazards of tobacco use, undermining the argument that the Campaign contains a personal attack or a vilification, whatever the actual meaning of those terms.

education, marketing, prevention, and enforcement campaign that empowers youth to live tobacco-free.'" *Id.* Research studies and other literature prepared by the FPPTC, "as well as results of previous tobacco control efforts, affirmed the assumption that the health risks of tobacco were already well known among teens and were not a deterrent to tobacco use. . . . Existing public service announcements, seen as too severe and preachy, did not match teens' perceptions of the problem. Research showed that smoking is equated with rebellion and teen self-realization, and the theme of 'industry manipulation' held broad appeal among young people."²⁴

Accordingly, the FPPTC's "truth" advertising campaign, which was launched in April 1998, veered away from the existing public service announcement approach and took a different and innovative tack. The "truth" advertisements were designed to appeal to teens' need for rebellion and to inform them of the misinformation perpetuated by the tobacco industry; the advertisements also were presented using "the same production values and edgy humor that commercial marketers use to reach young people." *Id.* Notably, teens themselves were involved in developing these "truth" advertisements. *Id.*

²⁴ David Zucker, et al., *Florida's 'truth' Campaign: A Counter-Marketing, Anti-Tobacco Media Campaign*, *Journal of Public Health Management and Practice*, Vol. 6, No. 3, at 2 (May 2000).

The "truth" campaign in Florida has had dramatic results. The results from the Florida Youth Tobacco Survey, conducted by the Florida Department of Health from 1998 to 2000, demonstrated that: "[o]ver the 2-year period between the first and third surveys, current cigarette use declined by 40% (from 18.5% to 11.1%; $P < .001$) among middle school students and by 18% (from 27.4% to 22.6%; $P = .001$) among high school students."²⁵ Moreover, the CDC observed that "the decline of teen smoking in Florida between 1998 and 1999 'is the largest annual reported decline observed in this nation since 1980.'" *Id.* at 5.

By 1998, there also was literature demonstrating that the California counter-marketing campaign had been effective and that the "industry manipulation" theme found in some of the California advertisements worked with youth.²⁶

The recommendations of the Columbia Expert Panel and the experience of the Florida "truth" campaign influenced the way in which the truth® campaign was designed. As the Columbia Expert

²⁵ Ursula E. Bauer, et al., *Changes in Youth Cigarette Use and Intentions Following Implementation of a Tobacco Control Program*, *Journal of the American Medical Association*, Vol. 284, No. 6, at 725 (2000).

²⁶ See, e.g., John P. Pierce, et al., *Has the California Tobacco Control Program Reduced Smoking?*, *Journal of the American Medical Association*, Vol. 280, No. 10 (Sept. 9, 1998); Lisa K. Goldman, et al., *Evaluation of Antismoking Advertising Campaigns*, *Journal of the American Medical Association*, Vol. 279, No. 10 (March 11, 1998).

Panel recommended, the truth® campaign utilized a non-smoking brand, truth®, akin to other brands that are present throughout youth culture. For example, it incorporated the Panel's recommendations regarding the nature of the brand.

Specifically, it included the theme that the tobacco industry is manipulating teens by lying to them about the addictiveness and health effects of smoking. Legacy's truth® campaign also used the general approach taken in the Florida advertisements and benefited from the success of the Florida campaign.

B. The Legacy Foundation's truth® Campaign Has Been Highly Effective.

The Legacy Foundation launched the truth® media campaign in February 2000 with the target audience of 12 to 17 year olds who are "susceptible or open to smoking."²⁷ As discussed above, the truth® campaign is a counter-marketing program designed to challenge the core assumptions about smoking held by youths (e.g., smokers are independent, rebellious, risk-takers). *Id.* The approach taken by the truth® campaign is one that was endorsed by the Columbia Expert Panel and which had been proven effective in Florida: the campaign advertisements "feature[] 'edgy' and rebellious, multi-ethnic teens rejecting tobacco

²⁷ American Legacy Foundation, *Getting to the Truth: Assessing Youths' Reactions to the truthsm and "Think. Don't Smoke" Tobacco Countermarketing Campaigns*, First Look Report 9 ("First Look Report") at 6 (June 2002).

marketing efforts and revealing stark facts about the deadly nature of tobacco." *Id.* It is an important aspect of the campaign's success that it tells teens the truth about tobacco and the marketing efforts that have promoted tobacco to children. Another foundation of the truth® campaign is that truth® is a non-smoking brand designed to appeal to youths in the same fashion as other popular youth-oriented consumer brands. *Id.* The national truth® campaign, which is the culmination of considered expert opinions and proven successes by other similar state-wide campaigns, has been demonstrated to yield exceptionally positive results.

A study published last year in the American Journal of Public Health ("AJPH"), *Evidence of a Dose-Response Relationship Between "truth" Antismoking Ads and Youth Smoking Prevalence*, demonstrates the effectiveness of the truth® campaign.²⁸

Using data from the University of Michigan Monitoring the Future study conducted for the National Institute on Drug Abuse, the AJPH study showed that the overall prevalence of smoking among youths involved in the survey declined 18%. *Id.* at 428. This study also demonstrated that youth in areas with higher exposure to the truth® campaign had significantly lower odds of

²⁸ Matthew C. Farrelly, et al., *Evidence of a Dose-Response Relationship Between "truth" Antismoking Ads and Youth Smoking Prevalence*, American Journal of Public Health, Vol. 95, No. 3, at 428 (March 2005).

becoming smokers, even when controlling for other factors such as price and investments in state tobacco control programs. The study further demonstrated that approximately 22% of that total decline in youth smoking between 1999 and 2002 was attributable to the truth® campaign. *Id.* In addition, the same study demonstrated that, by 2002, "smoking rates overall were 1.5 percentage points lower than they would have been in the absence of the campaign, which translates to roughly 300,000 fewer youth smokers based on 2002 U.S. census population statistics." *Id.* at 429 (emphasis added).

Moreover, the truth® campaign also has significantly changed youths' attitudes towards tobacco, as demonstrated in the study, *Getting to the Truth: Evaluating National Tobacco Countermarketing Campaigns*.²⁹ In this study, the researchers relied on the results of two national surveys, the Legacy Media Tracking Surveys, to compare the exposure of 12- to 17-year-olds (the target age group for the truth® campaign) to the truth® campaign and Philip Morris's "Think. Don't Smoke" ("TDS") campaign. *Id.* at 901. Philip Morris's TDS campaign was first launched in 1998 and is significantly different from the truth® campaign: it is a campaign designed around a highly

²⁹ Matthew C. Farrelly, *Getting to the Truth: Evaluating National Tobacco Countermarketing Campaigns*, *American Journal of Public Health*, Vol. 92, No. 6, at 905 (June 2002).

conventional approach (i.e., the "just say no" approach). *Id.* The TDS campaign "neglects the long-term health effects of tobacco or tobacco's addictive nature" and "TDS ads generally feature role models who are closed to the idea of smoking explaining why they do not smoke."³⁰

The study, *Getting to the Truth: Evaluating National Tobacco Countermarketing Campaigns*, showed that the truth® campaign has changed youths' attitudes about smoking in dramatic ways. As noted in the study by Dr. Farrelly, et al., shifting youths' attitudes towards smoking is an intermediate step to changing smoking behaviors or preventing youths from initiating smoking.³¹ For example, "[t]he percentage of youths who held anti-tobacco attitudes and beliefs increased by an amount that ranged from 6.6% to 26.4% during the first 10 months of the campaign, which compares favorably with the 10% average increase in Florida during the first year of the campaign." *Id.* at 905. In addition, "[t]he attitudes that changed most dramatically were 'taking a stand against smoking is important,' 'not smoking is a way to express independence,' and 'cigarette companies deny that cigarettes cause cancer and other harmful diseases.'" *Id.*

³⁰ First Look Report at 6.

³¹ Matthew C. Farrelly, *Getting to the Truth: Evaluating National Tobacco Countermarketing Campaigns*, *American Journal of Public Health*, Vol. 92, No. 6, at 901 (June 2002).

Moreover, the truth® advertisements were found to be more consistently effective in modifying youths' attitudes towards smoking than Philip Morris's TDS Campaign or Lorillard's "Tobacco Is Whacko . . . If You're A Teen." Even though Philip Morris's conventional advertising campaign aired for at least 12 months before the truth® campaign was launched, the truth® campaign still "resonat[ed] more with youths." *Id.* at 905. Ninety percent of the youth surveyed said the truth® advertisements they saw were convincing, and 85 percent said the advertisements gave them good reasons not to smoke.³² Exposure to truth® was associated with a significant decrease in the odds of current nonsmokers expressing an intention to smoke in the next year, while exposure to TDS was associated with an increase in the odds of youths intending to smoke in the next year. Youths exposed to TDS advertisements were also more likely to report favorable feelings toward the tobacco industry than youth not exposed to TDS advertisements.³³

This impact is particularly disturbing because studies show that youth with a more favorable view of the tobacco industry

³² First Look Report at 16.

³³ Matthew C. Farrelly, *Getting to the Truth: Evaluating National Tobacco Countermarketing Campaigns*, *American Journal of Public Health*, Vol. 92, No. 6, at 905-06 (June 2002).

are also more likely to smoke.³⁴ These results are not surprising. The slogans for Phillip Morris's campaign, as well as Lorillard's, are directly contrary to the recommendations of the Columbia Expert Panel, which "advise[d] against directive messages such as those telling youths not to smoke and that smoking is uncool and for adults only." *Id.* at 906.

Lorillard's campaign's penetration was so weak it was impossible to measure an effect. First Look Report at 11-12, 27. In contrast, the truth® campaign utilizes stark facts about tobacco and tobacco industry marketing practices rather than a directive "just say no" approach.

Research in the communications field also demonstrates why the approach taken by Philip Morris and Lorillard in their advertisements is not effective. While the tobacco companies and their defenders have argued that Americans, including children, make rational decisions to smoke based on the knowledge of the health risks associated with smoking,³⁵ communications experts have determined that the decision to smoke is not a rational decision. Using survey data, such experts have demonstrated that young smokers are not thinking

³⁴ David F. Sly, et al., *The Industry Manipulation Attitudes of Smokers and Nonsmokers*, *Journal of Public Health Management and Practice*, Vol. 6, No. 3, at 49-56 (2000).

³⁵ W.K. Viscusi, *Smoking: Making the Risky Decision* (Oxford University Press, 1992).

about how smoking might affect their health when they begin smoking; rather, they are focused on doing something new and exciting.³⁶ In short, it is favorable feelings about smoking (e.g., smoking is popular, relaxing), as opposed to rational thinking, that influence the decision to smoke. In contrast to the Lorillard and Philip Morris campaigns, the truth® campaign is successful precisely because it takes into account and develops its ads using the best available scientific research about how young people make their decisions about whether to smoke and about what is most likely to influence them not to smoke.

If Lorillard is successful in its bid to have certain advertisements from the truth® campaign found to violate the MSA, the truth® campaign's ability to affect tobacco use among young people will be crippled, which would have a detrimental effect on the public health. By contrast, the interpretation of the terms adopted by the Chancery Court will allow the Legacy Foundation, through the truth® campaign, to continue to reduce tobacco use among young people.

CONCLUSION

The truth® national counter-marketing campaign was well researched and designed with the benefit of considered expert

³⁶ P. Slovic, ed., *Smoking, Risk, Perception, & Policy* (Sage Publications, 2001).

opinion and the proven successes of several predecessor state-wide campaigns. The considerable research and study that went into the design of the truth® campaign has yielded extraordinary results: the truth® campaign has proven highly effective in changing children's attitudes towards smoking and their smoking behavior. To be successful, Legacy needs to be able to produce truthful advertisements that take advantage of what is known about how best to reach teens even if the tobacco industry does not like the messages or the messages cause tobacco executives to be uncomfortable. The frank messages and counter-marketing techniques about which Lorillard complains were included precisely because they are effective ways to reach children and their removal would undermine the whole purpose of the truth® campaign, which is to reduce youth tobacco use.

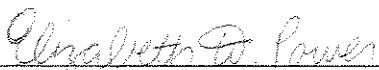
Dated: February 10, 2006

Respectfully submitted,

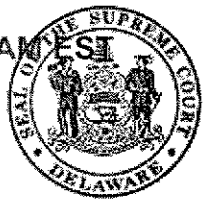
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I, Elizabeth D. Power, hereby certify that on February 10, 2006, copies of the foregoing *Brief of Amici Curiae Campaign for Tobacco-Free Kids, American Cancer Society, American College of Occupational and Environmental Medicine, American Dental Hygienists' Association, American Heart Association, American Lung Association, American Medical Association, American Public Health Association, American School Health Association, American Society of Addiction Medicine, Association of Schools of Public Health, Community Anti-Drug Coalitions of America, Lung Cancer Alliance, Medical Society of Delaware, National African American Tobacco Prevention Network, National Association of County and City Health Officials, National Association of Local Boards of Health, National Latino Council on Alcohol and Tobacco Prevention, Society for Research on Nicotine and Tobacco, and Tobacco Control Legal Consortium, in Support of Plaintiff-Below/Appellee American Legacy Foundation* were served upon the following counsel of record via electronic mail:

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