

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

PHILIP MORRIS USA, INC. f/k/a  
PHILIP MORRIS INCORPORATED, et al.,

Defendants.

Civil Action  
No. 99-CV-02496 (GK)

**BRIEF OF *AMICUS CURIAE* TOBACCO CONTROL LEGAL CONSORTIUM  
AND OTHERS IN SUPPORT OF THE POSITIONS OF THE PLAINTIFF  
UNITED STATES OF AMERICA AND INTERVENORS REGARDING  
REMEDIES**

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## I. INTRODUCTION

The *amici curiae* are nonprofit organizations with a shared mission centered on improving public health.<sup>1</sup> As such, we support the Proposed Final Judgment and Order (“Proposed Order”) regarding remedies submitted by the Department of Justice (“DOJ”) in this action with certain critical reservations and additional proposals that are addressed herein or are being addressed by the organizations to which this Court has granted intervenor status (“Intervenors”).

We agree with Intervenors that the smoking cessation remedy should be expanded to comply with the recommendations made by DOJ’s own expert witness. See generally United States’ Written Direct Examination of Michael C. Fiore, M.D., M.P.H. (Docket Entry #5370) We further agree with Intervenors’ recommendations for improving upon several of the other remedies described in the Proposed Order.

In this brief, we respectfully make several specific suggestions for improving the proposed remedies described in Section IV(F) of the Proposed Order dealing with Document Disclosure; Section V of the Proposed Order dealing with Prohibited Practices; Section IV(E) of the Proposed Order dealing with Corrective Communications; and Section VI(C) of the Proposed Order concerning the authority vested in the Independent Investigations Officer (“IO”).

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<sup>1</sup> The individual organizations that join in this brief are identified in the motion for leave to file this brief, which also explains the interest of each *amicus curiae* joining this brief.

## **II. ENHANCEMENTS TO DISCLOSURE PROVISIONS OF PROPOSED ORDER**

Defendants should be required to disclose information in addition to that described in the Proposed Order that may be related to their potential future violations of the Racketeer Influenced and Corrupt Organizations (“RICO”) Act, 18 U.S.C §§ 1961 *et seq.* *Amici* agree with the requirement in DOJ’s Proposed Order that Defendants publish on websites and in repositories the documents produced in discovery in the present case and certain other litigation. This proposed requirement would alert the public to important information. The proposed disclosure requirements are inadequate, however, to provide the level of disclosure that would dissuade Defendants from committing future violations of the RICO Act and for this reason must go beyond documents produced in domestic litigation.

### **A. The Court Should Expand Disclosure Requirements to Include International Litigation**

Defendants should be required to disclose all documents produced in foreign courts or administrative agencies in actions falling within those categories described in Proposed Order Section IV(F)(3)(a) for all actions commenced since the filing of this action by plaintiffs in 1999. Just as U.S. litigation has cast light on Defendants’ misconduct elsewhere,<sup>2</sup> foreign litigation can cast light on Defendants’ misconduct in or

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<sup>2</sup> Documents from U.S. litigation show that Defendants conspired to protect their commercial interests internationally by promoting controversy over smoking and disease and through strategies directed at reassuring smokers. See Neil Francey & Simon Chapman, “Operation Berkshire”: The International Tobacco Companies’ Conspiracy, 321 *Brit. Med. J.* (2000); see also Richard W. Pollay, Targeting Youth and Concerned Smokers: Evidence from Canadian Tobacco Industry Documents, 9 *Tobacco Control* 136 (2000) (smoker reassurance in Canadian market). Another study of the industry’s internal documents revealed an “intense” campaign in Latin America and the Caribbean against perceived common threats to market interests, including hiring scientists to refute reports that cigarettes were harmful to smokers and non-smokers, and influencing government officials to thwart tobacco control regulation. See Pan American Health Organization, Profits Over People: Tobacco Industry Activities to Market Cigarettes and Undermine

affecting the United States. Indeed, discovery in litigation outside the U.S. already has proven helpful to understanding behavior in or affecting the U.S. See *British American Tobacco Australia Services Ltd. v. Cowell*, 2002 WL 31737235 (Victoria Ct. of App.) (2004) (Australian case that revealed evidence of tobacco industry wrongdoing that DOJ used to support its claim RICO violations in the present litigation).

While discovery tends not to be as extensive in foreign litigation as in the United States, and while Defendants are not parties to many of these cases, these are not reasons to exclude public disclosure of documents Defendants provide in foreign cases.

Litigation against the tobacco industry abroad has been gathering momentum. Most of the lawsuits brought thus far involve individuals seeking compensation for injuries related to smoking or government or insurance company attempts to gain reimbursement for health expenditures for smoking-related disease. See *Action on Smoking and Health, International Tobacco Litigation in Other Countries (Excl. USA)* (2005), <http://www.ash.org.uk/html/litigation/internatlit.html>. See Norwegian Agency for Health and Social Welfare, Department for Tobacco Control, *Tobacco Control Worldwide*, (2002).

A critical reason to require disclosure of discovery documents from foreign litigation is that there is no guarantee that litigation in the U.S. will continue to produce documents useful for preventing future RICO violations or other public health or scholarly purposes. Defendants have demonstrated that they are adept at evading discovery requests here and abroad by flooding individual plaintiffs with motions, shipping documents and research to foreign countries, hiding discoverable documents

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Public Health in Latin America and the Caribbean (2002), <http://www.eldis.org/static/DOC11213.htm>. In Finland, industry documents showed that the tobacco industry used similar tactics. See Heikki Hiilamo, *Tobacco Industry Strategy to Undermine Tobacco Control in Finland*, 12 Tobacco Control 414 (2003).

behind questionable claims of privilege, destroying documents, supporting legislation to stop private lawsuits, and by other means. See generally Michael V. Ciresi, et al., Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation, 25 Wm. Mitchell L. Rev. 477 (1999) (detailing tobacco industry's manipulation of discovery process to avert liability); United States' Written Direct Testimony of Frederick T. Gulson (former attorney for British American Tobacco's Australian subsidiary describing purpose of document retention policy as destruction of documents) (Docket Entry #4792); United States' Written Direct Examination of John St. Vincent Welch (former Tobacco Institute of Australia executive acknowledging tobacco industry's practice of destroying documents that might produce finding of liability in smokers' lawsuits) (Docket Entry #4739). Furthermore, Defendants are likely to use the constraints and monetary exactions imposed upon them in the present case to argue against the need for punitive damages in future private litigation. A reduced likelihood of receiving a substantial punitive damages award will discourage plaintiffs' attorneys from bringing future cases in this country.

Large-scale settlements of current or future legal actions against Defendants or legislative changes to the civil justice system could have a similar effect in terms of dramatically reducing discovery in domestic litigation. To the extent that Defendants can stymie litigation in the future, or thwart future discovery requests made in such litigation, Defendants' conduct will remain hidden from public scrutiny.

**B. The Court Should Require Defendants to Disclose Current Marketing Plans**

The expert testimony in this case makes clear that counter-marketing can be an effective way to reduce youth smoking and inform youth about the dangers of smoking.

To improve the effectiveness of counter-marketing advertising, as suggested in the Proposed Order, Defendants should be required, on an ongoing basis, to provide current marketing plans to the American Legacy Foundation or another designated counter-marketing entity (“Counter-Marketing Entity”). Given the tobacco industry’s past practice of targeting youth smokers through advertising specific brands in a manner attractive to their demographic, the plans required to be disclosed should include original marketing plans, studies, reports, and pertinent memoranda prepared by advertising agencies, marketing consultants, and Defendants’ employees. There should be transparency in this activity so that a successful counter-marketing campaign can reach the same audience. See Written Direct Examination of Michael Eriksen, Sc.D. (“Eriksen Testimony”) at p. 7, ll. 1-6 (Docket Entry #5371).

The fundamental challenge of marketing, according to DOJ witness Robert J. Dolan, Ph.D., Dean of the Stephen M. Ross School of Business at the University of Michigan and an expert on marketing practices in particular, is “[to] create something customers perceive to be valuable [by] figur[ing] out what people want.” Written Direct Examination of Robert J. Dolan, Ph.D. (“Dolan Testimony”) at p. 27, ll. 21-22 (Docket Entry #4336). Specifically with regard to cigarette marketing to youth, Dolan explained Defendants’ attitude towards marketing: “The tobacco companies regularly and systematically analyzed the market to identify opportunities and threats to their business. They understood the challenge of bringing in new people including teenagers into the market and they focused on increasing the perceived value of their products to achieve this.” Id. at p. 45, ll. 19-22.

Understanding what makes young people gravitate to certain brands of cigarettes requires determining the motivations underlying their preferences. See Centers for Disease Control and Prevention, [Designing and Implementing an Effective Tobacco Counter-Marketing Campaign](#) (First Edition October 2003) (describing need for qualitative data to effectively counter-market to target audience). Matthew Myers, President of the Campaign for Tobacco-Free Kids, stated in his testimony: “It is [] vitally important that each solution include a mechanism to monitor tobacco industry marketing on a continuing basis, along with a mechanism for adjusting the solution if changes in tobacco industry behavior result in the continuing exposure of young people to that marketing and to images that have made and continue to make the product so appealing to kids.” United States’ Written Direct Examination of Matthew L. Myers (“Myers Testimony”) at p. 38, ll. 10-14 (Docket Entry #5372).

The importance of knowing the attraction of particular brands is essential to crafting an effective counter-marketing campaign, particularly because the tobacco industry itself has used this qualitative data to target youth. In his testimony, Anthony Biglan, Ph.D., Senior Scientist and member of the Board of Directors at Oregon Research Institute (ORI) and an expert in adolescent psychology, stated:

Through brand image, marketing communicates that smoking a particular brand will fulfill psychological needs, such as the need for popularity or for adventure. The brand image contributes to the value of the brand for the consumer. In other words, the value of a brand to the consumer develops from the attributes associated with that brand through marketing. The value of the brand is known as brand equity.

Written Direct Examination of Anthony Biglan, Ph.D. (“Biglan Testimony”) at p. 114, ll. 15-19 (Docket Entry #4542). Biglan explained the effect of brand image:

The brand image has a three-fold effect: (1) the adolescent understands the cigarette brand itself to have attributes such as masculinity; (2) the adolescent believes that anyone who smokes the brand will have those attributes; and (3) the adolescent believes that he/she can have those attributes by smoking the brand. By imbuing a cigarette brand and its smokers with a valued attribute, Philip Morris motivates those who want that attribute and who want others to see them as having that attribute to smoke that brand.

Id. at p. 115, ll. 4-10.

If the Counter-Marketing Entity could gain real-time access to this information directly from Defendants, counter-marketing would be more effective. Real-time information would allow the Counter-Marketing Entity to respond before the cigarette company's marketing effort can succeed in influencing its target audience. In contrast, stale information about marketing campaigns puts the Counter-Marketing Entity in the much more difficult position of trying to undo beliefs and attitudes already formed in teenage minds.

Defendants may argue that this information is a closely guarded trade secret, and therefore should not be given to the Counter-Marketing Entity established under this Court's Order. That marketing information may constitute a trade secret, however, does not mean Defendants should have the freedom to direct seductive, misleading or deceptive advertisements at youth without an immediate corrective response from a responsible public health-oriented entity. As to the issue of secrecy, the Court is familiar with the common practice in litigation whereby protective orders issued during discovery provide that not only attorneys but also non-attorneys and expert witnesses will be bound. A similar order could be imposed to protect the information disclosed to the Counter-Marketing Entity, and the Court has ample power to find contempt on the part of the

Counter-Marketing Entity should it disclose confidential material covered by such a protective order.

**C. The Court Should Require Defendants to Disclose any Funding of Outside Organizations**

The Proposed Order should require Defendants to disclose publicly any funding they provide to outside organizations including, but not be limited to, academic institutions, grass-roots or citizens' action groups, political or industrial advocacy groups, and political action committees and candidates for public office. Defendants have a long history and well-established record of funding individuals and outside groups to promote their agenda without disclosing their monetary contributions. This strategy is used to make it appear that Defendants have independent allies who support their position on critical issues.

Defendants have attempted to use third parties to influence legislation and regulation in areas such as secondhand smoke, taxation, and tort "reform".<sup>3</sup> For example, in the context of secondhand smoke, Gray Robertson, President of Healthy Buildings International ("HBI"), an indoor air quality consulting firm, testified that the Tobacco Institute paid HBI to conduct apparently independent studies. See Proposed Testimony of John Graham "Gray" Robertson as Corrected by John Graham "Gray" Robertson at p.

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<sup>3</sup> See Monique Muggli & Richard Hurt, Tobacco Industry Strategies to Undermine the 8th World Conference on Tobacco OR Health, 12 Tobacco Control 195 (2003) (analyzing tobacco industry's attempt at initiating a wide-ranging campaign to undermine the implementation rules limiting secondhand smoke exposure in Latin American countries and its use of outside organizations for that purpose); Anne Landman, Push or Be Punished: Tobacco Industry Documents Reveal Aggression Against Businesses That Discourage Tobacco Use, 9 Tobacco Control 339 (2000) (describing tobacco industry's attack aided by third parties, on businesses voluntarily enacting policies to discourage tobacco use and minimize exposure of employees and patrons to secondhand smoke); Michael S. Givel & Stanton A. Glantz, Tobacco Lobby Political Influence on US State Legislatures in the 1990s, 10 Tobacco Control 124 (2001) (analyzing tobacco industry's use of third party groups to affect legislation and policy in the areas of taxation and tort "reform").

42 (Docket Entry #3938). Gregory Wulchin, one of HBI's technicians, testified: "HBI's data contain unexplained entries that raise serious questions about the integrity of its studies." Testimony of Gregory A. Wulchin ("Wulchin Testimony") at p. 17, ll 12-14 (Docket Entry #3990) .

Justice Brandeis famously opined that "sunshine is the best disinfectant." Louis Brandeis, Other People's Money, and How the Bankers Use It 92 (1914). Disclosure of their funding and support of outside groups will enable the IO and public health groups to detect any efforts by Defendants to undermine future tobacco control efforts by using third parties to advance their interests surreptitiously in order to do something that they themselves would be prohibited from doing.

### **III. ENHANCEMENTS TO PROHIBITED PRACTICES PROVISIONS OF PROPOSED ORDER**

In Section V of the Proposed Order, DOJ asks the Court to permanently enjoin all "Defendants, Covered Persons and Entities" from engaging in certain "prohibited practices." Three of the listed prohibited practices could be made more effective through expansion or clarification: (1) use of express or implied health messages and health descriptors; (2) brand-name sponsorship and promotions of events; and (3) communications regarding smoking and health.

#### **A. The Court Should Place Further Restrictions on Defendants' Use of Express or Implied Health Claims and Misleading Health Descriptors**

##### **1. Scope of the Problem**

Defendants' use of implied health claims and misleading descriptors has been detrimental to the public health, as such claims and descriptors tend to reinforce common

misconceptions – some created by Defendants themselves – about the health risks of smoking certain types of cigarettes. Trial witness testimony and exhibits define the scope of this problem. Permanently enjoining Defendants from the use of implied health claims and misleading descriptors and properly defining the injunction’s scope are thus of crucial importance to the public health.

Michael Eriksen, Sc.D., Professor and Director of the Institute of Public Health at Georgia State University, testified for DOJ as an expert in public health. See Eriksen Testimony at p. 1, ll. 3-5. Eriksen noted that “most light cigarette smokers are unaware of how smokers tend to change their smoking patterns in order to derive the same or more tar and nicotine from ‘light’ and low tar cigarettes that is obtained from full flavor cigarettes, resulting in no health benefit for those smokers who switch to ‘light’ cigarettes and compensate.” Id. at p. 21, ll. 18-22. He concluded that “ensur[ing] that the information that is being conveyed whether implicitly or explicitly is not misleading to the American public . . . is of particular importance with regard to the use of product descriptors that have been used to provide reassurance to health-concerned smokers and imply that certain brands have health benefits.” Id. at p. 21, ll. 24-27 through p. 22, l. 1. Eriksen thus recommended “that terms that convey a misleading impression of the harm caused by the product should no longer be used.” Id. at p. 22, ll. 1-3. Specifically, he “recommend[ed] removal of cigarette brand descriptors such as ‘low tar,’ ‘light,’ ‘ultra-light,’ or ‘mild’ from all marketing and the name of the brand.” Id. at ll. 5-6. “Assuming the United States’ allegations [concerning brands described as ‘light’] have been proven,” Eriksen continued, “these products are not reduced exposure cigarettes, and the marketing of them with these brand descriptors is misleading.” Id. at ll. 6-9.

Professor Neil Weinstein, Ph.D., of Rutgers University, who has acted as a consultant on matters involving risk perception, also testified extensively for DOJ regarding common public misperceptions surrounding cigarettes labeled “light,” “ultralight,” etc. See Written Direct Examination of Neil Weinstein, Ph.D. (“Weinstein Testimony”) at p. 3, l. 21; p. 13, ll. 11-25; p. 23, ll. 21-22 (Docket Entry #4793). One of the major misconceptions Weinstein noted among smokers of these cigarettes is “a perception of reduced risk.” Id. at p. 23, l. 21. He discussed, by way of example, a national telephone survey revealing “that 58% of ultralight cigarette smokers and 39% of light cigarette smokers agreed that they ‘smoke [Light or Ultra-light] cigarettes to reduce the risks of smoking without having to give up smoking..’” Id. at pp. 23, l. 23 - p. 24, l. 3, citing U.S. Exhibit 17,736 (bracketed text in original).. He also noted another study in which 23% of the smokers surveyed “still believed that smoking light cigarettes lowers the risk of health problems.” Id. at p. 50, ll. 20-22, citing U.S. Exhibit 17,736.

Additionally, Weinstein addressed misperceptions about tar content in “light” cigarettes. He testified: “Most smokers believe that light and ultralight cigarettes have less tar . . . As a consequence, few realize that smoking a light cigarette yields about the same amount of tar as a regular cigarette . . .” Id. at p. 54, l. 23; p. 55, ll. 1-2. Weinstein backed this conclusion by mentioning several studies, including one reporting “that 70% of light cigarette smokers said that light cigarettes decrease one’s daily tar intake,” Id. at p. 55, ll. 6-7, citing U.S. Exhibit 17,736.. Such study results, Weinstein continued, show that “[f]ewer than one in ten smokers knew that light cigarettes can and often do deliver as much tar to smokers as regular cigarettes.” Id. at ll. 19-20.

Recent Surgeon General's Reports support these witnesses' testimony. The 2000 Report of the Surgeon General concluded that "[w]ithout information about toxic constituents in tobacco smoke, the use of terms such as 'light' and 'ultra light' on packaging and in advertising may be misleading to smokers." U.S. Exhibit 18,264 (2000 Report of the Surgeon General at 261). The Surgeon General further stated, "[b]ecause cigarettes with low tar and nicotine contents are not substantially less hazardous than higher yield brands, consumers may be misled by the implied promise of reduced toxicity underlying the marketing of such brands." *Id.* Additionally, the 2004 Report concluded that "[s]moking cigarettes with lower machine-measured yields of tar and nicotine provides no clear benefit to health." U.S. Exhibit 18,264 (2004 Report of the Surgeon General at 25) .

## 2. The Proper Remedy

DOJ requests that Defendants be enjoined from "[c]onveying any express or implied health message or health descriptor for any cigarette brand in the brand name or on any packaging, advertising or other promotional, informational or other material." Proposed Order at Section V(4). DOJ states that such "forbidden health descriptors" include the words "light," "ultra light," "mild," and "natural." *Id.* This limited list, though non-exhaustive, fails to include certain potentially misleading health descriptors that Defendants commonly use. This list should contain words that may connote a health benefit, including (but not limited to) "low tar," "ultra," "smooth," "slim," "super slim," "free," "additive-free," "no additives," "medium," "low nicotine," "reduced nicotine," and "ultima." Next, although the Proposed Order is explicit in identifying certain forbidden "health descriptors," it remains vague as to the meaning of "any express or

implied health messages.” Id. To prevent other types of communication from misleading consumers, such forbidden messages should expressly include, but not be limited to, use of ordinal numbers, letters, and color shades/variations<sup>4</sup> on any packaging, advertising or other promotional, informational or other materials that are intended to or have the likely effect of indicating that one product is or may be less dangerous than another.

**B. The Court Should Prohibit All Brand Name Sponsorship and, If It Does Not Prohibit Events in Adult-Only Facilities, It Should at Least Restrict Promotion of Events in Adult-Only Facilities**

1. Scope of the Problem

Although Defendants have been subject to the Brand Name Sponsorship limitation of the Master Settlement Agreement (“MSA”) (U.S. Exhibit 36,251) for almost seven years, studying the MSA demonstrates substantial gaps in its restrictions that permit Defendants to continually devise methods of enticing youth through sponsorship activities that infiltrate these gaps. At first glance, the MSA appears to permit only one Brand Name Sponsorship. This “one” sponsorship, however, is very broadly described and, in reality, permits unlimited Brand Name Sponsorship in venues where children are not permitted. In addition to allowing Brand Name Sponsorship of an “athletic, musical, artistic, or other social or cultural” event or a national or multi-state series of such events, the MSA also permits Brand Name Sponsorship of an entrant, participant, or team, in the sponsored series or events in the series. MSA at Section II(j) . The definition specifically exempts from Brand Name Sponsorship restrictions an unlimited number of events in

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<sup>4</sup> E.g., a red to green or black to white continuum where red or black might be perceived as posing greater risk and green or white might be perceived as posing less risk.

“Adult-Only Facilities.”<sup>5</sup> Id. And although the MSA prohibits Brand Name Sponsorship of events at which “the intended audience is comprised of a significant percentage of youth,” it still permits sponsorship of events at which youth may be present, although not in a “significant percentage.” See MSA section III(c)(1)(B) . Additionally, the MSA permits sponsorship of events at which the actual attendance consists of a significant percentage of youth, as long as such an audience was not “intended.”

Other MSA gaps related to Brand Name Sponsorships include that the MSA prohibitions on Outdoor Advertising, Brand Name Merchandise, and Paid Product Placement in Media all make exceptions related to Brand Name Sponsorships. See MSA sections III(c)(3)(E), III(c)(3)(D), and III(c)(3)(C) . These loopholes have resulted in massive tobacco billboards and banners at sponsored sporting events without even a Surgeon General’s warning; hats, shirts and other merchandise that act as human billboards for tobacco use (e.g., “NASCAR Winston Cup” apparel); and tobacco use being promoted on television through, for example, Marlboro and Kool racing cars and their celebrity drivers.

According to DOJ witness Dean Krugman, an expert in mass communication and marketing communication, “[m]any of the public entertainment events sponsored by cigarette brands have enjoyed prominent television coverage and have continually reinforced both the brand name and image of specific cigarettes.”<sup>6</sup> Written Direct

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<sup>5</sup> The MSA defines an “Adult-Only Facility” as “a facility or restricted area . . . where the operator ensures or has a reasonable basis to believe . . . that no Underage person is present.” MSA at Section II(c). “Underage” is defined as “younger than the minimum age at which it is legal to purchase or possess (whichever minimum age is older) Cigarettes in the applicable Settling State.” Id. at Section II(yy).

<sup>6</sup> Krugman noted as an example a Philip Morris event tape highlighting the television coverage of their sponsored activities and brand name associations. Krugman Testimony at p. 103, ll. 13-15, citing U.S. Exhibit 38,269. According to Krugman, “[t]he event tape documents the success of several promotions by illustrating how cigarette brand-sponsored events such as the Virginia Slims professional women’s tennis tournament, Virginia Slims ‘Fashion Spree,’ Benson & Hedges Blues Festival, Marlboro Music Tour,

Examination of Dean Krugman, Ph.D. (“Krugman Testimony”) at p. 103, ll. 11-13 (Docket Entry #4387). Krugman continued, “[t]obacco companies rely on sponsorships to develop customer relationships and foster positive brand images. Brand images are conveyed to both event attendees and broadcast audiences of the event. Public entertainment events also enjoy media coverage that reinforces both the brand name and image of specific cigarettes.” Id. at p. 108, ll. 4-7. Brand Name Sponsorship events, therefore, “are important tools for the companies in presenting positive cigarette brand images to potential and current smokers including young people. Because the product is conveyed in the context of the event, it creates a ‘rub off’ between the event and the product.” Id. at p. 112, ll. 1-4. According to Krugman, “[b]y making their cigarette products and messages ubiquitous, the tobacco companies normalize smoking and make smoking an acceptable behavior among adolescents.” Id. at p. 47, ll. 17-19.

Paul Slovic, Ph.D., Professor of Psychology at the University of Oregon and President of Decision Research, testified similarly for DOJ. See Written Direct Examination of Paul Slovic, Ph.D. According to Slovic, “display of even the brand name or package may create positive affect through the mere exposure effect. Other promotional efforts (e.g. . . . sponsorship of athletic and entertainment events) likewise are designed to increase the positive affect associated with smoking. As positive affect increases, the perceived risk of smoking would be expected to decrease . . . .” Id. at p. 44, ll. 4-7 through p. 45, ll. 1-2.

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Marlboro ‘Mini Grand Prix,’ and Marlboro professional racing events were covered on television.” Id. at ll. 15-19. In 2001 alone, according to Krugman, “[t]he cigarette industry spent \$312.4 million . . . on public entertainment . . . .” Id. at p. 108, l. 10.

Similarly, DOJ witness Anthony Biglan testified about the positive imagery that has become associated with different cigarette brands through company marketing efforts, including sponsorship events. See generally Biglan Testimony. Regarding the Marlboro brand, Biglan stated that internal industry documents “support [his] conclusion that Philip Morris uses auto racing and other sports-related marketing to associate [the brand] with adventure and excitement.” Id. at p. 143, ll. 9-11. Biglan also testified regarding Philip Morris’s Virginia Slims brand: “[B]eginning in 1971, [Philip Morris] sponsored the Virginia Slims Tennis Tournament. . . . Through [event] advertisements, Philip Morris associated Virginia Slims with tennis greats such as Billie Jean King and Martina Navratilova.” Id. at p. 200, ll. 2-3; p. 201, ll. 1-3, citing U.S. Exhibit 58,930. Biglan testified similarly about Brown & Williamson’s Kool brand, stating that associating the Kool brand with sports conveys to adolescents that smoking Kool “is an essential component of being a successful, masculine athlete,” and an association with popular music links the brand to “images of popular musicians who are influential male role models among adolescents.” Id. at p. 244, ll. 16-19.

There is evidence that such marketing practices have an especially profound effect on youth. According to the testimony of Matthew Myers, President of the Campaign for Tobacco-Free Kids, the MSA’s allowance of one Sponsorship per year “has allowed the industry in this country and overseas to continue to use brand name sponsorships to gain exposure to audiences that include large numbers of children.” Myers Testimony at p. 35, ll. 8-9. Additionally, although he did not have specific attendance or audience data, Dean Krugman concluded “that some unknown number of

teenagers are reached with positive cigarette messages” through Brand Name Sponsorship events. Krugman Testimony at p. 112, ll. 10-14.

2. The Proper Remedy

In its Proposed Order, DOJ asks the Court to expand the prohibition of Brand Name Sponsorship to include “any Motor Sports Brand Name Sponsorships<sup>7</sup> that results in exposure, by any means, of a brand sold in the United States, whether the exposure is intended by the Defendant or not.” Proposed Order at Section V(5)(c). Although this is a valuable addition to the list of prohibited events, DOJ’s request is not broad enough. Defendant companies still would be permitted to hold “one” Brand Name Sponsorship per year so long as the sponsorship were not of motor sports, or other events or participants specifically prohibited by the MSA. This would leave open a wide range of possible Brand Name Sponsorship of events, including other athletic and non-concert entertainment events such as skateboarding, rodeo, comedy shows, and extreme sports – which youth often attend and view on television. Furthermore, the proposed Order’s sponsorship prohibition is phrased as being “of events,” but it should also specifically ban sponsorship of teams, entrants, or participants in these events (which MSA section II(j) treats as a separate category from the events themselves). Associating tobacco products with celebrity athletes and entertainers powerfully affects youth attitudes about tobacco use. Additionally, the proposed Order lacks the language in the MSA banning mixing product and event promotion. See MSA section III(c)(3)(A) and (B).

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<sup>7</sup> DOJ defines “Motors Sports Brand Name Sponsorship” as “any motor sports event or series of events with respect to which payment (or other consideration) is made by or on behalf of a Defendant or an entity within a Defendant’s direction or control, in exchange for the association or use of a brand name with or in relation to the event or series of events.” Proposed Order at Section I.

In light of the enormous youth smoking problem in this country, the profound effects of industry marketing on youth, and the many loopholes in the MSA, further restrictions are needed. An injunction, therefore, should extend to prohibit all Brand Name Sponsorship, as did the FDA regulations that the Supreme Court stopped on jurisdictional grounds. See 61 Fed. Reg. 44396 (Aug. 28, 1996); FDA v. Brown & Williamson Tobacco Corp. 529 U.S. 120 (2000). From monitoring MSA implementation, it has become clear that Brand Name Sponsorship must be broadly defined to include sponsorship not only of events, but also of entrants, participants, and teams in those events; product advertising associated with celebrities or athletes; all product advertising at events (e.g., product ads in event programs, public address announcements about product-related events, big-screen video features including brand names, sales of merchandise bearing brand names—all of which tobacco companies have done in connection with Brand Name Sponsorships after signing the MSA (or Smokeless Tobacco MSA)). The Brand Name Sponsorship prohibition should also include events in Adult-Only Facilities (“AOFs”).

If Brand Name Sponsorships in AOFs are permitted by this court, the AOFs should not be permitted to display any exterior brand name or product advertising, to prevent Defendants from circumventing the youth promotional restriction by, for example, erecting AOF tents at events where children are present featuring large and colorful exteriors promoting their brands. Further, the tobacco companies should not be permitted to distribute free samples from AOFs at events. Because of the potential for “rub off” between media coverage of an event and a branded product, no advertising, promotion, or marketing for a brand-sponsored event held in an AOF should refer to the

sponsoring brand or otherwise indicate a link between the brand name and the event.

Krugman Testimony at p. 112, ll. 1-4.

**C. The Court Should Order Restrictions on Data Collection from Youth Regarding Smoking and Health**

1. Scope of the Problem

Evidence presented at trial demonstrates that tobacco companies have surveyed youth under the guise of tracking youth smoking or reviewing the market for future trends, when the data was in fact used for youth-marketing purposes. For example, in his testimony Dean Krugman analyzed a group of Reynolds documents from the 1970s discussing the company's "National Family Opinion" ("NFO") surveys on smoking habits. See Krugman Testimony at pp. 70-74, 87. Krugman found it "clear that R.J. Reynolds used [NFO] data about teenagers in developing marketing plans to build demand." Id. at p. 72, ll. 21-22.

Krugman pointed to an April 22, 1973, Camel Marketing Plan as indicating "how R.J. Reynolds used [NFO] data on teenagers. Given that it is a Camel marketing plan, R.J. Reynolds's use of NFO data is contrary to R.J. Reynolds' contention that the NFO data was only used for 'tracking' purposes." Id. at p. 73, ll. 6-9, citing U.S. Exhibit 48,902. Krugman also cited a 1975 Marketing Plans Presentation that examined "the growing importance of the young adult in the cigarette market" and noted Reynolds' brands' "comparative weakness against Marlboro and Kool" in the 14-24 age category. Id. at p. 75, ll. 10-12, citing U.S. Exhibit 23,052. Krugman found this presentation "to provide compelling support for [his] conclusion that the tobacco companies collected research on teenagers and designed their marketing to appeal to teenagers." Id. at ll. 17-

19. Reynolds, in his opinion, was “not just looking at trends for forecasting purposes, it [was] specifically comparing its market share of 14-24 year olds with other companies’ shares” and “continue[d] through with . . . targeting” that age group.” Id. at ll. 19-22

Krugman cited yet another document along these same lines. An October 31, 1977, memorandum, Krugman testified, focused on young people in terms of their “higher susceptibility to fads, peer pressure, etc.” Id. at p. 77, ll. 8-13, citing U.S. Exhibit 48,844. Krugman thought that this was not merely “monitoring teenagers to just look at future trends,” but rather “an analysis of the data for current marketing purposes. Taken in the context of the other documents, R.J. Reynolds is really trying to figure out what marketing strategies to employ in order to reach these teenagers.” Id. at ll. 16-20.<sup>8</sup>

Although Krugman recognized “that in a few cases the documents explicitly note the teenage data are for forecasting purposes, and not for developing marketing strategies for the teenage market,” in the context of all the R.J. Reynolds’s documents of this era he concluded “that R.J. Reynolds’s objective in creating and circulating these reports was to continue its focus on the teenage market [and] not just to review this market for future trends.” Id. at p. 79, ll. 19-22; p. 80, ll. 1-2.

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<sup>8</sup> Other Reynolds examples of NFO data use that Krugman discussed in his testimony include:

- April 7, 1971, meeting summary notes entitled “Summary of Decisions Made in MRD-Esty Meeting Concerning Spring 1971 NFO Tobacco Products Survey,” noting that the survey would include respondents aged 14-20 and respondents aged 13 and younger, with age breaks of 14-15, 16-17, and 18-20. U.S. Exhibit 48,184.
- A September 2, 1971, memorandum entitled “NFO Profiles for Camel Regular and Filter,” stating: “Perhaps the most interesting data in this report is that for smokers 14-20 years of age.” The report carefully tracked the 14-15 and 16-17 year old age groups. U.S. Exhibit 20,679.
- A September 7, 1976, report conducted by NFO entitled “Smokers Screening - April 1976 Profile (14-17),” using a sample that focused on 14-17 year olds. The report included very detailed charts on teenage smoking behavior, preference by brand, and demographics. U.S. Exhibit 20,678.

2. The Proper Remedy

In Section IV(D) of the Proposed Order, DOJ asks for “Youth Smoking Reduction Targets and Penalties” as a remedy. This remedy requires each Defendant to reduce the share of youth (age 12 to 20) who smoke its cigarette products by 42% (from a 2003 baseline) by the year 2013, broken down by yearly targets. See Proposed Order at Section IV(D)(1). If a Defendant misses a yearly target, it will have to pay a monetary penalty. Id. at Section IV(D)(2). This remedy necessarily requires that Defendants stay informed as to the rate of youth smoking and ascertain ways to prevent youth smoking from occurring. However, there is ample publicly available information for Defendants to keep informed about youth smoking rates. In light of evidence of Defendants’ use of survey data to target the youth market rather than for its proper purposes and the potential to continue doing so, the Court should prohibit Defendants from the collecting of such data.

If, however, the Court finds that it must permit Defendants to collection some data in order to avoid penalties imposed by a powerful look back provision as contemplated by the Proposed Order of DOJ and strengthened in the Proposed Order to be submitted by the Intervenors, it must place firm restrictions on Defendants collection and use of such data.

To eliminate the possibility of misuse, the Court should order that an independent third party collect any and all youth data. The third party should be prohibited from retaining any personal identifying information from youths surveyed, including but not limited to name, address, telephone number, or e-mail address. The Defendant’s relationship with the third party should be disclosed publicly, as should all survey results.

For an example of a cigarette manufacturer-funded youth data collection project that uses an independent third party surveyor and makes its results publicly available, see Philip Morris’ “Teenage Attitudes and Behavior Study” (“TABS”);<sup>9</sup> but see Written Direct Examination of Cheryl G. Heaton at p. 58, ll. 7-14 (criticizing TABS for being “so similar to marketing research that it could be used for marketing purposes,” and finding fault with the strength of the alleged “firewall between youth smoking prevention and other parts of Philip Morris”).

Regardless of whether the Court decides not to order the remedy requested in Section IV(D) of the Proposed Order of DOJ or Intervenors, it should prohibit Defendants from directly or indirectly collecting any data about youth or addressing any communications to youth. Defendants’ motivations to encourage youth smoking are so strong, and their record of doing so despite protestations to the contrary so well established by testimony in this case, that Defendants cannot be trusted to have anything to do with youth. Cf. Dept. of Parks and Recreation v. State Pers. Bd., 284 Cal.Rptr. 839 (Cal. Ct. App. 1991) (noting California Department of Parks and Recreation’s refusal to employ convicted child molesters in recreational areas where people camp and bring their children to recreate “because it does not wish to expose the public to the risk of this type of offense . . .”).

#### **IV. ENHANCEMENTS TO THE CORRECTIVE STATEMENTS PROVISIONS OF PROPOSED ORDER**

*Amici* agree with the requirement proposed by DOJ that Defendants make corrective statements concerning the adverse health effects of smoking, “including ‘low

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<sup>9</sup> Philip Morris provides information about TABS at:  
<http://www.philipmorrisusa.com/en/ysp/tabs/about/about.asp>.

tar' cigarettes; the addictiveness of smoking and nicotine; the adverse health effects of exposure to secondhand smoke; and the impact of tobacco marketing on youth.”

Proposed Order at Section IV(E). Such statements could help correct some deep misimpressions that Defendants have created in smokers and the general public, misimpressions that expert testimony in this case concludes will continue to mislead consumers and potential consumers of Defendants' products.

As a direct result of Defendants' conduct, smokers and the general public have deeply ingrained misimpressions. See Weinstein Testimony at p. 22, ll. 20 through p. 24, ll. 3. Smokers and potential smokers “have little knowledge of the nature of the illnesses that can be caused” or “the extent to which smoking increases the likelihood of these illnesses.” Id. at p. 21, ll. 7-20. When individuals do perceive a risk, they “minimize the personal relevance of these risks,” concluding that “smoking may be risky for others, [but that] these same risks do not apply to themselves.” Id. Smokers even underestimate the difficulty of breaking their addiction to nicotine. Id.

To ensure that the corrective statement remedy is efficacious, *amici* recommend that the Court expand it. First, the IO should be instructed to consult with experts to determine whether graphic imagery should accompany the corrective statements. Research has shown that graphic imagery is an effective means to provide consumers with an accurate understanding of smoking and health outcomes. See Erin Stahan, et al., Enhancing the Effectiveness of Tobacco Package Warning Labels: a Social Psychological Perspective, Tobacco Control, Vol. 11, pp. 183-90 (2002).

Second, if after two years of corrective statements as proposed by DOJ, the IO determines, based on the advice of experts, that misimpressions created by Defendants

continue to linger, the IO should have authority to extend the use of corrective statements. This authority should expressly include the use of graphic imagery. The IO also should be authorized to impose additional rounds of corrective statements (and imagery) based on the advice of experts, should a Defendant reinforce or create a new misimpression in the future. The depth and breadth of the misimpressions in this case are unprecedented and could last well beyond two years even in the face of very persuasive corrective statements (and imagery).

Third, it should be clarified that the IO will consult with experts in determining the form, substance and placement of corrective statements (and imagery) on Defendants' websites. As an initial matter in this regard, the inclusion of corrective statements in Defendants' publicly accessible websites should include any restricted-access websites designed for customers, smokers, or adult consumers.

V. **AUTHORITY OF THE INDEPENDENT INVESTIGATIONS OFFICER**

In Section VI of the Proposed Order, DOJ asks the Court to appoint the IO. Although the IO's areas of authority are thoroughly enumerated in Section VI(C)(1), one area calls for expansion. Section VI(C)(1)(d) allows the IO complete and unfettered access to inspect and/or copy documents, records, etc., in the possession, custody or control of any Defendant, Covered Person or Entity, or other person receiving funds pursuant to the Final Judgment or Order. Section VI(C)(1)(f) similarly allows the IO to monitor Defendants' advertising, marketing practices, and marketing transactions.

These important powers should be expanded to give the IO authority to issue standing orders to ensure full and consistent disclosure of categories of industry documents necessary to enable the IO to properly monitor industry conduct.

Unfortunately, the language in the Proposed Order could be read as requiring the IO to identify specific documents of concern. This reading would be burdensome and impractical for two reasons. First, it would only permit the IO to seek disclosure of documents created before the IO's request and would preclude the IO from requiring disclosure of categories of documents on an ongoing basis. Thus, this language would introduce an unnecessary delay in the process. Second, Defendants could play cat and mouse with the IO by, for example, failing to release relevant documents on the ground that they had not been described precisely. See, e.g., Michael V. Ciresi, et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 Wm. Mitchell L. Rev. 477, 482-85 (1999) (describing defendants' discovery obfuscation in the Minnesota litigation). Standing general orders, by contrast, would require Defendants to provide the IO with copies of specific categories of documents as they are produced or at regular intervals.

**VI. CONCLUSION**

The *amici* provide these suggestions in the hope that they will assist the Court to develop a set of remedies that will help to achieve the maximum benefit for public health under the constraints of current law. We are aware that DOJ is petitioning the U.S. Supreme Court to review the February 4, 2005, ruling of the U.S. Court of Appeals for the District of Columbia in this case. If such review results in a change in the scope of remedies available to this Court, we would ask this Honorable Court to consider accepting an additional brief from us on the matter at that time.

Dated: August 24, 2005

Respectfully submitted by,

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