

The Hazards of Smoking

- Addiction
- Nicotine Levels
- Light Cigarettes
- Marketing to Youth
- Secondhand Smoke
- Suppression of Information

The Verdict Is In: Findings from *United States v. Philip Morris*



Tobacco Control
Legal Consortium



Law. Health. Justice.

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Tobacco Control Legal Consortium
875 Summit Avenue
Saint Paul, Minnesota 55105 USA
tobaccolaw@wmitchell.edu
www.tobaccolawcenter.org
651.290.7506

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Introduction

“The debate is over.” That’s what the Surgeon General said upon releasing the landmark 2006 Surgeon General’s Report on the hazards of secondhand smoke. Now another debate is over. The historic legal decision from which this publication is drawn—the Final Opinion in *United States v. Philip Morris*, the government’s massive racketeering case against cigarette manufacturers—lays to rest any lingering doubt about who’s behind the global tobacco epidemic.

After six years of litigation, nine months of trial, hundreds of depositions and thousands of exhibits, the verdict is in. A highly-respected impartial jurist, the Honorable Gladys Kessler of the United States District Court for the District of Columbia, has studied the evidence and rendered the definitive ruling on the tobacco industry’s fifty-year conspiracy to defraud America and the world. Importantly, the ruling strips away the pretense that these companies have reformed their ways. In one area after another, the Court finds, the fraud continues to this day.

Judge Kessler’s monumental Opinion is a masterpiece of legal scholarship: clear, thorough and compelling. Its only shortcoming is its length. With so much deceit to chronicle, the Opinion is longer than a Russian novel—more than 1700 pages, in fact. Its heft alone is enough to deter most readers. That’s why we’ve prepared this publication, a distillation of verbatim excerpts from the decision, to equip policymakers, health advocates and the public with the facts about the tobacco companies and their executives: what they knew, when they knew it, and how they continue to mislead the public and manipulate public policy. We hope that, armed with the evidence, we’ll all have a better chance at undoing the havoc these companies have created.

A handwritten signature in black ink, appearing to read "D. Douglas Blanke", with a stylized flourish at the end.

D. Douglas Blanke
Executive Director
Tobacco Control Legal Consortium

Guidelines for the Reader

The Verdict Is In: Findings from United States v. Philip Morris is a compilation of select quotes from 1,259 pages of Findings in a legal document over 1,700 pages long. Our goal in preparing this compilation has been to extract highlights of the Court's Findings that help tell the story in a direct and easily understandable way. The full text of the Court's 1700-page Final Opinion is available at <http://www.tobaccolawcenter.org/dojlitigation.html>.

We have taken great care in quoting verbatim and in chronological order from the Court's Opinion. Occasionally, we have used brackets to insert additional clarifying information in a quote, such as the full name or title of a company or individual. At times, photo cutlines include minor paraphrasing. Throughout this compilation process, we have used the following editorial conventions in quoting material and citing sources.

Defendants and their Acronyms

The eleven defendants in this case are:

- Philip Morris, Inc., now Philip Morris USA, Inc. ("Philip Morris")
- R. J. Reynolds Tobacco Co., now Reynolds American ("R.J. Reynolds" or "RJR")
- Brown and Williamson Tobacco Co., now part of Reynolds American ("Brown & Williamson" or "B&W")
- Lorillard Tobacco Company ("Lorillard")
- The Liggett Group, Inc. ("Liggett")
- American Tobacco Co., merged with Brown & Williamson, which is now part of Reynolds American ("American Tobacco")
- Philip Morris Cos., now Altria ("Altria")
- B.A.T. Industries p.l.c. ("BAT Ind."), now part of BATCo, British American Tobacco (Investments) Ltd. ("BATCo")
- The Council for Tobacco Research—U.S.A., Inc. ("CTR")
- The Tobacco Institute, Inc. ("TI")

Numbered Paragraphs

The Court's Findings are in the form of numbered paragraphs. We have retained the original paragraph numbers to assist readers who may wish to find an excerpt in its original context in the full Final Opinion.

Ellipses

Whenever we have omitted a word or words within a paragraph, we have used ellipses, following the rules of legal citation found in *THE BLUE BOOK* (18th ed., 2005) (Rule 5.3). Since we are quoting selectively throughout the document, we do not use ellipses at the beginning of paragraphs if the first sentence we're quoting is not the first sentence in the paragraph.

Endnotes and Footnotes

In the interest of readability, we have moved internal legal citations to Endnotes at the back of this publication. These Endnotes have numbers unique to this document. The Court's Findings, in their original form, also contain occasional numbered footnotes. In the few instances where we have quoted an excerpt containing one of the Court's footnotes, we have placed the footnote at the bottom of the page, designating it with an asterisk.

The Hazards of Smoking

Defendants Have Falsely Denied, Distorted and Minimized the Significant Adverse Health Consequences of Smoking for Decades

Summary

In this section of the Opinion, Judge Kessler explains that the evidence shows that the Defendants knew for fifty years or more that cigarette smoking caused disease, but repeatedly denied that smoking caused adverse health effects. Judge Kessler describes the Defendants' efforts during this time to attack and discredit the scientific evidence of a link between cigarette smoking and disease.

509. Cigarette smoking causes disease, suffering, and death. Despite internal recognition of this fact, Defendants have publicly denied, distorted, and minimized the hazards of smoking for decades. The scientific and medical community's knowledge of the relationship of smoking and disease evolved through the 1950s and achieved consensus in 1964. However, even after 1964, Defendants continued to deny both the existence of such consensus and the overwhelming evidence on which it was based.

1. Cigarette Smoking Causes Disease

510. Cigarette smoking and exposure to secondhand smoke (also known as environmental tobacco smoke or "ETS") kills nearly 440,000 Americans every year.¹

2. Scientific Research on Lung Cancer up to December 1953

a. Scientists Investigating the Rise in the Incidence of Lung Cancer Linked Smoking and Disease before 1953

538. Virtually unknown as a cause of death in 1900, by 1935 there were an estimated 4,000 deaths annually attributed to lung cancer.²

539. The rise in lung cancer had followed the dramatic increase in cigarette consumption which began early in the twentieth century.³

541. As early as 1928, researchers conducting a large field study associated heavy smoking with cancer.⁴

547. From their data from lung cancer patients and a control group in late 1948 and early 1949, it became clear to [Sir Richard] Doll and [Bradford] Hill [of the Medical Research Council, a unit of the National Health Service in the United Kingdom] that cigarettes were the crucial factor in the rise of lung cancer. . . . The findings were impressive: among the 647 lung cancer patients in Doll and Hill's study, all 647 were smokers.⁵

b. By 1953, Defendants Recognized the Need for Concerted Action to Confront Accumulating Evidence of the Serious Consequences of Smoking

558. The studies connecting smoking and lung

“The results of 34 different statistical studies show that cigarette smoking increases the risk of developing lung cancer. Many authorities believe the relationship to be one of cause-and-effect.”

R. J. Reynolds scientist Alan Rodgman in 1962



cancer were receiving attention outside the scientific community by 1953. For example, published reports like a Readers’ Digest article titled “Cancer by the Carton” shared the scientific findings in national media, creating public concern.⁶

563. While continuing to insist that there was no indication that cigarettes were unsafe, Defendants moved aggressively to market products which they implied were safer.

3. Developments Between 1953 and 1964

a. Between 1953 and 1964, the Evidence Demonstrating that Smoking Causes Significant Adverse Health Effects Grew Although No Consensus Had Yet Been Reached

574. Given this diversity of views amongst respected and independent scientists, the Court does not find, as the Government has argued, that, as of the mid-1950s, a consensus had yet been reached on whether cigarette smoking “caused” – in the precise scientific meaning of that term – cancer.

581. In 1961, the editors of The New England Journal of Medicine stated that . . . :
. . . most of the evidence is statistical and demonstrates a close association between heavy cigarette smoking and lung cancer. . . . Many conscientious observers believe that there are strong indications in favor of a causal relation in the vast majority

of cases. . . . Others remain unconvinced. . . . Each individual must choose his own course, whether to woo the lady nicotine or abjure the filthy weed, while the search for truth continues.⁷

593. In sum, by the early 1960s, the view of the scientific community had reached the conclusion that the evidence supporting a causal relationship between smoking and lung cancer was sufficiently established and recognized – albeit not to a scientific certainty – that it was appropriate to warn the public of the dangers it faced.

b. Before 1964, Defendants Internally Recognized the Growing Evidence Demonstrating that Smoking Causes Significant Adverse Health Effects

594. Internal documents reveal that Defendants’ knowledge of the potential harm caused by smoking was markedly different from their public denials on the same subject. Defendants specifically recognized the validity of the growing body of scientific evidence that existed in the 1950s.

603. In 1962, [R. J. Reynolds (RJR) scientist Alan] Rodgman offered his assessment of “the smoking and health problem”:

. . . The results of 34 different statistical studies show that cigarette smoking increases the risk of developing lung cancer. Many authorities believe the relationship to be one of cause-and-effect.⁸

604. Despite these writings, in 1995, Dr.

Rodgman stated under oath that, as of 1962, he disagreed that it was “more likely than not that cigarette smoking caused health problems.”⁷ This explanation is in direct contradiction to the clear wording of his own documents, set forth above, written 40 years before his 1995 testimony. Moreover, Dr. Rodgman had a financial incentive to offer favorable testimony to RJR when he testified. . . . Dr. Rodgman’s recantation of the extensive analysis and findings of his research of the late 1950s and 1960s is patently not credible.

c. In the 1950s, Defendants Began Their Joint Campaign to Falsely Deny and Distort the Existence of a Link Between Cigarette Smoking and Disease, Even Though Their Internal Documents Recognized Its Existence

625. Internally, Defendants acknowledged that, as William Kloefer, Vice President of Public Relations for the Tobacco Institute wrote to Earle Clements, President of the Tobacco Institute:

Our basic position in the cigarette controversy is subject to the charge, and may be subject to a finding, that we are making false or misleading statements to promote the sale of cigarettes.⁹

636. Defendants recognized – and used – the denial and rationalization used by smokers. In a memo to Joseph F. Cullman of Philip Morris, George Weissman, Executive Vice President Overseas (International), described how, in response to the 1964 Surgeon General’s Report, “we must in the near future provide some answers which will give smokers a psychological crutch and a self-rationale to continue smoking.” Among the “crutches” and “rationales” proposed to be offered to the smokers were questions of medical causation, “that more research is needed,” and that there are “contradictions” and “discrepancies.”¹⁰

4. The 1964 Surgeon General’s Report Represented a Scientific Consensus that Smoking Causes Disease

5. Post-1964 Research on the Adverse Health Effects of Smoking and Defendants’ Persistent Denials Thereof

a. Following Publication of the 1964 Report, the Scientific Community Continued to Document the Link Between Smoking and an Extraordinary Number of Serious Health Consequences

b. Defendants’ Internal Documents and Research from the 1960s, 1970s, and Beyond Reveal Their Continued Recognition That Smoking Causes Serious Adverse Health Effects and Their Fear of the Impact of Such Knowledge on Litigation

664. By at least January 1964, with the issuance of the Surgeon General’s 1964 Report, Defendants knew there was a consensus in the scientific community that smoking caused lung cancer and other diseases. Despite that fact, they publicly insisted that there was a scientific controversy and disputed scientific findings linking smoking and disease knowing their assertions were false.

672. In the 1960s, RJR established a facility [nicknamed the “Mouse House”] in Winston-Salem, North Carolina, which used mice to research the health effects of smoking.

673. Research done in RJR’s science and health group located at the Mouse House was routinely withheld from the scientific community – scientists were forbidden to both discuss and publish their findings.¹¹

674. As a result of the Mouse House work, RJR was aware that smoking was linked to emphysema. After extended exposure to smoke, the animals suffered weight loss and changes in metabolism of lipids both in surfactant and in lung and liver.¹²

677. In 1970, Philip Morris’s President complained to RJR about the work going on in the Mouse House. Despite the progress made there, RJR responded to the complaint by abruptly

closing the Mouse House – disbanding the entire research division in one day, without giving notice to the staff, firing all twenty-six scientists at the Mouse House, and destroying years of smoking and health research.¹³

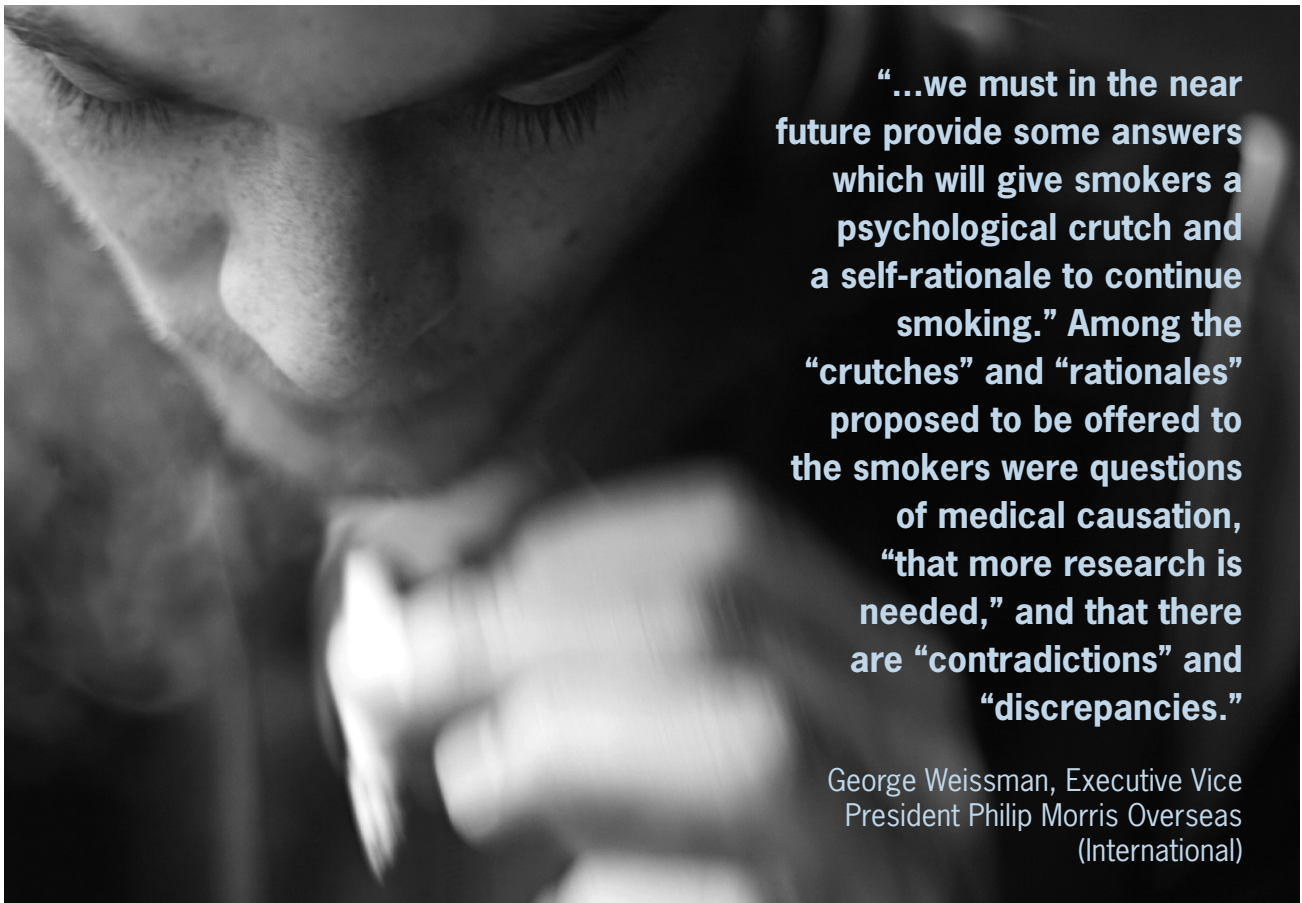
686. In 1980, [tobacco-funded Harvard researcher Dr. Gary] Huber sought to continue his smoking and health research on animals at a time when he was making significant progress, but Defendants cut off funding for his research at Harvard and denied his request for funding after he moved later that year to the University of Kentucky. In a 1980 meeting, Defendants' attorneys told Huber that the reason funding for his research had been discontinued was because he was "getting too close to some things."¹⁴

688. When Huber was subpoenaed by the State of Texas to testify in its case against the Defendants in 1997, lawyers for Defendants . . . contacted him and urged him "to keep the faith, to hold the line."¹⁵ The attorneys implied to Huber that he

did not "fully appreciate the full weight of . . ." representatives of the tobacco industry. The calls caused Huber to fear for the safety and financial security of his family.¹⁶ Huber perceived a clear message: Defendants wanted to keep him silent.¹⁷

697. In 1974, David Hardy of [the law firm of] Shook, Hardy & Bacon advised [British American Tobacco (Investments) Ltd. (BATCo)] against admitting to the public what its scientists knew internally – that smoking causes disease. At the time, BATCo was considering placing a warning on cigarette packages sold in England – with no government attribution – that stated that smoking "causes lung cancer, bronchitis, heart disease." In a letter addressed to BATCo, Hardy advised that this admission of fact would impede the defense of smoking and health litigation in the United States.¹⁸

699. In 1980, in a confidential memo analyzing BAT public positions and their impact on [Brown & Williamson's] stance in litigation, BATCo internally



"...we must in the near future provide some answers which will give smokers a psychological crutch and a self-rationale to continue smoking." Among the "crutches" and "rationales" proposed to be offered to the smokers were questions of medical causation, "that more research is needed," and that there are "contradictions" and "discrepancies."

George Weissman, Executive Vice President Philip Morris Overseas (International)

admitted: "It is simply incorrect to say, 'There is still no scientific proof that smoking causes ill-health.'"¹⁹

c. Despite their Internal Knowledge, Defendants Continued, From 1964 Onward, to Falsely Deny and Distort the Serious Health Effects of Smoking

725. In an August 10, 1967 RJR memorandum from J.S. Dowdell to C.B. Wade, Dowdell acknowledged:

Despite the fact that the industry has very little, if any, positive evidence upon which to base the aggressive campaign necessary at this late date to materially change public opinion, public attitudes can be changed . . . [T]he unfavorable opinion on the hazards of smoking will remain definitely high, and will not shift in a favorable direction, until positive action is taken by the industry to counter the anti-smoking propaganda and publicity.²⁰

736. During [a] televised interview, [Philip Morris President Joseph] Cullman falsely denied that cigarettes posed a hazard to pregnant women or their infants: "[I]t's true that babies born from women who smoke are smaller, but they are just as healthy as the babies born to women who do not smoke. Some women would prefer to have smaller babies."²¹

743. Defendants issued scathing comments about official reports demonstrating the adverse health effects of smoking. For example, a February 26, 1972 Tobacco Institute press release asserted that the 1972 Surgeon General's Report on the Health Consequences of Smoking "insults the scientific community" and that the report was "another example of 'press conference science' -- an absolute masterpiece of bureaucratic obfuscation."²²

758. One year prior to the release of the 1979 Surgeon General's Report on Smoking and Health, Defendants started planning their response to what they expected it to say. That response



A February 26, 1972 Tobacco Institute press release asserted that the 1972 Surgeon General's Report on the Health Consequences of Smoking "insults the scientific community" and that the report was "another example of 'press conference science' -- an absolute masterpiece of bureaucratic obfuscation."

included establishing a task force to write and publish a rebuttal paper. Rather than have scientists evaluate the evidence or the Report's findings, once they were issued, the Tobacco Institute assigned a public relations staff member to research, write, and edit the rebuttal paper.²³

780. The Tobacco Institute . . . purported to review the testimony given at the 1982 and 1983 Congressional tobacco labeling hearings and stated:

Thirty nine scientists presented testimony against proposals in the bills. . . . Fifteen witnesses explained why they consider the hypothesis that cigarette smoking causes lung cancer to be unproven. . . . Witnesses also questioned the assertion that cigarette smoking causes emphysema in particular and chronic obstructive lung disease (COPD) in general.

The report failed to disclose that most of these scientific witnesses were tobacco industry consultants who were receiving funding from the lawyers' Special Account No. 4.²⁴

784. In January 1990, RJR's Public Relations Manager wrote in a letter to the principal of a grade school and one of the school's students: . . . ["Despite all the research going on, the simple and unfortunate fact is that scientists do not know the cause or causes of the chronic diseases reported to be associated with smoking."]²⁵

6. As of 2005, Defendants Still Do Not Admit the Serious Health Effect of Smoking Which They Recognized Internally Decades Ago

796. In April 1994, in the now-famous congressional hearings before the United States House of Representatives' Subcommittee on Health and the Environment, Defendants' executives asserted yet again that the causal relationship of smoking and cancer had not been proven: the CEOs of Defendants [Brown & Williamson (B&W)], Liggett, Lorillard, Philip Morris USA, and RJR publicly denied that smoking caused cancer.²⁶

799. [Thomas Sandefur, CEO of B&W from 1993-1996] stated that he did not agree with the Surgeon General's conclusion that smoking causes cancer, heart disease, and other diseases because, as he stated, "[t]hey're not dealing with whole smoke. They're dealing with painting of mice and that kind of thing. I don't think that's valid in terms of human practices of smoking whole smoke."²⁷

811. Although Philip Morris recognized the "overwhelming medical and scientific consensus," regarding the causation of disease by cigarette smoking in 1999, it did not state its agreement with that consensus until October 2000.²⁸

821. Two years after the effective date of the Master Settlement Agreement, in 2000, B&W told visitors to its website: "We know of no way to verify that smoking is a cause of any particular



They mounted a coordinated, well-financed, sophisticated public relations campaign to attack and distort the scientific evidence demonstrating the relationship between smoking and disease, claiming that the link between the two was still an "open question."

person's adverse health or why smoking may have adverse health effects on some people and not others."²⁹

7. Conclusions

824. From at least 1953 until at least 2000, each and every one of these Defendants repeatedly, consistently, vigorously – and falsely – denied the existence of any adverse health effects from smoking. Moreover, they mounted a coordinated, well-financed, sophisticated public relations campaign to attack and distort the scientific evidence demonstrating the relationship between smoking and disease, claiming that the link between the two was still an "open question." Finally, in doing so, they ignored the massive documentation in their internal corporate files from their own scientists, executives, and public relations people that, as Philip Morris's Vice President of Research and Development, Helmut Wakeham, admitted, there was "little basis for disputing the findings [of the 1964 Surgeon General's Report] at this time."

Endnotes

- 1 TLT0960104-0112 at 0104 (US 87047) (Centers for Disease Control and Prevention, Smoking-Attributable Mortality and Years of Potential Life Lost – United States, 1994, MMWR, 46(20) (1997)); VXA1000001-0604 (US 77217) (Thun M., Myers D., Day-Lally C., Namboodiri M., Calle E., Flanders W.D., Adams S., Heath Jr. C., Age and the Exposure-Response Relationships Between Cigarette Smoking and Premature Death in Cancer Prevention Study II, Chapter 5, Smoking and Tobacco Control Monograph 8: Changes in Cigarette-Related Disease Risks and Their Implications for Prevention and Control, National Institutes for Health – National Cancer Institute, p. 383-476 (1997)); TLT0930001-0949 (US 88621) (2004 Surgeon General Report).
- 2 VXA1601844-2232 at 1986 (US 64057) (1964 Surgeon General Report); Brandt WD, 31:16-32:1.
- 3 VXA1601844-2232 at 1895-1898 (US 64057) (1964 Surgeon General Report); Brandt WD, 32:2-17; Samet TT, 9/29/04, 01031:13-01033:25.
- 4 2060544267-4274 (US 39010) (Lombard, Herbert L. and Carl R. Doering, Cancer Studies in Massachusetts: Habits, Characteristics and Environment of Individuals With and Without Cancer, New England Journal of Medicine, 196.10: 481-487 (1928)); Brandt WD, 33:14-34:13.
- 5 TIMN0145510-5519 (US 62855) (Doll & Hill, Smoking and Carcinoma), *supra*; Brandt WD, 42:1-44:2.
- 6 03358234-8235 (US 46459); Brandt WD, 48:1-18. . . .
- 7 (no bates) (JD 020447).
- 8 504822847-2852 at 2847-2848, 2850-2852 (US 20735) (emphasis in original); Brandt WD, 96:14-99:4.
- 9 TIMN0072354-2356 at 2354 (US 63576).
- 10 1005038559-8561 at 8559-8560 (US 20189).
- 11 [Bumgarner PD, Texas v. American Tobacco, 11/11/86, 35:3-38:18.]
- 12 *Id.* at 63:17-66:15, 68:14-20.
- 13 110315968-5971 (US 26378).
- 14 Huber PD, Texas v. American Tobacco, 9/20/97, 41:4-17, 43:21-44:15, 46:6-10, 46:12-24, 47:2-5, 73:12-74:18.
- 15 Huber PD, Texas v. American Tobacco, 9/20/97, 99:21-100:2, 100:4-8.
- 16 *Id.* at 101:4-8, 10-21.
- 17 *Id.* at 102:3-17.
- 18 110318156-8157 at 8156, 8157 (US 34974).
- 19 680050983-1001 at 0998 (US 20981).
- 20 500006192-6194 at 6193 (US 47761)
- 21 1002605545-5564 at 5561-5562 (US 35622); 1000211305-1305 (US 20080).
- 22 TIMN0120602-0603 at 0602 (US 21322).
- 23 TIMN0073990-3992 at 3990 (US 21525).
- 24 TI12431636-1650 at 1638, 1642, 1645 (US 62384).
- 25 508466199-6200 at 6199 (US 20813).
- 26 TLT0730001-0850 (US 77011); TLT0730851-1975 (US 77012); Brandt WD, 128:14-131:4; (no bates) (US 20468) (Cimons, Marlene, Cigarette Chiefs Steadfastly Deny Smoking Kills, Los Angeles Times, April 15, 1994, at A1.
- 27 [Sandefur PD, Broin v. Philip Morris, 7/13/94, 84:22-86:5.]
- 28 Keane WD, 27:11-28:11.
- 29 (no bates) (JD 012645).

- The Hazards of Smoking

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Tobacco Control Legal Consortium
875 Summit Avenue
Saint Paul, Minnesota 55105 USA
tobaccolaw@wmitchell.edu
www.tobaccolawcenter.org
651.290.7506

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Addiction

The Addictive Properties of Nicotine

Summary

In this section of the Opinion, Judge Kessler discusses the evidence that for over forty years, the Defendants' research had shown that the nicotine in tobacco causes cigarette smoking to be addictive. Judge Kessler addresses the evidence that the Defendants not only publicly denied that smoking is addictive but also withheld information about their research from the American public, the government, and the public health community, including the United States Surgeon General. Judge Kessler explains that the evidence shows the Defendants acted this way to maintain profits by keeping people smoking and attracting new consumers, to avoid liability, and to prevent regulation of the industry.

1. Introduction

829. Since the 1950s, Defendants have researched and recognized, decades before the scientific community did, that nicotine is an addictive drug, that cigarette manufacturers are in the drug business, and that cigarettes are drug delivery devices.

830. Notwithstanding the understanding and acceptance of each Defendant that smoking and nicotine are addictive, Defendants have publicly denied and distorted the truth as to the addictive nature of their products for several decades.

2. Cigarette Smoking Is Addictive and Nicotine Is the Primary Element of That Addiction

856. Dr. Peter Rowell, one of the Defendants' experts, admitted that there are many similarities between the properties that determine tobacco addiction and those that determine heroin and/or cocaine addiction¹

864. By 1988, almost every major public health organization, including the Surgeon General, the National Institute on Drug Abuse, the World Health Organization, the American Psychiatric Association, the Harvard School of Public Health, and others, had declared that smoking is an addiction driven by the drug nicotine. . . .²

881. Disputes over terminology . . . should not obscure the reality that Defendants long ago internally recognized the same phenomenon that the scientific and medical community have struggled to understand and describe: the extraordinary hold that nicotine has on the human nervous system and the fact that such hold stems from nicotine's pharmacological properties.

3. Defendants Were Well Aware that Smoking and Nicotine Are Addictive

888. The evidence . . . demonstrates the extensive knowledge Defendants have had since the 1950s about nicotine's addictive effects on smokers, their use of that knowledge to maintain and increase the sale of cigarettes, and their

decades-long efforts both to deny the truth about the addictive nature of nicotine and to conceal their own internal research which generated that information.

890. In a November 15, 1961 presentation, [Philip Morris's Vice President for Research and Development, Helmut] Wakeham addressed the company's ability to control the nicotine content of its cigarettes. He . . . stated that: "Even though nicotine is believed essential to cigarette acceptability, a reduction in level may be desirable for medical reasons."³

901. Philip Morris . . . [s]cientists [William] Dunn and Frank Ryan described some of the withdrawal effects of nicotine in a 1971 study on cessation in the following graphic terms:

Even after eight months quitters were apt to report having neurotic symptoms, such as feeling depressed, being restless and tense, being ill-tempered, having a loss of energy, being apt to doze off. They were further troubled by constipation and weight gains which averaged about five pounds per quitter. . . . This is not the happy picture painted by the Cancer Society's anti-smoking commercial which shows an exuberant couple leaping into the air and kicking their heels with joy because they have kicked the habit. A more appropriate commercial would show a restless, nervous, constipated husband bickering viciously with his bitchy wife who is nagging him about his slothful behavior and growing waistline.⁴

974. [Scientist Claude] Teague wrote a memorandum dated December 1, 1982 to Research and Development Vice President Robert DiMarco in which he stated that . . . [R.J. Reynolds] needed to contemplate the future scenario where smokers who want to stop can stop; if this happened, he wrote, RJR would "go

"To lower nicotine too much might end up destroying the nicotine habit in a large number of consumers and prevent it from ever being acquired by new smokers."

An internal document from British American Tobacco (Investments) Ltd., dated June 1959

out of business." Therefore, RJR "cannot be comfortable marketing a product which most of our consumers would do without if they could."⁵

988. Many . . . [British American Tobacco (Investments) Ltd. (BATCo)] documents disclose how BATCo and other Defendants, in particular [Brown & Williamson (B&W)], used BATCo's knowledge of nicotine for commercial gain.

989. A June 1959 BATCo internal document . . . cautioned that "[t]o lower nicotine too much might end up destroying the nicotine habit in a large number of consumers and prevent it from ever being acquired by new smokers."⁶

994. [In a February 13, 1962 memorandum, Sir Charles Ellis, scientific director to the BAT Board of Directors, stated: "As a result of these various researches we now possess a knowledge of the effects of nicotine far more extensive than exists in published scientific literature."⁷

1023. In a June 30, 1971 memorandum . . . BATCo scientist R.R. Johnson reported [that] . . . BATCo director Sir Charles Ellis . . . [stated that BATCo was "in a nicotine rather than a tobacco industry"]⁸

1076. [BATCo's Product Developer, Colin] Greig described tobacco as "a fast, highly pharmacologically effective and cheap 'drug'" contained within a "relatively cheap and efficient delivery system." At the close of his memorandum, Greig observed that because cigarettes leave smokers unsatisfied and always craving more, "all we [BATCo] would want then is a larger bag to carry the money to the bank."⁹

1104. An August 24, 1978 B&W memorandum to M. J. McQue from Assistant Brand Manager H. David Steele . . . stated: "Very few consumers are aware of the effects of nicotine, i.e., its addictive

nature and that nicotine is a poison.”¹⁰

1129. Lorillard knew that nicotine shared attributes of opiates, and sought to use this knowledge to its advantage.¹¹

4. Defendants Publicly Denied that Nicotine Is Addictive and Continue to Do So

1149. Philip Morris Chairman James C. Bowling denied that cigarette smoking was an addiction in a July 18, 1973 “60 Minutes” interview. Instead, Bowling compared the choice to stop smoking to the choice to eat eggs or not.¹²

1161. In the May 12, 1997 issue of Time magazine, then President and CEO of Philip Morris, James Morgan, was quoted from his deposition testimony as stating, “If [cigarettes] are behaviorally addictive or habit forming, they are much more like . . . Gummi Bears, and I eat Gummi Bears, and I don’t like it when I don’t eat my Gummi Bears, but I’m certainly not addicted to them.”¹³

1172. An article in the August 2, 1994 New York Times reported that RJR scientist John Robinson “contests the consensus view of nicotine as addictive.” Robinson stated that he could not differentiate “crack smoking from coffee drinking, glue sniffing from jogging, heroin from carrots, and cocaine from colas.”¹⁴

1183. In comments published in the Wall Street Journal on October 31, 1996, the CEO of BAT Industries and Director of BATCo, Martin Broughton, denied any concealment of research linking smoking and addiction, saying that, “We have no internal research which proves that . . . smoking is addictive.”¹⁵

1189. In [a June 29, 1994 letter to the editor of The Daily Telegraph, BATCo scientist Dr. Sharon Boyse] wrote that

It has been suggested that smoking must be addictive because it contains nicotine. So do many common vegetables, including tomatoes, aubergines and potato skins.

Are vegetable eaters also drug users – physically dependent on their ratatouille, perhaps, in the same way that heroin addicts are dependent on their heroin?¹⁶

1193. On April 14, 1994, the Chief Executive Officer of American [Tobacco Company], Donald S. Johnston, testified under penalty of perjury . . . before the House Subcommittee on Health and the Environment . . . [and] denied that nicotine is addictive¹⁷

1204. Dr. Christopher Coggins, Lorillard’s Senior Vice President of Science and Technology [stated] . . . that cigarette smoking is only as addictive as “sugar and salt and Internet access.”¹⁸

1206. On April 14, 1994, the Chairman and Chief Executive Officer of the Liggett Group, Inc., Edward A. Horrigan (formerly of RJR), also testified under penalty of perjury . . . before the House of Representatives Subcommittee on Health and the Environment . . . [and] denied that nicotine is addictive¹⁹

1210. On March 12, 1982, the Tobacco Institute’s William D. Toohey issued a press release summarizing the tobacco company-funded testimony of [consultant Theodore] Blau before a Congressional Subcommittee. According to the release, Blau criticized the characterization of smoking as addictive, claiming that he placed the “attachment” to smoking in the same category as “tennis, jogging, candy, rock music, Coca-cola, members of the opposite sex and hamburgers.” The press release went on to claim that “removal of these activities, persons or objects can cause sleeplessness, irritation, depression and other uncomfortable symptoms, similar to those felt by some with abstinence from tobacco.”²⁰

1252. Susan Ivey, former president and CEO of B&W and current CEO of RJR and Reynolds American, stated in 2004 that . . . the company would not agree that nicotine is an addictive drug.²¹

1253. Lorillard’s current position, as of 2005, is that smoking is addictive but only in the same way

as “repetitive pleasurable activities that can be difficult to stop.” Lorillard believes that smoking is not addictive in a “pharmacological sense.”²²

1255. [Lorillard President and CEO] Martin Orlowsky . . . was a particularly evasive and unresponsive witness in this litigation. His testimony was not credible.

1256. While Philip Morris now appears to have accepted that smoking and nicotine are addictive, that new position was not adopted until 2000, after the filing of this lawsuit.²³

1260. [General counsel for Defendant Philip Morris USA] also admitted that when Philip Morris purchased three Liggett brands in 1999, L&M, Lark, and Chesterfield, it removed the pre-existing package labels stating that smoking is addictive.²⁴

1262. While Philip Morris told people that it agrees that cigarette smoking is addictive, it has not told the public that it agrees that it is the nicotine delivered in cigarette smoking that is addictive. Ms. Keane, Philip Morris’ general counsel, admitted this was material information that the public should possess.²⁵

1264. Moreover, no cigarette company Defendant other than Liggett and Philip Morris, has admitted that nicotine in cigarette smoke is addictive. Liggett is the only Defendant to do so publicly.

5. Defendants Concealed and Suppressed Research Data and Other Evidence that Nicotine Is Addictive

1268. Defendants themselves possessed, from their own in-house and external research, information that led them to conclude, long before public health bodies did, that the primary reason people keep smoking cigarettes is to obtain the drug nicotine, which is addictive. Defendants intentionally withheld this data . . . when there were major public efforts to review and synthesize all available information. This occurred with the preparation of both the 1964 and 1985 Surgeon



“Very few consumers are aware of the effects of nicotine, i.e., its addictive nature and that nicotine is a poison.”

A Brown & Williamson memorandum, dated August 24, 1978

General’s Reports and numerous congressional investigations. Defendants also engaged in a decades-long, elaborate, sophisticated, well-funded public relations offensive, denying and attacking the consensus conclusion they had long ago reached internally²⁶

1269. A September 9, 1980 Tobacco Institute internal memorandum revealed the recognition by the member companies that a public admission that nicotine was addictive would undermine their litigation defense that a person’s decision to smoke is a “free choice”²⁷

1270. A second reason Defendants denied addiction was to avoid regulation by the FDA.²⁸

1276. [Scientist William] Dunn wrote a “CONFIDENTIAL” memorandum dated October 19, 1977 . . . summarizing his program for Tom Osdene. Dunn made [the following] observations . . . First, the mission of the Philip Morris program was to “study the psychology of the smoker in search of information that can increase corporate profits.” [Also], Dunn stated that . . . without [nicotine,] “the cigarette market would collapse, P.M. would collapse, and we’d all lose our jobs and consulting fees.”²⁹

1278. [I]n a November 3, 1977 memorandum, Dunn revealed his strategy for concealing any unfavorable nicotine research results. Regarding a proposed study of nicotine withdrawal in rats to be undertaken by Philip Morris scientist Carolyn Levy, Dunn . . . cautioned that, “If . . . the results with nicotine are similar to those gotten with morphine and caffeine, we will want to bury it.”³⁰

1289. Using [the intravenous self-administration rat model], and the same procedure that NIDA used to demonstrate abuse potential, the Philip Morris [Victor] DeNoble study demonstrated the abuse potential of nicotine.³¹

1296. In April 1984, a few months after a top Philip Morris executive and lawyer visited the behavioral pharmacology lab, DeNoble’s laboratory was suddenly, with no warning, preparation, or explanation, shut down and the animals killed.³² In DeNoble’s own words, “[O]ur laboratory was terminated in one day.”³³

1299. In a September 10, 1986 letter, [Philip Morris’s Assistant General Counsel Eric A.] Taussig again threatened DeNoble and Mele with litigation if they published, or presented, their findings on nicotine self-administration and brain effects . . .³⁴

1303. None of the results or conclusions from the Philip Morris Nicotine Program or Behavioral Research Program were made public or were included in Philip Morris’s and the industry’s collective submission to the FDA in 1996.³⁵

1305. Philip Morris’s representatives met with Merrell Dow on several occasions and attempted to shut down the marketing and sale of Nicorette.³⁶

1308. At a February 16, 1983 meeting of tobacco company directors, attended by Manny Bourlas of Philip Morris, L.C.F. Blackman, a BATCo board member and former head of research, and representatives from several European tobacco companies, the participants . . . agreed that the tobacco industry should not cooperate with the [Independent Scientific Committee on Smoking and Health] and should respond to government requests by falsely stating that it had no relevant expertise.³⁷


1315. In a letter dated May 6, 1963, to B&W in-house counsel DeBaun Bryant, outside counsel J.M. Johnson recommended that the company respond to the Surgeon General’s Advisory Committee in an intentionally vague and confusing manner: . . . [“The response] must necessarily be so vague and incomplete as to be irksome to the reader.”]³⁸

1336. In a May 10, 1994 B&W press release, the company made . . . claims that are patently false in light of the company’s pre-1964 acknowledgment that nicotine is addictive and the company’s decision not to disclose to the Surgeon General BATCo’s internal nicotine research showing addiction prior to the 1964 report . . .³⁹

1354. Long-time tobacco industry-affiliated/funded scientists Francis Roe and Jeffrey Cohen



Susan Ivey, former president and CEO of B&W and current CEO of RJR and Reynolds American, stated in 2004 that . . . the company would not agree that nicotine is an addictive drug.



**For approximately
forty years, Defendants
publicly, vehemently,
and repeatedly denied
the addictiveness of
smoking and nicotine's
central role in smoking.**

were asked to prepare a “Nicotine Monograph” [which included a section entitled “Smoking Behaviour: Role of Nicotine in the Smoking Habit”] in 1977 for the member companies of the Tobacco Advisory Council [(TAC)] (including Philip Morris, RJR, and BATCo).⁴⁰

1358. [Roe and Cohen’s] observations and conclusions did not survive review by the TAC and its member companies. . . . The TAC and its member companies controlled the “Monograph” scientific review, and made sure that Roe and Cohen’s document was industry-favorable on the issues of nicotine and addiction.⁴¹

6. Conclusions

1359. For approximately forty years, Defendants publicly, vehemently, and repeatedly denied the addictiveness of smoking and nicotine’s central role in smoking. They made these denials out of

fear . . . of . . . governmental (i.e., FDA) regulation, adverse liability judgments from addicted smokers suffering the adverse health effects of smoking, loss of social acceptability of smoking, and the ultimate loss of corporate profits.

1360. [T]here is no question that the public health community lacked the substantial and sophisticated understanding of nicotine’s effects and role that Defendants possessed. Put quite simply, if the Surgeon General of the United States possessed the information and data Defendants possessed prior to publication of his 1964 Report, it is simply not possible that he would have ignored it.

1365. Time and time again, Defendants falsely denied these facts to smokers and potential smokers, to government regulatory authorities, to the public health community and to the American public.

Endnotes

- 1 Rowell TT, 3/22/05, 16549:23-16650:15.
- 2 Benowitz WD, 26:3-36:8.
- 3 1000277423-7447 at 7438, 7441 (US 20088).
- 4 1000348671-8751 at 8676, 8708 (US 20097).
- 5 500898255-8257 at 8256 (US 48652).
- 6 100099115-9117 at 9117 (US 20112); Henningfield WD, 88:21-89:10.
- 7 301083820-3835 at 3828-3829 (JE 46579).
- 8 2065128907-8909 at 8908 (US 85281).
- 9 100503495-3506 at 3497, 3505 (US 76168).
- 10 665043966-3966 (US 21485); 776078962-8962 (US 87137).
- 11 00110371-0371 (US 34404).
- 12 503665743-5757 at 5752 (US 50417).
- 13 Myron Levin, Jury Views CEO's "Gummy Bear" Tobacco Deposition: Philip Morris Executive Testifies Cigarettes Aren't Any More Addictive Than Coffee or Candy, Los Angeles Times, July 18, 1997, at D3; Morgan PD, Broin v. Philip Morris, et al., 4/17/97, 77:20-78:23.
- 14 970260581-0581 (US 85337).
- 15 State of Minnesota v. Philip Morris, Inc., et al., C1-94-8565, Exhibit No. 2909, 700428854-8856 at 8854 (US 85342).
- 16 [500810940-0941 at 0941 (US 23036).]
- 17 Regulation of Tobacco Products (Part I) Hearings before the Subcommittee on Health and the Environment of the Committee on Energy and Commerce, House of Representatives, 103rd Congress April 14, 1994, 2023195738-5892 at 5780-5781 (US 21990).
- 18 Coggins PD, United States v. Philip Morris, 8/16/01, 116:22-117:14.
- 19 Regulation of Tobacco Products (Part I) Hearings before the Subcommittee on Health and the Environment of the Committee on Energy and Commerce, House of Representatives, 103rd Congress April 14, 1994, 2023195738-5892 at 5780-5781 (US 21990).
- 20 TIMN0120729-0730 (US 65625).
- 21 Ivey TT, 11/16/04, 6194:21-6195:5.
- 22 Orlowsky WD, 116:14-117:18.
- 23 Szymanczyk PD, United States v. Philip Morris, et al., 6/13/02, 249:15-254:8, 267:10-270:3.
- 24 Keane TT, 1/18/05, 10457:5-10460:16.
- 25 Keane TT, 1/18/05, 10533:5-10534:4.
- 26 Henningfield WD, 87:10-103:13, 104:14-110:8, 134:23-136:1, 150:14-159:8, 161:23-167:6. See also 490010042-0044 at 0043 (US 79285) (presenting "Addiction Statement," prepared by Shook, Hardy & Bacon, deciding the company's position must be that smoking is not addictive and that, "Statements in company documents cannot refute this conclusion.").
- 27 TIMN0107822-7823 at 7823 (US 21275).
- 28 25055597781-7998G (US 23028*).
- 29 1000046538-6546 at 6538-6542 (US 26074); 2021423403-3497 at 3488 (US 36743).
- 30 1003293588-3588 (US 20168).
- 31 DeNoble WD, 17:9-20:2; See also, 2023963269-3341 at 3312-2213 (US 20398) (DeNoble testimony at 1994 Waxman hearings).
- 32 DeNoble WD, 38:4-16, 39:3-9; Mele WD, 25:19-26:21.
- 33 2504099642-9666 at 9660 (US 22708).
- 34 2023192361-2362 (US 20380).
- 35 2505597781-7998G (US 23028*).
- 36 2023799801-9802 at 9802 (US 37048); Henningfield WD, 167:7-168:22. See also 2023799804-9804 (US 26802); 2023799803-9803 (US 37049).
- 37 109840698-0702 at 0699-0700 (US 21733)
- 38 680249785-9786 (US 85391)) [sic].
- 39 202337394-7394 (US 21965).
- 40 2501160364-0371 at 0369 (US 87173).
- 41 2021585328-5378 at 5365-5368 (US 87175).

- The Hazards of Smoking
- Addiction

Nicotine Levels

- Light Cigarettes
- Marketing to Youth
- Secondhand Smoke
- Suppression of Information

The Verdict Is In:

Findings from *United States v. Philip Morris*



Tobacco Control
Legal Consortium



Law. Health. Justice.

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Tobacco Control Legal Consortium
875 Summit Avenue
Saint Paul, Minnesota 55105 USA
tobaccolaw@wmitchell.edu
www.tobaccolawcenter.org
651.290.7506

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Nicotine Levels

Nicotine “Manipulation”: Defendants Have Falsely Denied That They Can and Do Control the Level of Nicotine Delivered In Order to Create and Sustain Addiction

Summary

In this section of the Opinion, Judge Kessler discusses evidence showing that the Defendants control the nicotine levels in cigarettes to ensure that smokers become addicted and stay addicted. Judge Kessler explains that, while the Defendants deny publicly that they manipulate or control the nicotine levels, the facts prove otherwise.

1366. Defendants have designed their cigarettes to precisely control nicotine delivery levels and provide doses of nicotine sufficient to create and sustain addiction. At the same time, Defendants have concealed much of their nicotine-related research, and have continuously and vigorously denied their efforts to control nicotine levels and delivery.

1368. Every aspect of a cigarette is precisely tailored to ensure that a cigarette smoker can pick up virtually any cigarette on the market and obtain an addictive dose of nicotine.¹

1370. In the early 1970s, the Federal Trade Commission developed a machine to measure tar and nicotine levels. Even though it became the accepted mechanism for taking such measurements, it became widely known in both the public health community and by the cigarette company Defendants that the FTC method did not accurately measure the amounts of nicotine and tar which a smoker actually ingested. Cigarette company Defendants, with the benefit of their much more sophisticated understanding of smoker compensation, as well as their knowledge

of nicotine control, then intentionally developed and marketed cigarettes which, in actuality, delivered higher levels of nicotine than those measured by the FTC method. Those levels of nicotine were sufficient to create and sustain addiction in smokers.

1. For Decades, Defendants Have Recognized that Controlling Nicotine Delivery, in Order to Create and Sustain Smokers’ Addiction, Was Necessary to Ensure Commercial Success

a. Defendants Recognized the Need to Determine “Minimum” and “Optimum” Nicotine Delivery Levels in Order to Provide Sufficient “Impact” and “Satisfaction” to Cigarette Smokers

1373. Defendants’ internal documents

demonstrate that, based on their knowledge of nicotine's pharmacological properties and addictive nature, they incorporated physical and chemical design techniques into their commercial products that would assure delivery of the precise levels of nicotine necessary to assure taste, impact, and satisfaction, i.e., to maintain addiction.²

1374. In their research reports, studies, and memoranda, Defendants used different terms to describe or identify the attributes of nicotine which were so desirable to smokers. Those terms include the words "impact," "satisfaction," "hit," "optimum," "optimal," and "minimum." These terms were not used in a uniform or consistent manner, and were often used interchangeably.

1379. Defendants have claimed that the terms "impact," "satisfaction," "hit," etc., as used in their internal documents, refer only to the taste characteristics of cigarettes. This claim is rejected because the documents themselves prove otherwise.

1394. In a November 26, 1990 document on the subject of "Project XB," one of Reynolds's projects devoted to the study of nicotine control . . . , an employee with the initials GRD identified a series of questions to be answered by Project XB. These questions included:

. . . 6. How good do we feel that legal group will allow us to sell product we visualize – i.e., take out tar vs. add nicotine?³

b. Defendants Have Long Recognized that Controlling the Nicotine to Tar Ratio Would Enable Them to Meet Minimum and Optimum Nicotine Delivery Levels

1431. [A]n August 19, 1976 [R.J. Reynolds] report, titled "New Product/Merchandising Directions A Three Year Action Plan," . . . stated, "[i]t would be more

desirable from our standpoint, i.e. providing satisfaction to the smoker and maintaining his allegiance to smoking if we could reduce 'tar' to whatever target we choose without a proportionate drop in nicotine."⁴

1442. A May 3, 1991 report titled "REST Program Review" explained Reynolds's goal for use of [Reestablishment of Solubles in Tobacco (REST)] processing to control nicotine delivery in its products:

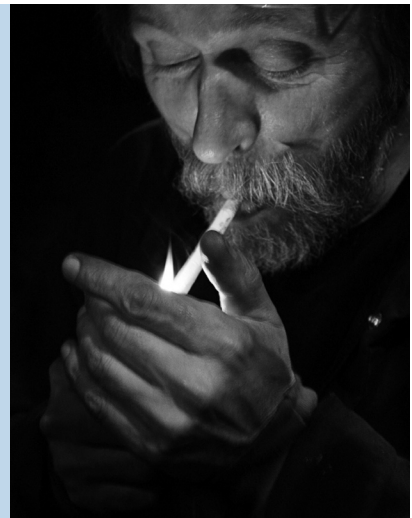
. . . We are basically in the nicotine business. It is in the best long term interest for [R.J. Reynolds (RJR)] to be able to control and effectively utilize every pound of nicotine we purchase. Effective control of nicotine in our products should equate to a significant product performance and cost advantage.⁵

1454. Prior to the publication of the 1964 Surgeon General's Report, [Brown & Williamson (B&W)] General Counsel Addison Yeaman evaluated the findings of [two British American Tobacco (Investments) Ltd. (BATCo) nicotine research projects from the early 1960s], and suggested that the best reaction to the Surgeon General's Report was to provide a filter capable of removing certain constituents of smoke considered suspect by public health officials, while still "delivering full flavor – and incidentally – a nice jolt of nicotine."⁶

1460. A BATCo document, titled "R&D Views on Potential Marketing Opportunities, marked, "Not

"[i]t would be more desirable from our standpoint, i.e. providing satisfaction to the smoker and maintaining his allegiance to smoking if we could reduce 'tar' to whatever target we choose without a proportionate drop in nicotine."

From an R.J. Reynolds report, dated August 19, 1976



for Circulation” and dated September 12, 1984 refers to compensation and lists as a “high priority” development of “alternative designs (that do not invite obvious criticism) which will allow the smoker to obtain significant enhanced deliveries should he so wish.” The author recommends that this action be taken “irrespective of the ethics involved.”⁷

c. Defendants Understood the Correlation Between Nicotine Delivery and Cigarette Sales

1493. As the internal documents discussed below reveal, each Defendant also understood that its market position, as well as the financial viability of the tobacco industry as a whole, required the development of cigarettes that provide nicotine in amounts sufficient to ensure that smokers become and remain addicted.

1503. [BATCo senior scientist S.J.] Green explained, “Nicotine is an important aspect of ‘satisfaction,’ and if the nicotine delivery is reduced below a threshold ‘satisfaction’ level, then surely smokers will question more readily why they are indulging in an expensive habit.”⁸

2. Defendants Researched, Developed, and Utilized Various Designs and Methods of Nicotine Control to Ensure that All Cigarettes Delivered Doses of Nicotine Adequate to Create and Sustain Addiction

1509. Defendants’ control of nicotine has not focused simply on delivering as much nicotine as possible, because delivery of large amounts of nicotine can make cigarettes harsh and unpalatable to the smoker.⁹ In addition, an unsmoked cigarette already contains much more nicotine than a smoker will inhale because, as mentioned, . . . not all of the nicotine present in tobacco is transferred to cigarette smoke.¹⁰



At an experimental farm in North Carolina during the 1980s, BATCo and B&W developed a tobacco that the companies referred to as “Y-1.” The tobacco was genetically engineered to have a nicotine content approximately twice the nicotine content of conventional tobacco.

a. Defendants Recognized the Need to Design Cigarettes that Would Produce Low Nicotine and Tar Measurements under the FTC Method While Also Delivering the Minimum Nicotine Levels to Create and Sustain Addiction

b. Leaf Blend and Filler: Defendants Controlled the Amount and Form of Nicotine Delivery in Their Commercial Products by Controlling the Physical and Chemical Make-Up of the Tobacco Blend and Filler

1549. At an experimental farm in North Carolina during the 1980s, BATCo and B&W developed a tobacco that the companies referred to as “Y-1.” The tobacco was genetically engineered to have a nicotine content approximately twice the nicotine content of conventional tobacco.¹¹

1552. B&W found the taste of Y-1 unacceptable to consumers when used alone. Nevertheless, [B&W Chairman and CEO] Tommy Sandefur admitted that B&W incorporated millions of pounds of the Y-1 leaf into its Viceroy and Richland style cigarettes, using Y-1 “as a blending tool.”¹²

c. Nicotine to Tar Ratio: Defendants Have Used Physical Design Parameters to Increase the Nicotine to Tar Ratio of Their Cigarettes

1580. Despite numerous public statements that “nicotine follows tar,” i.e., that the amount of nicotine delivered by a cigarette automatically follows the amount of tar in a fixed ratio, and that smokers would therefore get less nicotine as tar levels dropped, Defendants conducted years of research to develop methods of changing the ratio of nicotine to tar in tobacco smoke.

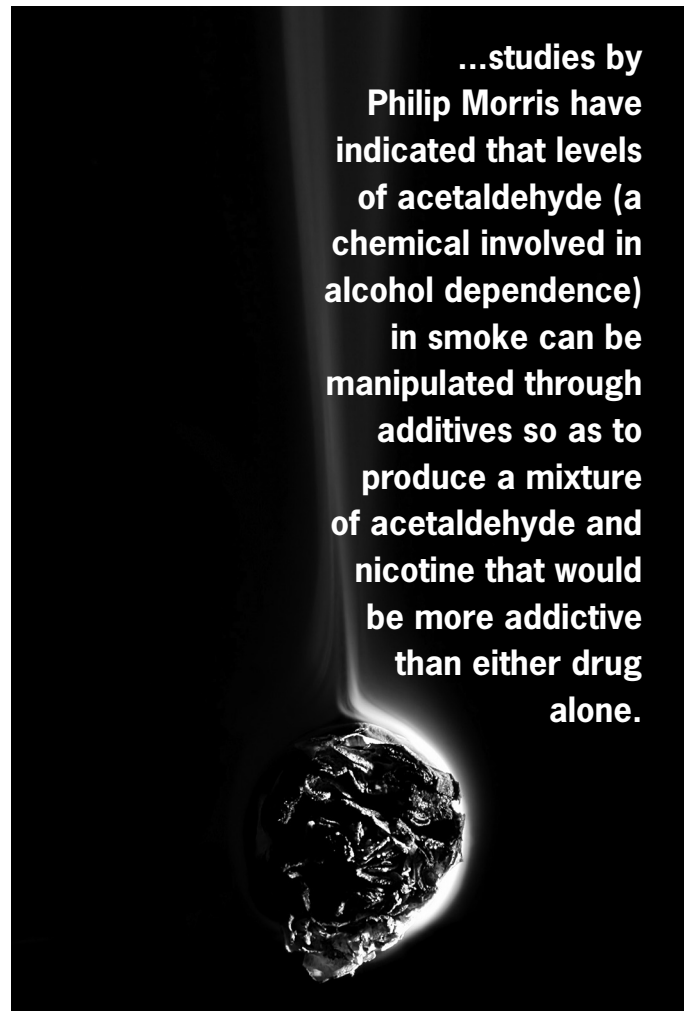
d. Smoke pH and Ammonia: Defendants Altered the Chemical Form of Nicotine Delivered in Mainstream Cigarette Smoke for the Purpose of Improving Nicotine Transfer Efficiency and Increasing the Speed with Which Nicotine Is Absorbed by Smokers

1600. Molecule for molecule, the pH of tobacco smoke is an important determinant of how much nicotine reaches a person’s bloodstream through cigarette smoking. Creation of more free nicotine by increasing the pH level of cigarette smoke increases “the amount of nicotine that can be readily released from the tobacco rod of a cigarette and, in turn, readily absorbed into the body of the cigarette smoker.”¹³

1607. Defendants were well aware of the particular chemical characteristics and effects of free nicotine, and undertook efforts to exploit these features. Internal research at Philip Morris confirmed that cigarette smoke that is more basic increases nicotine’s effects on the central nervous system, and that the “rate of entry [of nicotine into the bloodstream] is pH dependent.”¹⁴ As one Reynolds document explained:

In essence, a cigarette is a system for delivery of nicotine to the smoker in attractive, useful form. . . . As the smoke pH increases above about 6.0, an increasing proportion of the total smoke nicotine occurs in “free” form, which is volatile, rapidly absorbed by the smoker, and believed to be instantly perceived as nicotine “kick.”¹⁵

1609. Defendants have added ammonia compounds in order to enhance consumer use of cigarettes by: (1) increasing the amount of



nicotine that is transferred from the tobacco to the smoke; (2) improving the sensory response to nicotine in the mouth and oral mucosa; and (3) increasing the speed of delivery of nicotine to the bloodstream and possibly to the brain.¹⁶

1626. On August 26, 1986, Philip Morris applied for a patent on a process using ammonia to increase the nicotine delivery of Bright tobacco.¹⁷ Philip Morris acknowledged, “Ammonia treatment of tobacco has been employed in the past, principally as a means to displace and effect release of nicotine.”¹⁸

1635. Reynolds soon developed a cigarette design similar to Philip Morris’s. . . . By 1974, Reynolds had “introduced ammoniated sheet filler in the Camel filter cigarette Better market performance was indicated in the subsequent years.”¹⁹

1673. The [1991 handbook “Root Technology: A Handbook for Leaf Blenders and Product Developers,” created by B&W] sets forth the purposes for which Defendants used ammonia technology. For example, “[the ammonia in cigarette smoke] can liberate free nicotine from the blend, which is associated with increases in impact and ‘satisfaction’ reported by smokers.”²⁰

1676. In a March 1, 1991 document to employees in the research department, A.L. Heard informed the employees that the “Tobacco Strategy Review Team has identified a need to add greater confidentiality to our use of ammonia technology throughout the BAT Group. They have asked that for commercial confidentiality, we substitute a code word in place of the expression ‘ammonia technology.’” The memorandum further stated that existing code words for ammonia-related processes such as “ammonia treatment of stems or lamina” would continue to carry code names already in existence. The new code word for ammonia technology was to be transmitted via separate cover.²¹

e. Other Additives: Defendants Researched the Use of Other Additives to Control Nicotine Delivery

1696. Internal documents show that Defendants researched various additives, in addition to ammonia, which facilitate nicotine delivery. . . . For example, studies by Philip Morris have indicated that levels of acetaldehyde (a chemical involved in alcohol dependence) in smoke can be manipulated through additives so as to produce a mixture of acetaldehyde and nicotine that would be more addictive than either drug alone.²²

1700. [Philip Morris scientist Dr. Victor] DeNoble recounted that Philip Morris considered the acetaldehyde work “very sensitive and that [the company] did not want it to be misinterpreted if it got out.”²³

3. Defendants Have Made False and Misleading Public

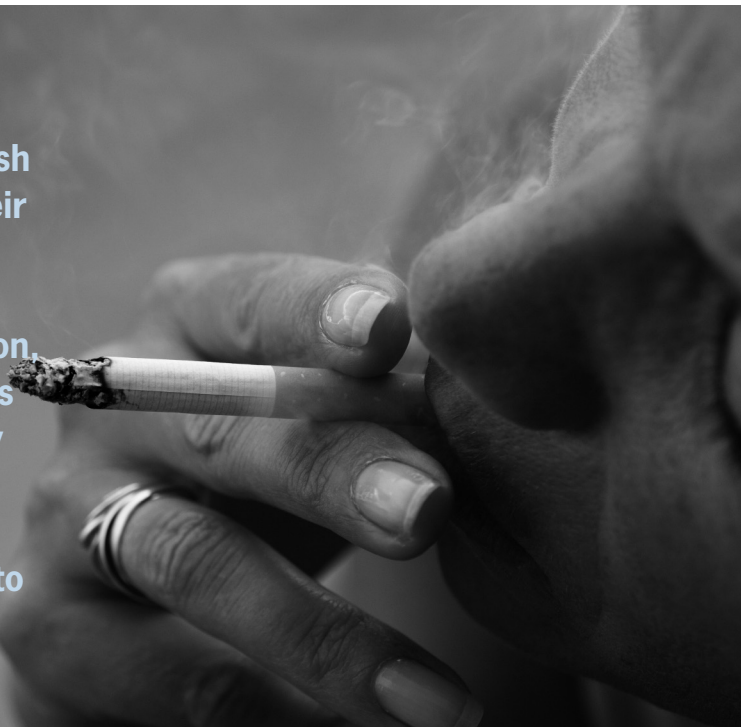
Statements Regarding Their Control of the Nicotine Content and Delivery of Their Products

1706. In 1994, the United States Congress held a series of public hearings regarding the addictiveness of cigarettes and the tobacco industry’s design of cigarettes and manipulation of nicotine. These hearings, before the House of Representatives Subcommittee on Health and the Environment, later became known as the “Waxman Hearings,” referring to Subcommittee Chairman Henry Waxman of California. The Chief Executive Officers of six Defendant cigarette manufacturers – Philip Morris, B&W, RJR, Lorillard, Liggett, and American – appeared voluntarily at a Subcommittee hearing on April 14, 1994.

1723. On March 25, 1994, Alexander W. Spears, Vice Chairman and Chief Operating Officer of Lorillard, testified at the Waxman Hearings that “[w]e do not set levels of nicotine for particular brands of cigarettes.” Spears further stated that “[n]icotine follows the tar level,” that the correlation between the two “is essentially perfect,” which “shows that there is no manipulation of nicotine.” In a 1981 study, the Chemical and Physical Criteria for Tobacco Leaf of Modern Day Cigarettes, Spears had previously stated explicitly that “low-tar” cigarettes used special blends of tobacco to keep the level of nicotine up while tar is reduced: “[T]he lowest tar segment [of product categories] is composed of cigarettes utilizing a tobacco blend which is significantly higher in nicotine.” Spears did not inform Congress of his earlier statement.²⁴

1736. Defendants have also prepared internal “talking points” documents to prepare their spokespersons for public comment on important smoking and health issues. . . . Regarding nicotine, BATCo’s response was that “BAT does not ‘manipulate’ the level of nicotine in its products.” Recipients were also instructed to respond to questions regarding addiction that “BAT does not ‘spike’ its tobaccos with nicotine. Smoking is not an addiction.”²⁵

The words of Defendants themselves establish that the goal of their extensive efforts, through research and experimentation, to control the levels of nicotine delivery was to ensure that smokers obtained sufficient nicotine to create and sustain addiction.



4. Conclusions

1758. The Defendants have repeatedly made vigorous and impassioned public denials – before Congressional committees, in advertisements in the national print media, and on television – that neither smoking nor nicotine is addictive, and that they do not manipulate, alter, or control the amount of nicotine contained in the cigarettes they manufacture. The Findings of Fact . . . provide overwhelming evidence that those statements are false.

1762. The words of Defendants themselves establish that the goal of their extensive efforts, through research and experimentation, to control the levels of nicotine delivery was to ensure that smokers obtained sufficient nicotine to create and sustain addiction:

- Philip Morris listed as one of the achievements of its Electrophysiological Studies Research Group a discovery “that there are optimal cigarette nicotine deliveries for producing the most favorable physiological and behavioral responses.”²⁶

- RJR’s “top priority [was] to develop and market low ‘tar’ brands . . . that: [m]aximize the physiological satisfaction per puff – the single most important need of smokers.”²⁷
- BATCo named as a “high priority” development of “alternative designs (that do not invite obvious criticism) which will allow the smoker to obtain significant enhanced deliveries should he so wish.”²⁸
- The “major objective” of Lorillard’s study of filter design was to “increase the physiological impact and/or nicotine to tar ratio in ultra low tar cigarettes.”²⁹

1763. In sum, the evidence as presented in these Findings of Fact is overwhelming that Defendants have, over the course of many years, time and again – and with great self-righteousness – denied that they manipulated the nicotine in cigarettes so as to increase the addiction and dependence of smokers. Those denials were false.

Endnotes

- 1 Farone WD, 3:12-22.
- 2 Henningfield WD, 35:16-36:16, 41:18-42:7, 54:7-15, 66:23-67:12.
- 3 511703121-3121 (US 51575). *See also* 511223463-3484 (US 20840).
- 4 500672011-2172 at 2054, 2111-2112 (US 20645) . . .
- 5 509479574-9587 at 9854 (US 20829); Henningfield WD, 102:2-4, 102:11-12.
- 6 2046754905-4909 at 4908-4909 (US 20477).
- 7 109869437-9440 at 9437-9438 (US 21707).
- 8 110069974-9982 at 9975 (US 20268); *see also* 400993160-3215 at 3196 (US 75975*); 100051935-1948 (US 34587).
- 9 Farone WD, 85:7-16.
- 10 Farone WD, 86:10-12.
- 11 510003880-3882 (US 20831).
- 12 682637648-7650 (US 21027); 500004560-4580 (US 20607).
- 13 Henningfield WD, 68:16-69:12, 69:19-70:2.
- 14 2025986551-6553 at 6552 (US 37312); 2025986931-6935 at 6934 (US 37314); 2056128345-8379 (US 20496).
- 15 511223463-3484 at 3466 (US 20840).
- 16 511223463-3484 (US 20840); Henningfield WD, 69:2-18, 74:21-75:13; 85:12-86:14; “Nicotine in Cigarettes and Smokeless Tobacco Products Is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination,” 61 Fed. Reg. 44619 (August 1996) (jurisdictional determination annex) at 44974-44975 (US 61237); *see also* Townsend WD at 169:22-170:5; *Technology: Ammoniation*, at 8864-65 (US 20820).
- 17 2026526349-6353 at 6349 (US 86964).
- 18 2026526349-6353, at 6350 (US 86964); 2026377889-7896 (US 37347); 2024761243-1250 (US 86965).
- 19 509018864-8865A at 8864 (US 20820).
- 20 621800840-0899 at 0845 (US 86908).
- 21 400182372-2372 (US 47487).
- 22 DeNoble WD, 31:5-32:15; 1000413881-3964 (US 20100); 1003060443-0503 (US 87091).
- 23 DeNoble WD, 11:8-10, 32:18-33:1, 33:18-35:4, 36:14-18.
- 24 TLT0730001-0850 at 0148-0149, 0382-0383 (US 77011); 82495618-5628 at 5620 (US 86932).
- 25 800335882-5886 at 5884 (US 31906).
- 26 ¶947, *supra*.
- 27 ¶1431, *supra*.
- 28 ¶1460, *supra*.
- 29 ¶1488, *supra*.

- The Hazards of Smoking
- Addiction
- Nicotine Levels

Light Cigarettes

- Marketing to Youth
- Secondhand Smoke
- Suppression of Information

The Verdict Is In:

Findings from *United States v. Philip Morris*



Tobacco Control
Legal Consortium



Law. Health. Justice.

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Tobacco Control Legal Consortium
875 Summit Avenue
Saint Paul, Minnesota 55105 USA
tobaccolaw@wmitchell.edu
www.tobaccolawcenter.org
651.290.7506

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Light Cigarettes

Defendants Falsely Marketed and Promoted Low Tar/Light Cigarettes as Less Harmful than Full-Flavor Cigarettes in Order to Keep People Smoking and Sustain Corporate Revenues

Summary

In this section of the Opinion, Judge Kessler explains that, since the 1970s, Defendants have misled consumers into believing that so-called low tar and light cigarettes are healthier than other cigarettes and an acceptable alternative to quitting. The Defendants do this even though they have known for decades that light cigarettes offer no clear health benefit. Judge Kessler describes how the Defendants dramatically increased their sales by exploiting consumers' belief that light cigarettes are less harmful, while claiming falsely that their marketing is based only on smokers' preference for a lighter taste. Judge Kessler finds that the Defendants are continuing to make these false and misleading claims in order to reassure smokers and dissuade them from quitting.

1. Low Tar/Light Cigarettes Offer No Clear Health Benefit over Regular Cigarettes

2048. On March 24, 1966, the [Federal Trade Commission (FTC)] notified cigarette manufacturers that they would be permitted to advertise tar and nicotine yields provided they used the Cambridge Filter Method.¹

2049. The FTC Cambridge Filter Method uses a machine to “smoke” the cigarette for a designated puff volume at a designated interval for a designated period of time. As the smoke is drawn into the machine, it passes over a filter known as a Cambridge pad, on which the particulate tar matter is collected . . . to calculate the tar and nicotine yields for the cigarette.²

2066. Defendants did not, however, disclose their knowledge that smokers would ultimately ingest as much if not more nicotine and tar from low-delivery cigarettes as they would from full-flavor products. . . . Nor did Defendants disclose to the

FTC that “a major reason that the method could yield misleading data was that nicotine addiction would drive smokers to achieve relatively stable nicotine intakes” and that smokers’ “physiological need to obtain nicotine substantially lessens the accuracy of the FTC ratings.”³

2068. [Smokers] offset the decrease in their cigarettes’ FTC tar and nicotine yields, in whole or in part, by one of two means. First, smokers may . . . [smoke] individual, lower FTC-yield cigarettes more intensively by taking bigger puffs, taking more frequent puffs, smoking the cigarette closer to the butt, blocking ventilation holes placed in the filter that dilute the smoke, or other means. Second, they may simply smoke more cigarettes.⁴

2072. Because each smoker smokes to obtain his or her own particular nicotine quota, smokers end up inhaling essentially the same amount of nicotine – and tar – from so-called “low tar and nicotine” cigarettes as they would inhale from regular, “full flavor” cigarettes. . . . Virtually all smokers, over 95%, compensate for nicotine.⁵

2. Based on Their Sophisticated Understanding of Compensation, Defendants Internally Recognized that Low Tar/Light Cigarettes Offer No Clear Health Benefit

2148. Dr. Farone[, Director of Applied Research at Philip Morris,] explained that the very Ames mutagenicity testing that Philip Morris has conducted for the past 25 years . . . has indicated that Philip Morris's Marlboro Lights cigarettes are, as designed, more mutagenic [(likely to cause the cellular changes that can lead to cancer)] than Marlboro full-flavor cigarettes . . .⁶ Philip Morris has not "changed the design of 'Light' cigarettes in response to its studies and knowledge concerning mutagenicity."⁷

2156. James Morgan, former President and CEO of Philip Morris, conceded in 2002 that, in his opinion, lower tar cigarettes are not any safer than higher tar cigarettes.⁸

2163. A February 4, 1976 memorandum from Ernest Pepples, [Brown & Williamson (B&W)] Senior Vice President . . . reveals Defendants' knowledge that the low tar and filter cigarettes they were marketing as less harmful were not producing less tar and less nicotine to the smoker and were not likely to actually be less harmful . . .⁹

2174. According to Dr. William Farone, . . . during his employment at Philip Morris, the company had "a greater understanding of compensation [of nicotine] than the outside scientific community," and, in his expert opinion, "the same is true for the other tobacco company Defendants."¹⁰

2192. A September 17, 1975 Philip Morris document . . . to Leo F. Meyer, Philip Morris Director of Research, reflecting results of Philip Morris's studies with its Human Smoker Simulator, reported that, due to compensation, smokers got as much tar and nicotine from Marlboro Lights as from full-flavor Marlboros . . .¹¹

2193. As Dr. Burns [an expert in the science of tobacco and health] explained, "there are three things that are powerfully significant in this document":

(1) It "very clearly demonstrates that, in contrast to what we believed six years later when we wrote the 1981 Surgeon General's Report, smokers who smoked brands of cigarettes on the market in 1975 were not getting different yields when they smoked those products. We [in the public health community] believed they were."

(2) "[T]his is dated 1975, six years prior to the time the [1981] Surgeon General's Report reached its conclusion. And we did not have access to this information or comparable information."

(3) "[T]his study was done on a machine that mimicked actual smoking behaviors, that actually matched the behavior of the individual when the machine smoked the cigarette. In 1981, one of the recommendations that we made . . . was that this type of machine should be developed so that we could develop a better understanding of the relationship between delivery of tar and nicotine of these cigarettes when they were actually smoked. So . . . six years prior to the time we were reviewing that evidence for the Surgeon General, this information was available to Philip Morris."¹²

3. Defendants Internally Recognized that Smokers Switch to Low Tar/Light Cigarettes, Rather than Quit Smoking, Because They Believe They Are Less Harmful

2234. Defendants conducted extensive research on quitting to help them identify and understand potential quitters . . . and design marketing that would dissuade them from quitting. Defendants'

internal documents demonstrate their recognition that smokers interested in quitting smoking were instead switching to low tar cigarettes under the mistaken belief that doing so would either help them quit or be better for their health.

2241. [Jeanne Bonhomme, Director of Consumer Insights for Philip Morris] added that “Philip Morris’s own marketing research shows that there are consumers who switch to low tar cigarettes even though they do not prefer the taste or flavor, because they believe it is better for them”¹³

2243. Defendants’ own expert, A. Clifton Lilly, Vice President of Technology and Research for Philip Morris, demonstrated that Philip Morris did not intend to market Merit as a “lighter tasting” cigarette, but rather as one that tasted just like a full flavor cigarette, yet with a health benefit.¹⁴

2246. According to [James Morgan, former CEO of Philip Morris], Philip Morris did not intend for the name Marlboro Lights to communicate that it had light or lighter taste:

I have trouble in describing what light taste really means. . . . Light taste, first of all, is not a positive attribute if it does mean anything . . . in my judgment, light taste is really a meaningless and nebulous claim . . . the bigger proposition is the lower tar and nicotine. . . . We are not talking, in my judgment, talking about light . . . as a taste. It’s not a term that means anything in terms of taste, and the name Marlboro Lights as I said before, a word which we feel has appeal in a different sense than suggesting what the cigarette even tastes like.¹⁵

2254. According to Nancy Lund, Senior Vice President of Marketing for Philip Morris, when

light cigarettes were first introduced, their largest drawback was that consumers disliked their taste. . . . She acknowledged that smokers were buying them, nonetheless, because they were perceived to be less harmful.¹⁶

2295. Philip Morris conducted research on former smokers to assist it in marketing purportedly less harmful cigarettes to draw them back into the market and to dissuade potential quitters from actually quitting.

“Quitters may be discouraged from quitting, or at least kept in the market longer. . . . A less irritating cigarette is one route. . . .”


1986 B&W document

2313. A 1969 [R.J. Reynolds (RJR) survey] . . . recognized that “[a]s a group filter cigarette smokers were more conscious of a possible relationship between smoking and health,” and recognized the “willingness of an increasing number of smokers to compromise – to smoke what they considered to be a less harmful cigarette rather than give up smoking entirely.”¹⁷

2319. An August 1981 report prepared for RJR by the Beaumont Organization advised that ultra low tar brands, such as Now, Carlton, Cambridge and Barclay, can cause smokers who seek to eliminate the “danger” of smoking to keep smoking, because these smokers believe the ultra low tar brands “reduce the alleged health risks” of smoking “to an acceptable – minimal – level”¹⁸

2327. A 1986 B&W document stated: “Quitters may be discouraged from quitting, or at least kept in the market longer. . . . A less irritating cigarette is one route. . . . (Indeed, the practice of switching to lower tar cigarettes and sometimes menthol in the quitting process tacitly recognize this). The safe cigarette would have wide appeal.”¹⁹

2330. A March 22, 1979 internal BATCo document written by Terry Hanby, who researched



Terry Hanby, who researched “Smoking & Health reassurance” for BATCo, concluded that the sale of low tar cigarettes as “health reassurance” products would stem the decline in cigarette sales

Internal BATCo document, dated March 22, 1979

“Smoking & Health reassurance” for BATCo, concluded that the sale of low tar cigarettes as “health reassurance” products would stem the decline in cigarette sales²⁰

4. Despite Their Internal Knowledge, Defendants Publicly Denied that Compensation Is Nearly Complete and that the FTC Method is Flawed

2349. [W]hile the FTC contemplated at the time it adopted its Method that numerous potential variations among individuals in everyday smoking behavior could have some effect on tar and nicotine yields, it did not have a full understanding of smoker compensation Defendants withheld their long-held knowledge that the primary reason the FTC Method could yield misleading data was that nicotine addiction would drive smokers to obtain relatively stable nicotine intakes through smoker compensation.²¹

2360. [I]n September 1997, the FTC solicited public comment on a proposal to replace the

existing FTC test method with a methodology that would “provide information on the tar, nicotine, and carbon monoxide yields obtained under two different smoking conditions” to . . . convey to smokers that “a cigarette’s yield depends on how it is smoked.”²² In response, Philip Morris, RJR, B&W, and Lorillard submitted joint comments to the agency defending the current FTC Method and opposing the proposed change²³

2361. The comments further stated that: “Smokers are familiar with the ratings produced by the current test method, and continued use of the current test method assures historical continuity of the data. . . .”²⁴ The comments referred to compensation as a “hypothesized” and “weakly documented phenomenon” and stated: “The testing protocol should not be modified to reflect ‘compensatory’ smoking,[”] in part because “current knowledge about these behaviors is too sparse to be usable for modeling purposes.”²⁵

2362. In response to the FTC’s question: “What kinds of consumer education messages should be created to inform smokers of the presence of filter vents and the importance of not blocking them with their fingers or lips?” Defendants’ 1998 comments stated: “The manufacturers are not convinced that vent-blocking is a sufficiently

common or documented phenomenon that smokers should be alerted to the presence of filter vents and instructed not to block the vents.”²⁶

2363. In response to the FTC’s question: “If the effect of compensatory smoking behavior is not incorporated in the tar and nicotine ratings, should a disclosure warning smokers about compensatory smoking behavior be required in all advertisements?” Defendants’ 1998 comments stated: “The manufacturers are not convinced that compensatory smoking behavior is a sufficiently common or documented phenomenon that consumers should be alerted to its existence”²⁷

2366. In his April 14, 1994 written Statement before the House of Representatives Subcommittee on Health and the Environment . . . , William Campbell, President and CEO of Philip Morris USA, stated, contrary to extensive information developed by and known to Philip Morris USA, that “consumers are not misled by the published nicotine deliveries as measured by the FTC method. . . .”²⁸

2371. In the mid-1990s, Tommy Sandefur, B&W CEO, submitted a written statement to Congress defending the FTC Method: “We also vigorously dispute the suggestion of [David] Kessler and [John] Slade that the ‘tar’ and nicotine ratings produced using the FTC test method are meaningless or misleading.” More than ten years earlier, on March 19, 1984, Ernest Pepples, B&W Senior Vice President and General Counsel, wrote a letter to Howard Liebengood of the Tobacco Institute acknowledging that FTC tar and nicotine ratings “may be misleading to consumers” and bear no relation to actual consumer intake.²⁹

2372. Susan Ivey, President and CEO of B&W, admitted at trial that B&W “has been aware for many years” that some smokers compensate when smoking low tar cigarettes. B&W takes a different position on its website, which states that “[t]he question of why compensation occurs is still the subject of scientific research, and the relative importance of tar versus nicotine in determining compensation is unclear. . . . [H]ow much smokers alter their behavior when they switch to lower tar products, and for how long, is still unclear. . . . [A]s actually smoked by consumers,

lower tar cigarettes will generally deliver less tar and nicotine than higher tar cigarettes, and cigarette deliveries generally align with the ranges associated with the descriptors: ultra lights, lights, and full flavor.”³⁰

2376. In 1999, Alexander Spears, CEO of Lorillard, stated publicly that the FTC tar and nicotine numbers did not need to be explained to smokers because it was “very obvious” that they were meaningless due to smoker compensation.³¹

5. Despite Their Internal Knowledge, Defendants’ Marketing and Public Statements About Low Tar Cigarettes Continue to Suggest that They Are Less Harmful than Full-Flavor Cigarettes

2377. As detailed below, Defendants made, and continue to make, false and misleading statements regarding low tar cigarettes in order to reassure smokers and dissuade them from quitting. These actions include: assertions that low tar cigarettes

“[C]onsumers are not misled by the published nicotine deliveries as measured by the FTC method. . . .”

William Campbell in his April 14, 1994 written Statement before the House of Representatives Subcommittee on Health and the Environment



deliver “low,” “lower,” or “less” tar and nicotine than full-flavor cigarettes; claims that low tar cigarettes are “mild” or deliver “clean” taste; and use of brand names with descriptors such as “light” and “ultra light,” with full knowledge that consumers interpret these claims and descriptors to convey reduced risk of harm.

2382. The terms “Light” and “Low Tar,” as they are used by Defendants, are essentially “meaningless” and “arbitrary.” As Dr. Farone explained:

[T]here are lights of certain brands with higher tar levels than regulars of other brands from the same company, and there are also lights and regulars of the same brand that have the same FTC tar rating. So therefore the term “light” is not related to tar or taste. For example, according to the most recent FTC report of tar and nicotine yields, Philip Morris sells versions of Virginia Slims and Virginia Slims Lights that both deliver 15 mg of tar by the FTC method.³²

2392. Defendants continue to disseminate false and misleading public statements regarding their true intent in marketing low tar cigarettes. For example, Defendants Philip Morris, RJR, B&W, and Lorillard jointly stated to the FTC in February 1998: “The manufacturers do not claim that lower-yield cigarettes are ‘safe’ or are ‘safer’ than higher yield cigarettes.”³³

2398. Defendants’ testimony to the FTC fails to make any reference to the vast amounts of consumer research Defendants conducted, and had conducted for them by their numerous advertising and marketing consultants, that expressly found that many consumers strongly disliked the taste of low tar cigarettes, but were smoking them because they believed they were healthier for them.³⁴

2402. According to [Brand Manager of Marlboro from 1969 to 1972, James] Morgan, Philip Morris made a calculated decision to use the phrase “lower tar and nicotine” even though its own marketing

research indicated that consumers interpreted that phrase as meaning that the cigarettes not only contained comparatively less tar and nicotine, but also that they were a healthier option.³⁵

2403. Morgan, who later became CEO of Philip Morris, further explained in 2002 that rather than relying on the tar and nicotine numbers from the FTC Method, “the major influence in people’s perceptions in the tar of a cigarette would have come from the marketing positioning of a brand as opposed to people literally reading the FTC [tar and nicotine figures].”³⁶

2426. In 1979, Philip Morris promoted Cambridge as a low tar brand yielding 0.0 mg tar (less than 0.1 mg tar) on the FTC test. The 0.0 mg tar Cambridge cigarette was removed from the market and replaced by Cambridge light and ultra light brands, all of which had considerably more tar than the original Cambridge cigarette. Dr. Farone made it clear that:

The plan all along was to deceive the public into thinking that the Cambridge Light cigarette was a low tar cigarette, when in fact it was not . . . the trend to increasing tar deliveries in the product is very clear and there is no advertising that says that such increases are being made.³⁷



The trend in the 1970s toward low tar cigarettes was due in large part to consumer perception that they were less hazardous to health than higher tar cigarettes . . . Philip Morris took no additional steps to counter that mistaken perception.

James Morgan, former CEO of Philip Morris

2462. James Morgan, the former CEO of Philip Morris, acknowledged that the trend in the 1970s toward low tar cigarettes was due in large part to consumer perception that they were less hazardous to health than higher tar cigarettes Although Morgan conceded that “we were aware of that,” he admitted that, despite being armed with this knowledge, Philip Morris took no additional steps to counter that mistaken perception.³⁸

2471. Jeanne Bonhomme, Director of Consumer Insights for Philip Morris, stated that to her knowledge:

- “Philip Morris has always denied publicly that it markets low tar cigarettes as safe or safer than full-flavor brands;” and
- “Philip Morris has always denied publicly that it uses brand descriptors such as ‘light’ and ‘ultra light’ to communicate they are safe or safer than full-flavor brands.”³⁹

2474. In May 1996, representatives from Philip Morris, including Philip Morris General Counsel, Denise Keane, RJR, B&W, and Lorillard met with the FTC The FTC requested that the industry representatives provide the FTC with “any information the companies had concerning the issue of consumer perception of low tar, so-called “light” cigarettes.” Despite the decades of consumer and marketing research conducted or commissioned by Philip Morris concerning consumers’ interpretation of these terms . . . , Keane testified that “Philip Morris did not provide any such information” to the FTC.⁴⁰

2480. As recently as 2003 and 2004, the Board of Directors of Altria (formerly known as Philip Morris Companies), publicly made misleading statements to its shareholders and to the U.S. Securities and Exchange Commission [A] group of Altria shareholders proposed to the Altria Board of Directors that “the Board find appropriate ways of informing our customers about the actual health risks of smoking ‘light and ultra light’ cigarettes to disassociate them from any belief that such products are safer and deliver less tar and nicotine.” . . . The Board of Directors of Altria recommended that shareholders vote against this

proposal⁴¹

2510. A June 21, 1982 Product Research Report . . . written by RJR’s Marketing Development Department, stated: “Most respondents [ultra low tar smokers] preferred a white filter to a cork filter because they considered white to be more indicative of ULT cigarettes. The white filter generated strong associations with gentleness, purity, cleanliness, modernization, and innovativeness.”⁴²

2512. According to Gary Burger, RJR Senior President of Research & Development, RJR was aware that consumers smoke low tar cigarettes for the perceived health benefit. . . . He noted that consumers “have that impression that there are higher levels of bad stuff in high tar cigarettes and lower levels of bad stuff in low tar cigarettes.”⁴³

2515. A March 21, 2003 RJR statement to stockholders presented a proposal “to find appropriate ways of informing our customers about the actual health risks of smoking ‘light and ultra light’ cigarettes to disassociate them from any belief that such products are safer and deliver less tar and nicotine.” . . . The Board of Directors of RJR recommended a vote against this proposal.⁴⁴

2526. In March 1999, Nicholas Brookes, B&W Chairman and CEO from 1995 to 2000, became aware of a discrepancy in the tar delivery of Carlton cigarettes. The cigarette, when smoked by human smokers, delivered three milligrams instead of the advertised one milligram of tar. Because B&W had just introduced a new advertising campaign “touting Carlton as the ‘1’ for you,” Brookes attempted to delay the publication of a study that would have alerted the public to the new findings. Brookes did not direct B&W’s marketing department to discontinue the “Carlton is the ‘1’ for you” campaign, even though he acknowledged that it might cause confusion for consumers.⁴⁵

2556. Despite the substantial evidence already referred to . . . that B&W was aware that consumers interpreted its low tar brand descriptors to be indicative of a less harmful cigarette, in May 2004, B&W stated on its website

that brand descriptors were intended only to communicate taste⁴⁶

2557. BATCo's research documents establish that the company has long known and intended that its advertisements and marketing for low tar cigarettes, featuring claims of lowered tar and nicotine and "light" and "ultra light" brand descriptors, contributed to and reinforced consumers' mistaken belief that low tar cigarettes are better for their health, and caused consumers to smoke them for this reason.

2590. American Tobacco also placed advertisements for Carlton in the 1990s claiming that smokers could smoke ten packs of Carlton and still receive less tar than they would from smoking one pack of Marlboro, Camel, Winston, Kent, or Viceroy.⁴⁷

2598. A September 15, 1964 Lorillard memorandum from M. Yellen to Morgan J. Cramer, President and CEO . . . stated that, for several months before the release of the first Surgeon General's Report in January 1964, "LARK [a Liggett cigarette brand] was setting a base for future sales activities through the use of hospitals via rumors or otherwise . . . that medical scientists endorse LARK as the safest cigarette. This marketing technique on the part of LARK proved successful."⁴⁸

2606. In 1966, Lorillard introduced True brand cigarettes. Martin Orlowsky, Chairman, President, and Chief Executive Officer of the Lorillard Tobacco Company, admitted that Lorillard's True advertisements were targeted toward smokers who, due to their concerns about health risks, were seeking a low-tar cigarette.⁴⁹

2624. On September 5, 2001, Dr. Anthony Albino, Executive Vice President, Strategy, Communication and Consumer Contact at Vector Tobacco, Inc. [(a Liggett Group Inc. subsidiary)], sent an e-mail to a number of recipients, including Bennett LeBow, Chairman of the Board and Chief Executive Officer of Vector Group, Ltd., and VGR Holding Inc., admitting that: "the adoption of 'light' cigarettes over the past 25 years was mainly due to the PERCEPTION of safety."⁵⁰

6. Conclusions

2627. It is clear, based on their internal research documents, reports, memoranda, and letters, that defendants have known for decades that there is no clear health benefit from smoking low tar/low nicotine cigarettes as opposed to conventional full-flavor cigarettes. It is also clear that while defendants knew that the FTC Method for measuring tar and nicotine accurately compared the nicotine/tar percentages of different cigarettes, they also knew that that Method was totally unreliable for measuring the actual nicotine and tar any real-life smoker would absorb because it did not take into account the phenomenon of smoker compensation. Defendants also knew that many smokers were concerned and anxious about the health effects of smoking, that a significant percentage of those smokers were willing to trade flavor for reassurance that their brands carried lower health risks, and that many smokers who were concerned and anxious about the health risks from smoking would rely on the health claims made for low tar cigarettes as a reason, or excuse, for not quitting smoking.

2628. Despite this knowledge, Defendants extensively—and successfully—marketed and promoted their low tar/light cigarettes as less harmful alternatives to full-flavor cigarettes. Moreover, Defendants opposed any changes in the FTC Method which would more accurately reflect the effects of compensation on the actual tar and nicotine received by smokers, denied that they were making any health claims for their low tar/light cigarettes, and claimed that their marketing for these cigarettes was based on smokers' preference for a "lighter," "cleaner" taste.

2629. By engaging in this deception, Defendants dramatically increased their sales of low tar/light cigarettes, assuaged the fears of smokers about the health risks of smoking, and sustained corporate revenues in the face of mounting evidence about the health effects of smoking.

Endnotes

- 1 (no bates) (JD 004538); see also 680236589 (JD 004612); (no bates) (JD 001032 at 4-3).
- 2 Henningfield WD, 47:11-48:2; Henningfield TT, 11/22/04, 6794:8-6796:6.
- 3 Henningfield WD, 48:14-49:7.
- 4 Benowitz TT, 11/1/04, 4512:11-4513:1; Dixon WD, 16:13-21.
- 5 Benowitz WD, 59:6-17; 61:15-62:13; Benowitz TT, 11/2/04, 4769:25-4770:4; (no bates) (US 58700 at 10) (Monograph 13); accord Burns WD, 1:10-15, 12:10-11, 43:19-45:2; Burns TT, 2/15/05, 13311:9-15; Burns TT, 2/16/05, 13537:6-9.
- 6 Farone WD, 119:7-120:15; Farone TT, 10/7/04, 1866:2-17.
- 7 Farone WD, 121:3-9.
- 8 Morgan PD, Price v. Philip Morris, Inc., 6/5/02, 75:3-15.
- 9 170042567-2574 at 2568, 2574 (US 20292); Smith WD, 79:5-22.
- 10 Farone WD, 2:2-8, 2:15-19, 117:15-118:8; Farone TT, 10/12/04, 2169:18-22, 2170:5-11, 2171:25-2172:8, 2182:11-2190:7; Wigand WD, 8:11-17; 120:5-17.
- 11 2021544486-4496 at 4486-4488 (US 20348); see also Whidby WD, 45:11-12 (noting, in the context of this exhibit, that “Marlboro 85’s” refers to Marlboro Reds, a full-flavor cigarette brand).
- 12 Burns WD, 52:15-53:12.
- 13 Bonhomme WD, 56:6-12; 60:21-61:1; 63:13-18.
- 14 Lilly PD, Engle v. R.J. Reynolds Tobacco Co., 5/7/98, 34:3-39:2.
- 15 Morgan PD, Philip Morris Inc., 10/15/74, 82:25-83:13; 85:9-15; 85:17-86:4.
- 16 Brennan-Lund PD, Price, 9/20/02, 140:14-144:11, 186:12-189:19; 2040904809-4811 at 4809 (US 85035).
- 17 650340129-0193 at 0180, 0183 (US 20948).
- 18 503972013-2063 at 2038 (US 66448); Orlowsky WD, 86:4-7.
- 19 566628004-8083 at 8015 (US 20940).
- 20 109883112-3117 at 3115, 3117 (US 20264); 105657908-7909 (US 20248).
- 21 Henningfield WD, 48:3-49:7.
- 22 FTC Cigarette Testing; Request for Public Comment, 62 Fed. Reg. 48,158, 48,159 (Sept. 12, 1997) (US 88618).
- 23 Comments of Philip Morris Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp., and Lorillard Tobacco Co. on the Proposal Titled FTC Cigarette Testing Methodology Request for Public Comment (62 Fed. Reg. 48,158) at 2-3, (no bates) (US 88618) (“Joint Comments”).
- 24 Id. at 4.
- 25 Id. at 43.
- 26 Id. at 60, 82.
- 27 Id. at 89.
- 28 ATC2746877-6887 at 6877, 6878, 6887 (US 59009); compare with 1000861953-1953 (US 35484) (Wakeham 3/24/61) (“As we know, all too often the smoker who switches to a hi-fi cigarette winds up smoking more units in order to provide himself with the delivery which he had before.”).
- 29 Compare 682637627-7629 at 7629 (US 22946) with 521060910-0912 (US 20892).
- 30 Ivey WD, 67:19-21; TLT1040050-0055 at 0052-0054 (US 88620); Ivey WD, 64:1-67:11.
- 31 Spears PD, Minnesota, 9/23/97, 70:2-72:2.
- 32 Farone WD, 116:3-14; 525311179-1223 at 1185, 1207-1208, 1222 (US 52977).
- 33 Comments of Philip Morris Inc., RJR Tobacco Co., Brown & Williamson Tobacco Corp., and Lorillard Tobacco Co. on the Proposal Titled FTC Cigarette Testing Methodology Request for Public Comment (62 Fed. Reg. 48,158) at 3, 94 (“Joint Comments”) (US 88618).
- 34 Accord 2041186475-6517 at 6478, 6504 (US 22181*) (November 29, 1994 submission to the National Cancer Institute on behalf of B&W, American Tobacco, Lorillard, and Liggett contending that smokers use FTC tar and nicotine ratings primarily for information relating to taste considerations, referring to what Defendants called “the well-established significance of the FTC’s machine-determined yields for comparing the flavor, richness and satisfaction of different brands of cigarettes,” and predicting that if modifications to the FTC Method occurred, “[c]onsumers . . . would be deprived of important information about the flavor, taste and feel of cigarettes – information consumers consider to be highly relevant in distinguishing among” brands).
- 35 Morgan PD, Price v. Philip Morris, Inc., 6/15/02, 45:2-45:25, 45:2-46:25, 47:2-47:25, 48:2-48:25, 49:2-49:25, 50:2-50:25, 51:2-51:5, 52:15-52:20.
- 36 Morgan PD, Philip Morris Inc., 11/25/74, 174:10-175:4; 175:16-175:25.
- 37 Farone WD, 129:18-132:17; 2024983860-3862 at 3860 (US 20015).
- 38 Morgan PD, Price, 6/5/02, 42:16-42:25; 43:2-43:25; 44:2-44:25; 45:2 - 45:25; 63:10-63:25; 64:2-64:25; 65:2-65:21; 1004888470-8484 (US 85009); 502641641-1646 (US 85008).
- 39 Bonhomme WD, 11:18-20; 12:12-15.
- 40 Keane WD, 46:18-48:23; Keane TT, 1/18/05, 10369:20-10370:25; 2048216131-6135 at 6134 (US 38655).
- 41 (no bates) (US 87741).
- 42 503394459-4485 at 4464 (US 85036).
- 43 Burger PD, Arch v. American Tobacco Co., 8/21/97, 226:9-243:18.
- 44 TLT0960025-0029 at 0027-0028 (US 87993); Schindler WD, 66:4-67:16.
- 45 190245079-5080 (US 85018); Brookes PD, United States v. Philip Morris, 3/31/03, 146:18-148:12; 149:3-149:20; 150:14-150:18.
- 46 TLT1040056-0062 at 0061 (US 88628); Ivey WD, 70:5-14.
- 47 (no bates) (US 9182) (1993 advertisement in Sports Illustrated magazine stating: “10 packs of Carlton Menthol have less tar than 1 pack of these brands”); (no bates) (US 9122) (1992 advertisement noting same); Biglan WD, 281:17-283:22; (no bates) (US 9093) (1992 Carlton advertisement stating same); 970469347-9474 at 9464-9466 (US 85104) (1990s Carlton advertisements stating same); (no bates) (US 9186) (1993 advertisement stating: “A WHOLE CARTON OF CARLTON . . . HAS LESS TAR THAN 1 PACK OF THESE BRANDS. . . . Carlton is lowest in tar and nicotine”); Smith WD, 68:15-21.
- 48 01124257-4265 at 4259, 4257-4258 (US 20033).
- 49 Orlowsky TT, 10/13/04, 2288:24-2289:19.
- 50 VDOJ6743-6744 at 6743 (US 64727) (emphasis in original); LeBow TT, 4/4/05, 17594:24-17596:17.

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Tobacco Control Legal Consortium
875 Summit Avenue
Saint Paul, Minnesota 55105 USA
tobaccolaw@wmitchell.edu
www.tobaccolawcenter.org
651.290.7506

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Marketing to Youth

From the 1950s to the Present, Different Defendants, at Different Times and Using Different Methods, Have Intentionally Marketed to Young People Under the Age of Twenty-one in Order to Recruit “Replacement Smokers” to Ensure the Economic Future of the Tobacco Industry

Summary

In this section of the Opinion, Judge Kessler discusses the evidence showing that the Defendants tracked youth behavior and used the information to create highly sophisticated marketing campaigns to get young people to start smoking and continue smoking. Judge Kessler explains that the Defendants sought to remain profitable by bringing new, young smokers into the market to replace those who die or quit.

1. Definition of Youth

2. The Defendants Need Youth as Replacement Smokers

2637. As Bennett LeBow, President of Vector Holdings Group, stated, “if the tobacco companies really stopped marketing to children, the tobacco companies would be out of business in 25 to 30 years because they will not have enough customers to stay in business.”¹

3. Defendants’ Marketing Is a Substantial Contributing Factor to Youth Smoking Initiation

4. Tracking Youth Behavior and Preferences Ensures that Marketing and Promotion Reach Youth

a. Defendants Track Youth Behavior and Preferences

2717. Defendants spent enormous resources tracking the behaviors and preferences of youth under twenty-one . . . to start young people smoking and to keep them smoking. Defendants’ argument that their tracking was not done to determine youth preferences and behaviors so as to market to youth more effectively, is patently not credible.

2762. Philip Morris has conducted extensive consumer research to help inform and shape marketing campaigns that appeal to their youngest potential smokers.

2787. At a March 27, 1978 Lorillard field sales representatives’ seminar, several marketing ideas for Newport cigarettes were discussed. Discussion subjects included: sponsoring youth sports teams; . . . scholarships for underprivileged youth; . . . and sponsoring Miss Black Teenager contests.²

2789. An August 30, 1978 Lorillard memorandum from Ted Achey, Lorillard’s Director of Sales in the Midwest, to company President Curtis H. Judge regarding “Product Information,” demonstrates that Lorillard recognized the significance of the

underage market to the company:

The . . . base of our business is the high school student. NEWPORT . . . is the “In” brand to smoke if you want to be one of the group. Our problem is the younger consumer that does not desire a menthol cigarette. . . . I think the time is right to develop a NEWPORT NATURAL (non-menthol) cigarette to attract the young adult consumer desiring a non-menthol product.³

2792. An August 2, 1982 Lorillard memorandum from Florian Perini, Senior Research Chemist, to M.A. Sudholt, Manager of Analytical Development, . . . contained a proposal that “Video Game Imagery [be] incorporated in pack design (youth appeal).” It detailed:

the widespread video game craze has certain fundamental features which we could be the first to exploit. Names such as PAC MAN, SPACE INVADERS, TRON and their imagery can imaginatively show up on cigarette packs with repeat motifs . . . and patterns, and their bright imagery can have lasting appeal. Can extend concept to SPACE IMAGERY (Galaxy, Cosmos, Universe).⁴

2855. In a February 2, 1973 [R.J. Reynolds (RJR)] . . . memorandum, titled “Some Thoughts About New Brands of Cigarettes for the Youth Market,” [Dr. Claude Teague, an RJR Research & Development employee stated, “We are presently, and I believe unfairly, constrained from directly promoting cigarettes to the youth market”]⁵

b. Defendants’ Marketing Employs Themes Which Resonate with Youth

2892. As the following evidence demonstrates, Defendants have utilized the vast amount of research and tracking data they accumulated on youth smoking initiation, tastes and preferences by employing themes which resonate with youth in their marketing campaigns.⁶ . . . Above all, Defendants have burnished the image of their youth brands to convey rugged independence, rebelliousness, love of life, adventurousness, confidence, self-assurance, and belonging to the “in” crowd.

2918. On August 13, 1970, Philip Gaberman, creative director for Robert Brian Associates, . . . wrote a letter to Professor Charles Seide of Cooper Union, a New York City art college, proposing the use of Seide’s students for creating the Kicks package design. The letter stated:

. . . We have been asked by our client to come up with a package design . . . a design that is attractive to kids . . . (young adults). . . . Note: While this cigarette is geared to the youth market, no attempt (obvious) can be made to encourage persons under twenty-one to smoke. The package design should be geared to attract the youthful eye . . . not the ever-watchful eye of the Federal Government.⁷

2934. A section of [a May 26, 1975 report prepared for Brown & Williamson (B&W)] titled “How Can We Introduce Starters and Switchers to our Brands,” stated . . . that
an attempt to reach young smokers,



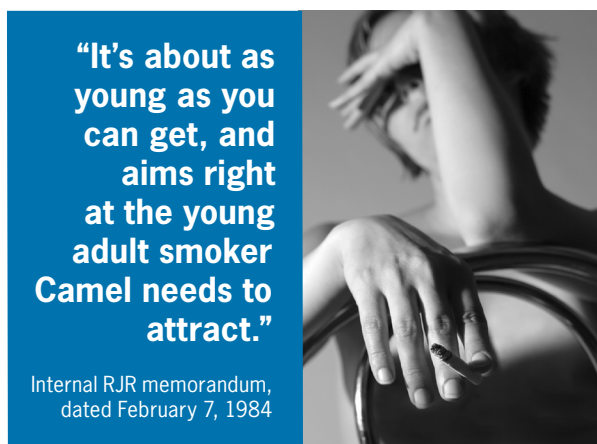
Above all, Defendants have burnished the image of their youth brands to convey rugged independence, rebelliousness, love of life, adventurousness, confidence, self-assurance, and belonging to the “in” crowd.

starters should be based . . . on the following parameters: [p]resent the cigarette as one of a few initiations into the adult world. Present the cigarette as part of the illicit pleasure category of products and activities. . . . [T]ouch on the basic symbols of the growing-up, maturity process. To the best of your ability (considering some legal constraints) relate the cigarette to “pot,” wine, beer, sex, etc.⁸

1955. A June 29, 1983 report . . . listed “beginning ideas” to be implemented at convenience stores to encourage purchase of RJR’s cigarette brands, including “activity booklet appealing to young people – things to do,” “develop a bike rack for kids with bikes – create ad space,” “hook-up cigarettes with other youth purchases,” “have a video game token given away with purchase,” “create a music channel that is closed-circuited into C.S. [convenience store] that is on-target to youth market,” and “some kind of game or contest . . . via proof of purchase – with a weekly winner. Could be video game – high school sports quiz.”⁹

1965. As a February 7, 1984 memorandum from Dana Blackmar to Rick McReynolds stated: “I think the French advertisement for Camel Filters is a smash. It would work equally well, if not better, for Camel Regular. It’s about as young as you can get, and aims right at the young adult smoker Camel needs to attract.”¹⁰

1971. Camel had only 2.4% of the fourteen to seventeen year old market in 1979, according to internal RJR data. . . . By 1993, by virtue of the Joe Camel campaign, Camel had increased its share of the teenage market to an astonishing 13.3%¹¹



1980. A September 15, 1989 RJR document . . . reported on Camel marketing at . . . a festival that offered “kiddy rides, vendor booths, and live entertainment on both stages.” A similar Dallas event included a midway area with carnival rides for the children: “Camel presence, as a major sponsor, was certainly realized by all those at the event. 25 large banners were hung around the perimeter of the park. The Camel 30-ft. inflatable giant pack was situated next to the main stage.” A Camel basketball game in a “freestanding booth with banners, flags and giant packs” was located in the midway area with children’s carnival rides which achieved “maximum brand impact.” The documents indicated that 2,000, 5,000, and 28,000 free samples of cigarettes were distributed at these three events, respectively.¹²

1986. A November 1993 Roper Starch report on an “Advertising Character and Slogan Survey” was conducted with a “national sample of young persons, age 10 to 17 years” to track awareness of the Joe Camel Campaign. The study found that 86% of the ten to seventeen year olds surveyed recognized Joe Camel. Joe Camel was identified correctly as advertising cigarettes by 95% of the ten to seventeen year olds who claimed awareness of the Joe Camel character. This percentage was higher than the percentage of children who knew that Ronald McDonald advertised McDonald’s fast food and within 1% of the number of children who knew that the Keebler elves advertised cookies.¹³

c. Defendants Continue Price Promotions for Premium Brands Which Are Most Popular with Teens

1991. Defendants recognize that youth and young adults are more responsive to increases in cigarette and other tobacco prices, and will not try smoking or continue to smoke if cigarette prices rise.¹⁴

2997. Since signing the [Master Settlement Agreement (MSA)], Defendants have increased the list price of their cigarettes. At the same time, they have enormously increased their promotions, thereby, in effect, decreasing the real price of cigarettes to consumers.¹⁵

3017. Since approximately 2000, B&W has spent more on discounting or reducing the price of Kool cigarettes than any of its other brands, according to Paul Wessel, the Current Divisional Vice President at B&W in charge of value for money premium niche brand and new product development.¹⁶

3018. Wessel claimed that he was unaware of whether youths were price sensitive and whether B&W had ever taken a position on the price sensitivity of youth.¹⁷ That statement is not credible in light of his corporate responsibilities and B&W's oft-claimed sensitivity to avoiding the marketing of its products to youth.

5. Defendants' Marketing Successfully Reaches Youth

a. Defendants' Spending on Marketing and Promotion Has Continually Increased

3026. After signing the MSA, Cigarette Company Defendants reported to the FTC significant increases in spending for newspapers (up 73%), magazines (up 34.2%), and direct mail (up 63.8%). Distribution of free cigarettes rose by 133.5%.¹⁸

3032. Much of Ms. Beasley's testimony on cross-examination was flatly not believable. Two examples will suffice. First, even though she was President and Chief Operating Officer at RJR, and a long-time employee of the company, she denied knowing that RJR's leading cigarette brand, Camel, is the third most commonly smoked brand among twelve to seventeen year olds.¹⁹ Second, she stated that in March 2001, RJR removed Rolling Stone and other magazines from its list of magazines approved for youth readership; she was then shown four different 2005 Rolling Stone magazine editions that contained RJR cigarette

brand ads for Camel, in direct contradiction of her testimony.²⁰ Therefore, the Court rejects her testimony that Reynolds's marketing, particularly in magazines, is not directed at youth.

b. Defendants Advertise in Youth-Oriented Publications

3054. Philip Morris's Director of Media [Richard Camisa] claimed that . . . he was not aware of the number of teens who were being reached by Philip Morris's advertisements in publications. That testimony is rejected as not being credible, particularly in light of his acknowledgment that the Media Department created binders of "cheat sheets," similar to "Cliff's Notes," for the Philip Morris Brand Groups that contained synopses of each magazine in which Philip Morris cigarette advertisements could be published. Those synopses included basic readership demographic data, including information on a magazine's age of readers, theme, and target audience.²¹

3083. Andrew Schindler, CEO of RJR, . . . stated – with a straight face – that, when RJR advertised in the 2003 swimsuit issue of Sports Illustrated, it did not occur to him that "the Swimsuit issue, might garner a very high absolute number of adolescent boys looking at it, even if the 25% threshold was not breached" or that "even if actual sales figures for this issues [sic] were not astronomically higher for adolescents, this is the one issue that has a huge potential for one tenth grade boy who did buy it to take it to school and share around with all of his pals."²² This statement is not credible.

c. Defendants Market to Youth Through Direct Mail

3089. Defendants have made extensive use of direct mail marketing to many millions of individuals to send them coupons, t-shirts, sporting goods, mugs, and magazines, all promoting their brand of cigarettes. These mailings were sent to millions of young people for whom Defendants had nothing more than an unverified representation that s/he was over the age of twenty-one.

3101. Lorillard, through its CEO Martin Orlowsky, admitted that “at times” it has sent mailings to individuals for whom it has no government-issued identification, and that it does not have third-party verification for every person to whom it mails.²³



“If we don’t do something fast to project that sense of industry responsibility regarding the youth access issue, we are going to be looking at severe marketing restrictions in a very short time.”

1995 Philip Morris Document

3102. In 2000, Lorillard sent 4,181,593 mailings that included coupons for cigarettes to 2.6 million individuals for whom Lorillard has no third-party age verification and no government-issued identification on file.²⁴

3108. In 2004, B&W also sent cigarettes through the mail to individuals whose age had not been verified through government-issued identification or third-party verification.²⁵

d. Defendants Market to Youth Through an Array of Retail Promotions

e. Defendants’ Promotional Items, Events and Sponsorships Attract Youth

3135. David Desandre, a Lorillard marketing employee, and Beth Crehan, an employee of a marketing promotion firm, were able to attend a Lucky Strike “Band to Band” event . . . without being asked for any identification. Inside the Concert Hall were “pole banners with the Lucky Strike Band to Band tag-line” . . . Desandre described how, while he was filling out a form to receive a free CD, a Lucky Strike staff member “threw me a pack of Lucky Strike cigarettes . . . she did not ask me if I was 21 or a smoker. She also did not ask for my id. Beth Crehan was also not asked if she was 21 or a smoker. Beth was also not asked for id.”²⁶

3136. Defendants sponsor televised racing events which have great appeal with youth. As a result, millions of youth watching these events are exposed to Defendants’ cigarette marketing imagery.

3141. Defendants falsely deny that the television exposure their cigarette brands garner does not motivate their continued sponsorship of racing events. For example, RJR asserted . . . that “radio and television exposure is not a motivating consideration for Reynolds in deciding whether to sponsor an event or a vehicle participating in an event.”²⁷ However, Susan Ivey, President and CEO of Reynolds American, acknowledged that one of the benefits of brand sponsorship of televised sporting events is exposure of the brand name on television.²⁸

3154. A 1992 Gallup survey revealed that almost half of adolescent smokers and one quarter of nonsmoking adolescents had received promotional items from tobacco companies.²⁹

6. Defendants’ Youth Smoking Prevention Programs Are Not Designed to Effectively Prevent Youth Smoking

3184. Internal documents suggest that Defendants designed their [youth smoking prevention] programs for public relations rather than efficacy in youth smoking prevention.³⁰

3185. A 1995 Philip Morris document . . . stated: [I]f we don’t do something fast to project that sense of industry responsibility regarding the youth access issue, we are going to be looking at severe marketing restrictions in a very short time. Those

restrictions will pave the way for equally severe legislation or regulation on where adults are allowed to smoke.³¹

7. Despite the Overwhelming Evidence to the Contrary, Defendants' Public Statements and Official Corporate Policies Deny that Their Marketing Targets Youth or Affects Youth Smoking Incidence

a. Defendants Claim They Restrict Their Marketing to People Twenty-one and Older

b. Defendants Deny Their Marketing Influences Youth Smoking Initiation; Defendants' Explanation for Their Marketing Practices Is Not Credible

3219. On the nationally televised ABC program 20/20, broadcast on October 20, 1983, Ann Browder, a Tobacco Institute spokesperson, . . . stated that

[c]igarette manufacturers are not interested in obtaining new business from teenagers. . . . We've been in business very well, thank you, for sometime now without attempting to hook kids. We do everything possible to discourage teenage smoking.³²

3230. On May 24, 1990, the Tobacco Institute issued a press release . . . [that] quoted [the Tobacco Institute's Charles O.] Whitley as testifying: "I know of no other industry in America that has taken such direct, voluntary action to steer its products away from young people."³³

3233. On December 12, 1990, [Brennan Dawson, Vice President of Public Relations for the Tobacco Institute,] told news reporters: "If a child never picks up another cigarette it would be fine with the tobacco industry."²⁴

3264. Steven C. Watson, Lorillard Vice President, External Affairs, was responsible for issuing a press release in 2001, stating "Lorillard Tobacco Company has never marketed or sold its products to youth."³⁵

3286. On September 18, 1990, Joan F. Cockerham of RJR's Public Relations Department, . . . stated:

Our intention with this campaign, as with all of our advertising, is to appeal only to adult smokers. We would not have launched the current Camel campaign if we thought its appeal was to anyone other than this group. . . . [O]ur advertising is directed to adult smokers and not younger people.³⁶

8. Conclusions

3296. The evidence is clear and convincing – and beyond any reasonable doubt – that Defendants have marketed to young people twenty-one and under while consistently, publicly, and falsely, denying they do so.³⁷

3297. In response to the mountain of evidence to the contrary, Defendants claim that all the billions of dollars they have spent on cigarette marketing serves the primary purpose of retaining loyal customers ("brand loyalty"), and the secondary purpose of encouraging smokers to switch brands.³⁸

3298. Defendants' marketing activities are intended to bring new, young, and hopefully long-lived smokers into the market in order to replace those who die (largely from tobacco-caused illnesses) or quit. . . . Defendants used their knowledge of young people to create highly sophisticated and appealing marketing campaigns targeted to lure them into starting smoking and later becoming nicotine addicts.³⁹

3301. Defendants spent billions of dollars every year on their marketing activities in order to encourage young people to try and then continue purchasing their cigarette products in order to provide the replacement smokers they need to survive. Defendants' expenditures on cigarette advertising and promotion have increased dramatically over the past decades, and in particular since the signing of the MSA.⁴⁰

3302. In the face of this evidence, Defendants have denied, over and over, with great self-righteousness, that they have marketed to youth.

Endnotes

- 1 LeBow WD, 63:16-64:1.
- 2 85530255-0264 at 0262-0263 (US 31998)
- 3 03537131-32 (US 22357).
- 4 96509517-9519 at 9519 (US 56890).
- 5 502987407-502987418 at 7408 (US 20708).
- 6 Krugman, WD, 85:11-92:18.
- 7 92352889-2890 (US 21725).
- 8 680092632- 2668 at 2664-2665 (US 21693); 170043558-3593 at 3581-3582 (US 20293); 679018003-8278 (US 87928).
- 9 500863242-3272 (US 20654).
- 10 502303940-3940 (US 22067); Horrigan PD, United States v. Philip Morris, 10/25/01, 25:1-27:8.
- 11 Eriksen WD, 1/17/05, 49:7-53:5; VXA1900036-0049 (US 63946).
- 12 507525019-5023 at 5020, 5022 (US 20778).
- 13 517145060-5108 at 5064, 5082, 5085 (US 20877).
- 14 Chaloupka WD, 94:23-124:4.
- 15 Chaloupka WD, 124:7-136:20.
- 16 Wessel PD, United States v. Philip Morris, 3/19/03, 28:17-29:1.
- 17 Id. at 36:23-37:12.
- 18 [Dolan WD, 61:15-16.]
- 19 Beasley TT, 3/31/05, 17358:1-17359:16.
- 20 Id. at 17364:11-17369:23.
- 21 Camisa PD, United States v. Philip Morris, 6/28/02, 85:20-87:2, 92:2-93:15.
- 22 Schindler WD, 214:13-215:8.
- 23 Orlowsky TT, 10/13/04, 2277:25-2278:25.
- 24 94945731-94945736 at 5734 (US 90002).
- 25 Ivey TT, 11/17/04, 6241:1-6243:11; 469100116-0136 (US 89166) (Confidential).
- 26 98600272-0273 (US 22212).
- 27 509321275-1290 (US 21993).
- 28 Ivey WD, 48:6- 49:4.
- 29 Krugman WD, 107:18-20.
- 30 TIMN0164421-4424 at 4423 (US 34445*)
- 31 2044046017-6022 at 6021-6022 (US 66716).
- 32 680286673-6686 at 6675-6676 (US 20999); 690149518-9531 at 9520-9521 (US 21046).
- 33 MNAT00600156-0157 (US 22349).
- 34 TIMN0131524-1525 (US 85153).
- 35 Watson PD, United States v. Philip Morris, 4/2/02, 190:5-191:6.
- 36 507706384-6384 (US 20782).
- 37 Dolan WD, 24:3-16; Krugman WD, 17:2-19:1; Chaloupka WD, 30:8-32:20; Biglan WD, 100-379.
- 38 Dolan WD, 61:6-16.
- 39 Dolan WD, 24:3-16; Krugman WD, 84:1-99:23; Chaloupka WD, 30:8-32:20; Biglan WD, 100-379.
- 40 Krugman WD, 23:10-24:4.

- The Hazards of Smoking
- Addiction
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Tobacco Control Legal Consortium
875 Summit Avenue
Saint Paul, Minnesota 55105 USA
tobaccolaw@wmitchell.edu
www.tobaccolawcenter.org
651.290.7506

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Secondhand Smoke

Defendants Have Publicly Denied What They Internally Acknowledged: that ETS Is Hazardous to Nonsmokers

Summary

In this section of the Opinion, Judge Kessler explains that the evidence shows that the Defendants have long known that secondhand smoke, or environmental tobacco smoke (ETS), is hazardous to non-smokers and that Defendants have understood how this information could affect the tobacco industry's profitability. Judge Kessler describes the steps the Defendants took, after promising to support objective research on the issue, to undermine independent research efforts, to fund industry-friendly research, and to suppress and trivialize unfavorable research results. Judge Kessler emphasizes that the evidence shows that the Defendants continue to deny the extent to which secondhand smoke is hazardous to non-smokers.

1. Introduction

3303. During the 1970s, scientific evidence suggesting that exposure to cigarette smoke was hazardous to nonsmokers began to grow, and public health authorities began to warn of a potential health risk to both adults and children. Fearing government regulation to restrict smoking in public places and sensing a decrease in the social acceptability of smoking, Defendants were faced with a major threat to their profits.

3304. In 1974, Tobacco Institute chairman Horace Kornegay warned that smoking restrictions not only impacted sales but also “could lead to the virtual elimination of cigarette smoking.”¹ Reynolds CEO Ed Horrigan wrote Lorillard executives in 1982: “We all know that probably the biggest threat to our industry is the issue of passive smoking.”² A 1986 [British American Tobacco (Investments) Ltd. (BATCo)] document stated: “The world tobacco industry sees the ETS issue as the most serious threat to our whole business.”³ Philip Morris Companies Vice Chairman Bill Murray was advised . . . in 1987: “The situation can’t get any worse. Sales are down, can’t be attributed to taxes or price increases. ETS is the link between

smokers and non-smokers and is, thus, the anti’s [anti-smoking activists] silver bullet.”⁴

3305. In response, Defendants crafted and implemented a broad strategy to undermine and distort the evidence indicting passive smoke as a health hazard. Defendants’ initiatives and public statements with respect to passive smoking attempted to deceive the public, distort the scientific record, avoid adverse findings by government agencies, and forestall indoor air restrictions. Defendants’ conduct with respect to passive smoking continues to this day, when currently no Defendant publicly admits that passive exposure to cigarette smoke causes disease or other adverse health effects.

2. The Consensus of the Public Health Community is that ETS Causes Disease in Nonsmokers

3. Internally, Defendants Recognized That ETS is Hazardous to Nonsmokers



Defendants recognized that secondhand smoke contained high concentrations of carcinogens and other harmful agents.

3362. Defendants recognized that secondhand smoke contained high concentrations of carcinogens and other harmful agents. Defendants also recognized that the research from the public health community showing that ETS caused disease was persuasive evidence of the harmful effects of secondhand smoke and could be adverse to their position. Most importantly, research funded by Defendants themselves provided evidence confirming the public health authorities' warnings that nonsmokers exposure to cigarette smoke was a health hazard.

4. Internally, Defendants Expressed Concern that the Mounting Evidence on ETS Posed a Grave Threat to Their Industry

3413. On January 31, 1974, at the 1974 Tobacco Institute's annual meeting in New York, Tobacco Institute president Horace Kornegay described the gradual acceleration of indoor air restrictions, stating that these restrictions not only impacted sales but also "could lead to the virtual elimination of cigarette smoking."⁵

3415. BATCo understood that the passive smoking issue not only risked an increasing number of smoking restrictions, but even threatened to reduce the number of starting smokers. Without such starting smokers, the industry could not survive. Papers from

Australia, the United States, Canada, and Germany presented at the 1976 Hot Springs conference emphasized that the threat of "social unacceptability" emanating from the health risks to nonsmokers "threatens to undermine smokers' confidence and to dissuade people not to take up the habit."⁶

3421. In 1987, a Philip Morris strategic planning memorandum on "social acceptability" stated that "the effects of ETS on others is now the most powerful anti-smoking weapon being employed against the industry."⁷

3423. In June 1987, Philip Morris Companies held its conference called "Operation Downunder" [a 1987 meeting between a small a group of executives on Hilton Head Island, South Carolina] . . . to formulate a worldwide strategy on passive smoking. [Philip Morris legal counsel] Covington & Burling's John Rupp told the group that the industry was "in deep shit" as a result of the 1986 reports* and the industry's "serious credibility problem."⁸

3427. The actual impact of smoking restrictions on cigarette sales was so substantial that by January 1992, Philip Morris was measuring past impacts on sales and modeling the future sales impact of the possible workplace smoking restrictions resulting from public concerns about the significant health impacts of secondhand smoke on non-smokers.⁹

5. Defendants Made Public Promises to Support Independent Research on the Link Between ETS and Disease

* Tobacco Control Legal Consortium note: The "1986 reports" referred to above are three scientific reports recognizing the adverse health consequences of secondhand smoke exposure in humans: (1) the Surgeon General's 1986 Report; (2) the National Research Council of the National Academy of Sciences 1986 report entitled "Environmental Tobacco Smoke, Measuring Exposures and Assessing Health Effects"; and (3) the World Health Organization's International Agency for Research on Cancer (IARC) 1986 report entitled "Tobacco Smoking," one in a series of "Monographs on the Evaluation of Carcinogenic Risk of Chemicals to Humans." These reports are discussed on pages 1223 - 1225 of the decision.

3434. These public promises were intended to deceive the American public into believing that there was no risk associated with passive smoking and that Defendants would fund objective research to find definitive answers. Instead, over the decades that followed, Defendants took steps to undermine independent research, to fund research designed and controlled to generate industry-favorable results, and to suppress adverse research results.

6. Defendants Undertook Joint Efforts to Undermine and Discredit the Scientific Consensus That ETS Causes Disease

3435.

[D]efendants recognized from the mid-1970s forward that the health effects of passive smoking posed a profound threat to industry viability and cigarette profits,

through (1) increasing numbers of smoking restrictions; (2) making smoking “socially unacceptable”; and (3) reducing the number of starter smokers. This recognition resulted in concerted, international action by Defendants and other members of the industry to meet the passive smoking threat head on.

3493. At a February 3, 1988 meeting of the Tobacco Institute’s Communications Committee, Sam Chilcote [then President of the Tobacco Institute] told the Executive Committee that they were now tasked to “move forward with an expanded comprehensive effort” to deal with the ETS threat. The “two basic objectives” in implementing Downunder were “to defeat or lessen all smoking restrictions” and “to slow the decline of the social acceptability of smoking.” These goals were to be achieved through, inter alia, funding the Center for Indoor Air Research

[(CIAR)], “media tours,” and “more experts.”¹⁰

3523. From 1988 until its dissolution as required by the [Master Settlement Agreement (MSA)] in 1999, CIAR funded over 150 projects at over 75 institutions that resulted in roughly 250 peer-reviewed publications.¹¹ Total research funding provided through CIAR was in excess of \$60,000,000.¹²

3539. [I]t is clear that although CIAR was publicly billed as an independent scientific entity organized to support research projects addressing indoor-air issues, its funding was controlled by the tobacco industry, and projects were sought for the purpose of establishing industry-favorable science and potential expert witnesses.



The “two basic objectives” in implementing Downunder were “to defeat or lessen all smoking restrictions” and “to slow the decline of the social acceptability of smoking.”

Sam Chilcote, at a February 3, 1988 meeting of the Tobacco Institute’s Communications Committee

3565. The MSA . . . required that Defendants shut down and disband CIAR within 45 days of “Final Approval.” Although the MSA was signed by the parties in November 1998, “Final Approval” by the settling States did not take place until approximately one year later.¹³

3567. Between the MSA signing in November 1998 and CIAR dissolution in December 1999, Defendants continued to fund millions of dollars of new and continuing research. In February 1999 alone the CIAR Board of Directors voted to fund over \$3.5 million in new research.¹⁴

3568. As one example of CIAR’s continued activities, in 2000, the second edition of the CIAR text by ETS consultant Roger Jenkins was published, with Max Eisenberg [former Executive Director of CIAR] listed as editor. The publication,



**One objective
... was simply
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titled “The Chemistry of Environmental Tobacco Smoke: Composition and Measurement,” continues to dispute the known health effects of passive smoking and trivializing its role as an indoor air pollutant. According to Jenkins’s introduction to his book: (1) “The degree to which ETS exposure represents a health hazard remains a point of contention”; and (2) “The contribution of ETS to the concentration of indoor air contaminants in commonly encountered environments is much less than is implied by the extreme values included in many tabulations of ranges observed.”¹⁵

3601. The ETS Consultancy Program was a worldwide network of consultants and organizations recruited to speak on behalf of the industry to influence public opinion, government officials, and scientists. . . . [D]efendants created the ETS Consultancy Program to attack and discredit the scientific consensus and underlying evidence that passive smoking was a health hazard.

3602. One objective in creating and implementing the ETS Consultancy Program was simply to “keep the controversy alive” by attacking the scientific consensus that ETS was a health hazard.¹⁶

3635. Through their recruiting and training of consultants around the world, Defendants created a cadre of seemingly independent consultants to support the industry’s position on secondhand smoke and to create the impression that a legitimate controversy existed among independent scientists. The global effort to create and manage this program required intense coordination among the companies and their counsel.

3642. Through the consultancy program, the tobacco industry was successful in reaching “public, scientific and governmental audiences.”¹⁷ In the words of [Brown & Williamson (B&W)] counsel Kendrick Wells: “The consultants groups’ operation is essentially a public relations program, not a scientific operation.”¹⁸

7. Defendants Made False and Misleading Public Statements Denying that ETS Is Hazardous to Nonsmokers

8. Defendants Continue to Obscure the Fact that ETS is Hazardous to Non Smokers

3829. In this litigation, Defendants have denied that ETS causes disease in nonsmokers.¹⁹

3830. Reynolds continues to publicly and directly deny that secondhand smoke causes diseases and other adverse health effects in nonsmokers. Reynolds’s position on its website is that it believes “that there are still legitimate scientific questions concerning the reported risks of secondhand smoke.” Reynolds’s website further states:

Considering all of the evidence, in our opinion, it seems unlikely that secondhand smoke presents any significant harm to otherwise healthy nonsmoking adults at the very low concentrations commonly encountered in their homes, offices and other places where smoking is allowed. We recognize that exposure to high concentrations of secondhand smoke may cause temporary irritation, such as teary eyes, and even coughs and wheezing in some adults. In addition, there is evidence that secondhand smoke, like other airborne irritants, or allergens such as pollen and dust may trigger attacks in asthmatics.²⁰

Mary Ward, an in-house attorney for Reynolds until 2004, testified that the Reynolds position

on passive smoking has not changed since she joined the company in 1985, with the exception of admitting that ETS “may trigger attacks in asthmatics.”²¹

3834. B&W also continues to publicly deny that secondhand smoke causes diseases and other adverse health effects in nonsmokers. The company’s 2003 website stated: “It is, therefore, our view that the scientific evidence is not sufficient to establish that environmental tobacco smoke is a cause of lung cancer, heart disease, or other chronic diseases.”²²

3835. BATCo continues to publicly dispute that secondhand smoke causes diseases and other

“Considering all of the evidence, in our opinion, it seems unlikely that secondhand smoke presents any significant harm to otherwise healthy nonsmoking adults at the very low concentrations commonly encountered in their homes, offices and other places where smoking is allowed.”

R.J. Reynolds’s website

adverse health effects in nonsmokers. BATCo also denies that passive smoke is a health hazard to adults or children. On its website, BATCo states that ETS can be “annoying,” but denies that it presents any risk:

We believe, however, the claim that ETS exposure has been shown to be a cause of chronic disease is not supported by the science that has developed over the last 20 years or so. In our view, it has not been

established that ETS exposure genuinely increases the risk of nonsmokers developing lung cancer, heart disease, or chronic obstructive pulmonary disease.²³

3838. In 2002, BATCo published a document titled “British American Tobacco Social Report 2001/2002.” In this report, BATCo asserted:

There is also a debate about Environmental Tobacco Smoke (ETS), also known as passive smoking. Some say it poses health risks, and others, including ourselves, say there is no convincing evidence that ETS is a cause of chronic diseases such as lung cancer.²⁴

3847. Philip Morris has created a new organization called the Philip Morris External Research Program, or PMERP, to continue the scientific research carried out by CIAR.

3848. The MSA, signed by representatives of certain Defendants on November 23, 1998, required that Defendants shut down and disband CIAR.²⁵ CIAR’s executive director Eisenberg formally dissolved the organization on December 6, 1999.²⁶

3851. Philip Morris established the PMERP in early 2000, using the same offices in Linthicum, Maryland, that formerly housed CIAR, employing many of the same individuals who were employed by CIAR, and even using the same phone numbers as CIAR had used. The program is administered by an entity called Research Management Group (RMG), set up in 2000 solely to manage the PMERP. RMG has never managed any other program.²⁷ RMG is headed by Max Eisenberg, the former executive director of CIAR.²⁸

3852. [A]ll told, 44 out of the 105 peer-reviewers listed by PMERP in its 2000 Request for Applications were drawn from the peer reviewer list in the 1998 CIAR Request for Applications.²⁹ Moreover, 53 of the peer reviewers were former recipients of CIAR funding.³⁰ Many researchers funded through CIAR have continued to receive funding through the PMERP.³¹

9. Conclusions

3859. Scientists have been concerned about the health effects of environmental tobacco smoke since at least the late 1960s, after the issuance of the Surgeon General's Report on Smoking and Health. However, no scientific consensus about the hazards of ETS to non-smokers (particularly to babies and young children), as well as to smokers who also inhale the sidestream smoke which is a component of ETS, was reached until 1986.

3860. Significantly, Defendants were well aware of, and worried about, this issue as early as 1961 when a Philip Morris scientist presented a paper showing that 84% of cigarette smoke was composed of sidestream smoke, and that sidestream smoke contained carcinogens. In addition to understanding, early on, that there was a strong possibility that ETS posed a serious health danger to smokers, Defendants also

understood the financial ramifications of such a conclusion. In 1974, the Tobacco Institute's president Horace Kornegay acknowledged that indoor air restrictions designed to defuse the passive smoking issue "could lead to the virtual elimination of cigarette smoking." In 1980, the CEO of R.J. Reynolds, Ed Horrigan, stated that "We all know that probably the biggest threat to our industry is the issue of passive smoking." In the 1990s, a Philip Morris report identified "the social acceptability of smoking practices [as] the most critical issue that our industry is facing today . . . Attacks on acceptability are almost exclusively based on claims that ETS can cause diseases in the exposed population."

3861. Despite the fact that Defendants' own scientists were increasingly persuaded of the strength of the research showing the dangers of ETS to nonsmokers, Defendants mounted a comprehensive, coordinated, international effort to undermine and discredit this research. Defendants poured money and resources into establishing a network of interlocking organizations. They identified, trained, and subsidized "friendly" scientists through their Global Consultancy Program, and sponsored symposia all over the world from Vienna to Tokyo to Bermuda to Canada featuring those "friendly" scientists, without revealing their substantial financial ties to Defendants. They conducted a mammoth national and international public relations campaign to criticize and trivialize scientific reports demonstrating the health hazards of ETS to nonsmokers and smokers.

3862. Defendants still continue to deny the full extent to which ETS can harm nonsmokers and smokers. Some Defendants, such as BATCo, R. J. Reynolds, and Lorillard, flatly deny that secondhand smoke causes disease and other adverse health effects; some, such as Brown & Williamson, claim it's still "an open question"; and others, such as Philip Morris, say that they don't take a position and that the public should follow the recommendations of the public health authorities. To this day, no Defendant fully acknowledges that the danger exists.

"We all know that probably the biggest threat to our industry is the issue of passive smoking."

Ed Horrigan, CEO of R.J. Reynolds



Endnotes

- 1 TIMN0067732-7755 at 7734 (US 22047).
- 2 93443843-3843 (US 32289).
- 3 100993158-3165 at 3158 (US 89556).
- 4 2021502671- 2678 at 2678 (US 22950).
- 5 TIMN0067732-7755 at 7734 (US 22047).
- 6 2025025457-5460 at 5457 (US 75152).
- 7 2021553739-3926 at 3901-3905 (US 36767).
- 8 2021502102- 2134 at 2105-2106 (US 20346).
- 9 2023914279-4284 at 4280 (US 88584).
- 10 TIDN0008865-8890 (US 65559).
- 11 (JD 002923 at 8360029); (JD 054352).
- 12 See US 25643[.]
- 13 (no bates at 32-33) (JD 045158).
- 14 2063908736-8736 (US 20514); 83205163-83205165 (US 23493).
- 15 BR2000545-0785 at 0553 (JD 065024).
- 16 321140944-0949 at 0944 (US 20586); 2021181803-1812 at 1803 (US 22155); 2047720166 0173 at 0169; (US 23966); 321091680-1729 at 1685 (US 28271).
- 17 2500048956-8969 at 8967 (US 27901).
- 18 401033325-3328 (US 24099).
- 19 USX6390001-0400 at 0045-0046 (US 89555) (BATCo); USX6390001-0400 at 00780079 (US 89555) (B&W); USX6390001-0400 at 0147-0148 (US 89555) (Lorillard); USX6390001-0400 at 0194-0195 (US 89555) (PM); USX6390001-0400 at 0272, 0274-0275 (US 89555) (RJR).
- 20 (US 92012).
- 21 Ward TT, 11/4/04, 5076:9-5077:22.
- 22 TLT0390003-0003 (US 7676).
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- 25 (no bates at 32-33) (JD 045158).
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- 27 Eisenberg TT, 11/9/04, 5631:9-24.
- 28 Eisenberg WD, 52:6-10, 53:10-16; Eisenberg TT, 11/15/04, 5852:10-5853:7.
- 29 2085317779-7809 at 7802 (US 22200); 86616778-6810 (JD 042662); Eisenberg TT, 11/15/04, 5663:14-18.
- 30 Eisenberg TT, 11/15/04, 5864:3-11.
- 31 Eisenberg WD, 54:14-17.

- The Hazards of Smoking
- Addiction
- Nicotine Levels
- Light Cigarettes
- Marketing to Youth
- Secondhand Smoke

Suppression of Information

The Verdict Is In:

Findings from *United States v. Philip Morris*



Tobacco Control
Legal Consortium



Law. Health. Justice.

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Tobacco Control Legal Consortium
875 Summit Avenue
Saint Paul, Minnesota 55105 USA
tobaccolaw@wmitchell.edu
www.tobaccolawcenter.org
651.290.7506

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Suppression of Information

At Various Times, Defendants Attempted to and Did Suppress and Conceal Scientific Research and Destroy Documents Relevant to Their Public and Litigation Positions

Summary

In this section of the Opinion, Judge Kessler discusses the evidence that for over fifty years, the Defendants tried to protect themselves from litigation and regulation by (1) suppressing and concealing scientific research, (2) destroying documents, and (3) shielding other documents from public view by asserting that they were “privileged” and protected by law. Judge Kessler explains that the Defendants’ destruction of documents makes it impossible to know what materials once existed.

3863. Defendants attempted to and, at times, did prevent/stop ongoing research, hide existing research, and destroy sensitive documents in order to protect their public positions on smoking and health, avoid or limit liability for smoking and health related claims in litigation, and prevent regulatory limitations on the cigarette industry.

3864. The evidence of Defendants’ suppression of research and destruction of documents consists of events which often seem to be unrelated and to lack a unifying thread. Defendants claim these facts, most of which are undisputed, amount to no more than a string of isolated instances which prove nothing. This explanation misses the point. The evidence is clear that on a significant number of occasions, Defendants did in fact suppress research and destroy documents to protect themselves and the industry. The fact that much additional evidence may be lacking because Defendants were successful in their efforts to suppress, conceal, and destroy materials that would have reflected adversely on their corporate interests is hardly a justification for ignoring the evidence that does exist. Moreover, in those instances where Defendants did successfully

suppress, conceal, and destroy materials, it is most unlikely that there would be any evidence to reflect that since it would no longer exist. By destroying evidence, Defendants make it virtually impossible to know what materials existed prior to their destruction.

1. Suppression and Concealment of Scientific Research

3866. In 1978, Sheldon Sommers, Chairman of the [Council for Tobacco Research (CTR)] Scientific Advisory Board..., complained to William Gardner, the Scientific Director of CTR, that he (Sommers) was concerned that the CTR lawyers were controlling tobacco research by CTR based upon legal considerations. Sommers stated: “I think CTR should be renamed Council for Legally Permitted Tobacco Research, CLIPT for short.” Indeed, the lawyer control of CTR had become so pervasive that Sommers concluded that “[m]y considered opinion is that the time for me to sever connections with CTR is near.”¹



“...the current lack of clarity about the relationship between R&D and Legal Dept. has raised questions which for me are ethically disturbing...”

Richard Binns, former Manager of BATCo's Group Research & Development Centre

3887. After the Vancouver conference, there was concern amongst the [British American Tobacco (BAT)] Group executives that scientists' statements would contradict the public statements and legal positions being taken by the company. As a result, Patrick Sheehy, then Chairman and CEO of BAT Industries, ordered BAT Group lawyers to bring the scientists together for a meeting to “solidify a method by which records related to scientific meetings and scientific research would be handled in the future.”²

3891. As suggested at the meeting, BAT thereafter held a series of mandatory training sessions about writing and document creation for company scientists. “The sessions were called ‘caution in writing’ seminars and at Brown & Williamson they were presented by lawyers, predominantly from Shook, Hardy & Bacon.”³ At the seminars, scientists were instructed by lawyers “on how to sanitize the documents they created.”⁴ The scientists were told “how to avoid writing documents with contentious words and topics.” The contentious words included words like “safer,” “addictive,” “disease,” and “cancer.”⁵

3897. Brown & Williamson [(B&W)] . . . suppressed certain scientific research particularly through lawyer oversight and vetting. In an August 1980 memorandum, Kendrick Wells, at that time corporate counsel to B&W, listed numerous edits that would be required before BAT scientist, Dr. Lionel Blackman could publish “Change of Stance on Public Smoking and Health,” which Blackman had drafted. In justifying the edits, Wells wrote:

The successful defense of product liability litigation and opposition to adverse legislation in the United States depends upon two essential arguments: (1) The scientific evidence does not prove a causal relationship between smoking and health and (2) the smoker voluntarily encounters the known risks of smoking.

A concession by a cigarette manufacturer to the charge that cigarettes cause human disease or a statement which contradicts the concept of voluntary choice of smoking by the consumer could cripple or destroy B&W's defense to smoking and health lawsuits and opposition to legislative attacks. This would be true even though the statements were made by BAT.⁶

“Change of Stance on Smoking and Health” as originally drafted by Blackman was never released to the public.⁷

3905. Richard Binns, the former Manager of BATCo's Group Research & Development Centre at Southampton, complained of the expansive role of lawyers in BATCo's science, writing that:

I am being asked to make significant and sometimes swingeing [sic] changes in documents produced recently by R&D staff. It is suggested that this must be done by finding a “managerial explanation” for the changes, without reference to the involvement of Legal Department. I will find this impossible to do. Senior R&D staff will not be so easily deceived. Personally, I am not prepared to lie to staff for very doubtful reasons. Therefore, the current lack of clarity about the relationship between R&D and Legal Dept. has raised questions which for me are ethically disturbing, particularly if extended beyond the present localized situation.⁸

3907. Defendant Philip Morris suppressed and concealed many scientific research documents, even going so far as to send them to a foreign

affiliate in order to prevent the disclosure of documents in litigation and in federal regulatory proceedings.

3909. Philip Morris did in fact purchase INBIFO [its foreign affiliate] to conduct its smoking and health research.

3913. As recently as 1993, Philip Morris maintained a system whereby research documents were “sent to Richmond for a review and [] then returned to INBIFO” with all “[s]upporting data and documents . . . kept at INBIFO.”⁹

3917. When Victor DeNoble, former Associate Senior Scientist at Philip Morris, and his fellow researcher, Paul Mele, performed research on rats demonstrating that nicotine caused self-administration and induced tolerance, they initially received Philip Morris’s approval to publish their research results. However, following DeNoble’s presentation of those results to Philip Morris senior management in New York City, the approval to publish was withdrawn.¹⁰ DeNoble explained that it was clear from a comment made to him at the presentation that Philip Morris senior management would not allow the research results to be disclosed. Ross Millhiser, a Philip Morris executive stated: “Why should I risk a billion-dollar industry on rats pressing a lever to get nicotine?”¹¹

2. Document Destruction Policies

3929. At various times, different Defendants attempted to and did destroy documents which were adverse to their public and litigation positions on smoking and health. While these efforts were often part of larger, legitimate institutional document retention policies, at other times – as with the BAT Group – they were clearly intended to render unavailable written materials which could prove damaging to or inconsistent with Defendants’ litigation position and public relations stance.

3950. [Fred Gulson, in-house counsel for Wills, an operating company owned by BAT Industries,] explained that Wills’s 1985 Document Retention Policy was comprised of two components, the

“Why should I risk a billion-dollar industry on rats pressing a lever to get nicotine?”

Philip Morris executive,
Ross Millhiser



written policy and the un-written purpose and application of the policy which were not reduced to paper for fear of discovery. Regarding the two distinct components of the document management policy, Gulson testified:

The written document’s primary purpose was to provide cover for the actual document destruction enterprise, to ascribe an innocent housekeeping justification for the widespread destruction of sensitive documents. The Document Retention Policy wasn’t simply the written policy itself, but the corporate knowledge of how the Policy was to be applied apart from the written language. My recollection of the Document Retention Policy comes not from the written document, but how it was explained to me by Nick Cannar, Andrew Foyle [a solicitor at Lovell, White & King, BATCo’s outside counsel], Brian Wilson, a partner at Clayton Utz, and others, rather than from the document itself, since the written document was incomplete in terms of describing the actual workings and purpose of the Document Retention Policy.¹²

When he received the Foyle Memorandum, Gulson sent it, at Foyle’s direction, to Brian Wilson, a lawyer at the Australian law firm of Clayton Utz, for answers to the questions Foyle raised regarding the use and implementation of the Document Retention Policy.¹³ Foyle wanted Gulson to direct these questions to Wilson because:

There were serious concerns at BATCo that Wills’ Document Retention Policy

might leave the BAT Group vulnerable. Foyle was trying to strike the proper balance between destroying more documents, thereby risking an adverse inference against the companies; and not destroying more documents, thereby risking their discovery and use against companies in litigation.¹⁴

Foyle also wrote:

For purposes of this exercise it can be assumed that, over the years, Wills has received copies of most of the sensitive documents generated by BATCo but that most of these (with the exception of the research reports) will have been destroyed as a result of the [1985] retention policy. It should also be assumed that a number of Wills employees have a detailed knowledge of the subjects to which many of the sensitive documents referred.¹⁵

3981. As part of its efforts to conceal information and reduce its litigation exposure, BATCo sought to reduce the amount of documents its employees generated. As described in its “Records Management: Creation Retention” manual, BATCo repeatedly preached to its employees to use the “mental copy” rule. The “mental copy” rule asks employees to “imagine that the memo, note or letter you are about to write will be seen by the person that you would least like to read it.” The employee is then to “send a ‘mental copy’ of your document to a newspaper, one of your competitors, a government agency, or potential plaintiff. Now: would you still write the memo? If so – would you still write it the same way?”¹⁶ That same document asked employees to “Think *before* you write,” and to question “does it *really* need to be in writing to do the job?”¹⁷

3984. On June 29, 1992, Sharon (Blackie) Boyse, a BATCo scientist, sent a facsimile to Jorge Basso Dastugue, a manager at BATCo’s Argentine company Nobleza-Piccardo. The facsimile included a price quote from Healthy Buildings International (“HBI”) to prepare information and materials for a public relations

“Please also note, more importantly, that this [is]* an extremely sensitive document! HBI are [sic] currently under a considerable amount of investigation in the US about their connections with the industry. All references to companies in the quote has [sic] therefore been removed. **Please do not copy or circulate this in any way and please destroy this fax cover sheet after reading!** I know this sounds a little like James Bond, but this is an extremely serious issue for HBI.”

Internal correspondence from British American Tobacco (Investments) Ltd., dated June 1992

program on Indoor Air Quality in Buenos Aires. In the facsimile cover sheet, Boyse instructed Dastugue to keep HBI’s involvement in the project quiet:

Please also note, more importantly, that this [is]* an extremely sensitive document! HBI are [sic] currently under a considerable amount of investigation in the US about their connections with the industry. All references to companies in the quote has [sic] therefore been removed. **Please do not copy or circulate this in any way and please destroy this fax cover sheet after reading!** I know this sounds a little like James Bond, but this is an extremely serious issue for HBI.¹⁸

3997. [M]embers of the BAT Group, in furtherance of the Policy’s purposes, destroyed documents, routed them from one country or BAT facility to another, erased a useful litigation database as well as the fact that the documents it contained had ever existed as soon as the pre-existing judicial hold was lifted, and constantly exhorted their many employees to avoid putting anything in writing. All these activities were taken for one overriding purpose – to prevent disclosure of

* Tobacco Control Legal Consortium addition.

evidence in litigation.*

3. Improper use of Attorney-Client and Work Product Privileges

4001. At various times during which litigation and federal regulatory activities were pending, Defendants improperly sought to conceal research material behind the attorney-client privilege and the work product doctrine in order to avoid discovery. To accomplish that purpose, Defendants' lawyers exercised extensive control over joint industry and individual company scientific research and often vetted scientific documents.

4003. Beginning in at least 1965, B&W and BATCo began their efforts to keep scientific research from disclosure. These efforts included sending smoking and health documents outside the United States to foreign affiliates to prevent their disclosure in U.S. litigation and in regulatory proceedings.¹⁹ B&W and BATCo also attempted to create improper attorney-client privilege or work product protection over documents through various means, including routing them through lawyers, maintaining scientific materials in lawyers' files, and indiscriminately marking them as "privileged and confidential" or with other similar designations.

4014. In a handwritten letter attributed to Richard Binns, the former Manager of BATCo's Group Research & Development Centre at Southampton,

he discusses BATCo's practice of routing scientific research to B&W through attorney Robert Maddox: "Report – stopped sending direct to B&W in Jan. Maddox farce. B&W withdrawn from circulation lists (but get 2 copies)."²⁰ Another document – from a Research & Development file used by Binns at the Southampton facility – addresses document circulation relating to B&W, and states that:

They suppressed, concealed, and terminated scientific research; they destroyed documents including scientific reports and studies; and they repeatedly and intentionally improperly asserted the attorney-client and work product privileges over many thousands of documents (not just pages) to thwart disclosure to plaintiffs in smoking and health related litigation and to federal regulatory agencies, and to shield those documents from the harsh light of day.

* The Court would note that on April 14, 2004, more than a year before this case went to trial, Special Master Levie found that the Government had established a prima facie showing that the crime fraud exception applied, and therefore overcame BATCo's claims of attorney-client privilege and/or work product protection for the Foyle Memorandum. He recommended that the Court order BATCo to produce a copy of the Foyle Memorandum to the Government within two days. R&R #155.

While the subsequent history of R&R #155 is fairly tangled, and involved several trips to the Court of Appeals, this Court did not reach the central substantive issue – whether the Government had established the crime fraud exception. With the benefit of hindsight, and on the strength of fully cross-examined, in-person testimony from several key witnesses for the Government (a luxury which the Special Master did not have), the Court concludes that the Special Master's ruling in this regard was eminently correct.

Generally, during the Barclay investigation some years ago we sent all correspondence to E. Pepples marked 'Attorney privileged'" Today, we seem to have a "mail drop" which is only slightly less obvious than Russians leaving microdots in matchboxes on Hampstead Heath. Why not continue the "Attorney privileged" route.²¹

No evidence was presented as to whether B&W ever claimed attorney-client or work product privilege over those documents routed through Maddox.

4020. During the 1990s, Liggett scientists were directed to label their work as privileged and confidential in order to prevent its discovery in civil litigation. As stated by Liggett's Manager of Science Issues,

we had become sensitized to labeling a lot of documents privileged and confidence [sic] without thinking[,] it was kind of just a matter of fact thing to do. . . . [M]ost of the documents that we put out, I think, are always subject to discovery. And not knowing exactly where – where this was gonna go, it was just considered almost standard practice to do that.²²

4. Conclusions

4034. The foregoing Findings of Fact demonstrate that, over the course of approximately fifty years, different Defendants, at different times, took the following actions in order to maintain their public positions on smoking and disease-related issues, nicotine addiction, nicotine manipulation, and low tar cigarettes, in order to protect themselves from smoking and health related claims in litigation, and in order to avoid regulation which they viewed as harmful: they suppressed, concealed, and terminated scientific research; they destroyed documents including scientific reports and studies; and they repeatedly and intentionally improperly asserted the attorney-client and work product privileges over many thousands of documents (not just pages) to thwart disclosure to plaintiffs in smoking and health related litigation and to federal regulatory agencies, and to shield those documents from the harsh light of day.

4035. While it is true that some of these efforts were unsuccessful and some of the elaborate document "retention" policies were either not fully implemented or not implemented at all, the fact remains that many were fully complied with. Consequently, we can never know the full extent of the evidence destroyed and lost to public view.



Endnotes

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- 3 Wigand WD, 59:13-23.
- 4 Id. at 60:1-6.
- 5 Id. at 64:15-23.
- 6 680050985-1001 at 0986 (JD 053700).
- 7 Wells WD, 21:6-8.
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- 9 2043725390-5391 (US 20449).
- 10 Farone TT, 10/7/04, 1947:19-1950:20; Farone WD, 156:3-15; Rowell TT, 3/23/05, 16645:15-16646:1, 16654:12-16655:15.
- 11 DeNoble WD, 13:20-15:7, 22:6-25:12; Mele WD, 14:2-14:14, 20:3-22:12.
- 12 Gulson WD, 16:21-17:7, 17:24-18:6. 3951.
- 13 Gulson WD, 32:18- 33:9; McCabe at ¶ 22.
- 14 Gulson WD, 29:20-30:5.
- 15 McCabe at ¶ 98.
- 16 325274431-4448 at 4434 (US 87012).
- 17 325274431-4448 at 4434 (US 87012) (emphasis in original); see also 321667716-7716 (US 88345); 325274431-4448 at 4433 (US 87012) ("Memos and notes can be barriers to effective communications and often need additional verbal explanation. Talking to someone face-to-face or on the phone is often the better way."); 325274431-4448 at 4435 (US 87012) ("Remember that verbal communication is best if you are dealing with a sensitive subject."); see also 503119213-9241 at 9230 (US 29646*) ("In order to help your [sic] decided how to write something, having decided it really needs to be a writing, we suggest that you use what we call the 'mental copy rule.' Imagine that what you are about to write will be seen by the person you would least like to see it. Send a mental copy (not to the real one of course!) of your record to the newspaper, to Philip Morris, to the Government or to a potential opponent in a court case.").
- 18 304058260-8263 at 8260 (US 85632) (emphasis in original).
- 19 107443680-3689 at 3682 (US 34839).
- 20 109878083-8089 (US 21767); Read PD, United States v. Philip Morris, 07/25/03, 181:22-184:11, 186:8-189:21; Read WD, 57:3-11; Read TT, 03/22/05, 16442:22-16443:17, 16445:13-16447:2, 16448:11-16453:1.
- 21 102880241-0259 at 0253, 0255-0259 (US 26242).
- 22 Dietz PD, United States v. Philip Morris, 07/01/02, 150:3-155:12; see, e.g., LWDOJ9290576-0582 at 0576 (US 21217); see also Dietz PD, United States v. Philip Morris, 05/29/03, 96:24-107:16.



About the Tobacco Control Legal Consortium

The Tobacco Control Legal Consortium is a network of legal programs supporting tobacco control policy change throughout the United States. Drawing on the expertise of its collaborating legal centers, the Consortium works to assist communities with urgent legal needs and to increase the legal resources available to the tobacco control movement. The Consortium's coordinating office, located at William Mitchell College of Law in St. Paul, Minnesota, fields requests for legal technical assistance and coordinates the delivery of services by the collaborating legal resource centers. Our legal technical assistance includes help with legislative drafting; legal research, analysis and strategy; training and presentations; preparation of friend-of-the-court legal briefs; and litigation support.