

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Civil Action No. 99-CV-2496 (GK)
)	Next scheduled court appearance: NONE
and)	
)	
TOBACCO-FREE KIDS ACTION FUND,)	
<i>et al.</i> ,)	
)	
Plaintiff-Intervenors,)	
)	
v.)	
)	
PHILIP MORRIS USA, INC., <i>et al.</i> ,)	
)	
Defendants.)	
)	

**PUBLIC HEALTH INTERVENORS' RESPONSE TO UNITED STATES SUBMISSION
OF PROPOSED CORRECTIVE STATEMENTS AND EXPERT REPORT**

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The Public Health Intervenors – Tobacco-Free Kids Action Fund, American Cancer Society, American Heart Association, American Lung Association, Americans for Nonsmokers’ Rights, and National African American Tobacco Prevention Network – support the proposed corrective statements submitted by the United States, with the exception of one proposed corrective statement. DN 5875.¹ The Court has made overwhelming findings that, as to each of the issues to be addressed, although Defendants were fully aware of the true facts, they nevertheless “consistently, repeatedly, and with enormous skill and sophistication, denied these

¹ The Court has recognized the Public Health Intervenors’ “clear interest in advancing the public health and in the remedies proposed in this case.” Amended Final Opinion (“Op.”) (DN 5750) at 14. As regards these corrective statements in particular, the Public Health Intervenors are particularly well-suited to evaluate appropriate corrective statements, in light of their substantial experience in crafting public health messages designed to counter the very misinformation that these corrective statements are designed to address.

facts to the public, to the Government, and to the public health community.” Op. at 3-4. As explained below, the United States’ proposed statements are critical to prevent and restrain Defendants from continuing their decades of massive deceptions concerning, *inter alia*, the adverse health effects and addictiveness of smoking, and also satisfy the D.C. Circuit test for factual and non-controversial statements.²

Because the United States’ submission did not address specific design elements or other implementation issues, Intervenor also will address some of those matters here. Although some of these additional issues beyond the precise content of the statements may require separate resolution – through the use of a Special Master or otherwise – Intervenor urge the Court to adopt an approach that ensures that corrective statements are actually disseminated as quickly as practicable.³

² While the United States is recommending some corrective statements that are *similar* to statements proposed by Intervenor in 2006, those statements in Dr. Kelly Blake’s Expert Report that are referred to as “Intervenor” statements are *not* the same ones we proposed. Rather, Intervenor’s 2006 recommendations included the following heading, in some form, on every statement: “For decades, we deliberately misled the American Public about the health effects of smoking. A Federal District Court is requiring us to make this statement.” Intervenor included this heading because consumers should fully understand the truth not only about tobacco, but about the tobacco companies’ role in perpetuating a massive fraud concerning tobacco and its effects, in order to prevent future violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961-1968. Although Intervenor maintain that their original 2006 proposals would be even more effective than those now proposed by the United States, they are prepared to accept all but one of the current statements recommended by the government as a reasonable compromise in order to ensure that corrective statements are implemented soon.

³ Intervenor covered many of the issues addressed here in their 2006 submissions (DN 5783; DN 5789); however, for the Court’s convenience, and given the passage of time, have incorporated and updated those filings here.

BACKGROUND

After a nine-month trial, in August, 2006 this Court found Defendants liable for massive RICO violations. Among myriad other unlawful activities, the Court found that Defendants had engaged in a deliberate, decades-long campaign to deceive the American public concerning the adverse health effects of smoking, cigarette addictiveness and Defendants' manipulation of cigarette contents to enhance addictiveness, the effects of secondhand smoke, and the true health effects of "light" cigarettes. Thus, the Court found that "each and every one of these Defendants repeatedly, consistently, vigorously – and falsely – denied the existence of any adverse health effects from smoking," Finding of Fact ("FF") 824, and made similar findings on each of these other matters.⁴

In light of the Court's findings that "Defendants have made false, deceptive, and misleading public statements about cigarettes and smoking from at least January 1954, when the Frank Statement was published up until the present," Op. at 1632, among other remedies the Court has ordered:

⁴ See, e.g., FF 1146 ("Despite the extensive and detailed knowledge possessed by Defendants for decades about the addictive qualities of nicotine and smoking, Defendants have publicly made false and misleading denials of the addictiveness of smoking, as well as nicotine's role in causing that addiction"); FF 1705 ("Despite the overwhelming evidence of their research into and utilization of methods to control the amount and delivery of nicotine in cigarettes, Defendants have denied, repeatedly and publicly, that they manipulate nicotine content and delivery in cigarettes in order to create and sustain addiction"); FF 2627-28 (although "Defendants have known for decades that there is no clear health benefit from smoking low tar/low nicotine cigarettes . . . Defendants extensively – and successfully – marketed and promoted their low tar/light cigarettes as less harmful alternatives to full-flavor cigarettes"); FF 3793 ("[D]espite their own internal recognition of the link between ETS and disease in nonsmokers, Defendants made numerous public statements denying the linkage").

Defendants to make corrective statements about addiction (that both nicotine and cigarette smoking are addictive); the adverse health effects of smoking (all the diseases which smoking has been proven to cause); the adverse health effects of exposure to ETS (all the diseases which exposure to ETS has been proven to cause); their manipulation of physical and chemical design of cigarettes (that Defendants do manipulate design of cigarettes in order to enhance the delivery of nicotine); and light and low tar cigarettes (that they are no less hazardous than full-flavor cigarettes).

Id. at 1636.

Intervenors submitted proposed Corrective Statements in 2006, *see, e.g.* DN 5783, and at that time emphasized both that the statements should be tested for effectiveness before being finalized, and that the Court must consider not only the content of the statements but also their specific design. *Id.* at 18-24, 39-44; *see also* DN 5789.

On appeal, Defendants argued that the entire corrective statements remedy violates their due process and First Amendment rights and is not permitted by RICO § 1964. *See United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1138-45 (D.C. Cir. 2009). With regard to due process, the Court of Appeals rejected the argument that Defendants were entitled to further proceedings before the Court could impose the corrective statements remedy, noting that “[e]ven on appeal, Defendants suggest no testimony they would have offered, no lines of cross-examination inquiry they would have pursued, and no factual disputes they would have addressed.” *Id.* at 1139. As for § 1964, the Court explained that, “as the district court observed and the intervenors here argue, requiring Defendants to issue corrective statements will ‘prevent and restrain them from making fraudulent public statements on smoking and health matters in the future.’” *Id.* at 1140 (other citations omitted).

Finally, with respect to the First Amendment, the Court explained that, under the commercial speech doctrine, the government may compel speech so long as that speech is

“narrowly tailored to achieve a substantial government goal.” *Id.* at 1143 (quoting *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989)). As for the government interest here, the Court observed that, “for over fifty years, Defendants violated RICO by making false and fraudulent statements to consumers about their products,” and are “reasonably likely to commit similar violations in the future.” *Id.* at 1144. In light of these facts, the Court concluded that corrective statements are appropriate “to counteract these anticipated violations.” *Id.* As for the content of these statements, the Court indicated that they should contain “factual and noncontroversial information . . . geared towards thwarting prospective efforts by Defendants to either directly mislead consumers or capitalize on their prior deceptions by continuing to advertise in a manner that builds on consumers’ existing misperceptions.” *Id.* at 1145.

On February 3, 2011 the United States submitted proposed corrective statements and an expert report detailing the research and focus group testing that supports the effectiveness of these specific statements. *See* DN 5875 (publicly released February 23, 2011). The Court has directed that responses to these proposals address (a) arguments that the statements are “not factual or are improperly ‘controversial’”; (b) the issues that may require further briefing; (c) the “factual disputes, if any,” requiring resolution before the Court may issue an “appropriate order[],” 18 U.S.C. § 1964(a), on corrective statements; and (d) the “topics, if any,” on which the Court should hold an evidentiary hearing to resolve factual disputes. Order # 11(Feb. 23, 2011) at 3 (DN 5873); *see also* Order #14 (Feb. 25, 2011) at n.1 (DN 5878).

DISCUSSION

With the exception of the proposed statement for second-hand smoke, the Public Health Intervenor support all of the statements proposed by the United States, and believe that the accompanying expert report amply demonstrates the effectiveness of these statements.

Particularly given the many *billions* of dollars Defendants spend on their marketing efforts, *see* Op. at 1521 (discussing over \$15 billion in marketing), it is critical for the Court to direct Defendants to publish effective, meaningful corrective communications to prevent and restrain additional deceptions.

Intervenor believe it is critical that each of the statements make clear that the statement is required by the Court and that the Court has found that the Defendants have misled the public for many years. These requirements are integral to the Defendants' telling the full truth about their behavior as well as the harmful effects of their products, in order to prevent and restrain ongoing deceptions. The overall public health toll of Defendants' product is a result of both the nature of the product and Defendants' deceptions. It is essential that consumers understand this. Moreover, as the D.C. Circuit has explained, a headline concerning the Defendants' deceptions is appropriate where, as here, the corrective statements are being required to address an "an egregious case of deliberate deception . . ." *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 763 (D.C. Cir. 1977).⁵

⁵ In *Warner-Lambert*, the Court rejected the FTC's proposed headline because the record supported a finding that the prior misstatements were *not* deliberate, but rather were made in good faith. 562 F.2d at 763. That is certainly not the case here.

Each of the corrective statements should also have an introductory statement that communicates the fact that companies are now being forced to tell the truth by a court of law.⁶ It is important that this critical element be consistent in some form across the five statements to produce clear overall communication across all media.

Because of the Court's unique specification for the newspaper statement, Intervenors will address that medium first, before turning to the other statements.

A. Corrective Statements In Newspapers

1. Text

The Court's Final Judgment and Remedial Order (Order #1015) directs that as to newspapers in particular, the Defendants "shall cause the text of all corrective statements . . . to be published as a full page advertisement" in specific papers. Order #1015, § III.B.7.c. The Court directed that all five corrective statements appear together because it only required that the corrective statements appear once in these newspapers. Although the text of all five statements could be included in a one-page advertisement, the Public Health Intervenors remain concerned that including five *separate* statements in one page may diminish the effectiveness of this particular mode of communication. Brief representative statements will be much more effective than a litany of information.

To address this concern, in their 2006 submission, Intervenors provided the Court with a model of how a *single* advertisement that incorporates the key elements of all five statements could appear. DN 5783 at 6. If the court prefers that there still be only one newspaper

⁶ As discussed below, the proposed statement for second-hand smoke does not follow this format – which is among the reasons Intervenors recommend an alternative statement for that topic.

placement, Intervenor recommend the following statement for newspapers, which incorporates the elements of the government's current proposed statements, and is updated slightly from the Intervenor's proposal in 2006:⁷

For decades, we denied that smoking was dangerous.

We told you that smoking and secondhand smoke were not dangerous and that smoking was not addictive. We falsely marketed "light" and "low-tar" cigarettes as less harmful than regular cigarettes to keep smokers from quitting – even when we knew they were not.ⁱ

Here's the truth:

- Smoking kills 1200 Americans every dayⁱⁱ from cancer, heart attacks, and many other illnesses. It damages almost every organ in the body.ⁱⁱⁱ
- Smoking is addictive^{iv} and therefore very hard to quit.^v We even manipulated cigarettes by adding things like ammonia to make them more addictive.^{vi,vii,viii,ix}
- There is no health benefit from smoking "light," "low-tar," "ultra-light," "mild," or "natural" cigarettes.^x
- Secondhand smoke is a proven cause of cancer, heart attacks, and other illness.^{xi} It kills nearly 50,000 Americans each year.^{xii}

Paid for by [Company Name] under order of a Federal District Court.

⁷ To address the Court's question about the factual and non-controversial nature of the statements, Intervenor include in this submission endnotes providing the relevant support for each assertion – although, to be clear, Intervenor are *not* suggesting that the Court require these endnotes to be included with the statements as published.

As demonstrated by the endnotes, the contents of this proposed statement are entirely factual and noncontroversial.⁸

Alternatively, to ensure full disclosure on each of these topics by the companies, Intervenor suggests the Court consider requiring the Defendants to publish *five* placements in newspapers, so that each of the full-length corrective statements appear separately. *See* Order # 1015 at 4 (recognizing that “[s]light variations in the corrective communications may be necessary and appropriate to accommodate the media or format utilized . . .”).

2. Design Elements

A mockup of Intervenor’s proposed newspaper advertisement is attached as Exhibit 1. Intervenor’s proposed newspaper advertisement takes into account the important considerations of newspaper advertising/ communications – in particular, the audience of this medium, which is the general public as distinguished from the audience of smokers only who will primarily see the inserts. For example, the headline should be in a significantly larger font than the body of the statement to ensure that it catches the attention of the public, and the layout should include enough white space to make it inviting to read, rather than being cluttered with too much information or unnecessary visuals. *See, e.g. Warner-Lambert*, 562 F.2d at 763 (approving of requirements for corrective print ads to be displayed so that the corrective statement “can be readily noticed”).

In order for the statements to have the intended corrective effect, it is also important to look beyond the specific language used to how the language and any other visuals are displayed

⁸ The fact that Defendants may not approve of the proposed statements does not render them “controversial.” *Cf. Fund for Animals v. Frizzell*, 530 F.2d 982, 988 n.15 (D.C. Cir. 1975) (explaining that controversy means more than disagreement).

and the background against which it is displayed. By altering how the language is displayed, the background against which it is displayed, and other factors, an advertiser can greatly influence whether an ad is effective. Therefore, it is appropriate and necessary for the Court to evaluate these aspects of the corrective statements as well. *See Warner-Lambert*, 562 F.2d at 763 (approving of the FTC's corrective statements requirements – *e.g.*, print sizes, text separation requirements, audio and visual requirements – because they were “well calculated to assure that the disclosure will [] attract the notice of readers, viewers, and listeners, and will be plainly conveyed”).

Exhibit 1 provides an illustration of how choices made about layout, font, text size, etc., can facilitate effective communication. For example, Exhibit 1 is direct and organized into readable components by topic, uses a headline that clearly states the issue – *i.e.*, that the Defendants have denied the truth about smoking – followed by a summary statement about the specific misinformation, a brief statement with the corrective fact(s), and an endline that explains that the Defendants are being ordered to make the statements

Given the Court's finding that Defendants' ads and public communications have been misleading, and to ensure that the corrective statements have their intended corrective effect, the Court should determine not only the exact wording of the corrective statements, but also all other aspects of the corrective statements involving the content and presentation of the corrective statements.

Important executional variables for full-page newspaper ads include size, spacing, color and font of the text; the relative sizes of the headline, body text and tagline; the background color; the layout; and any other visual elements that can either inhibit or enhance clear

communication. Exhibit 1 illustrates choices made that enhance communication of the key information. Exhibit 2 provides a list of recommended specifications for the full page advertisement (including specific margins, fonts, font sizes and copy color). It is critical that the Court provide at least sufficient direction to preclude Defendants from undermining the effectiveness of the statements through the use of font sizes, colors and other design elements. *See Warner-Lambert*, 562 F.2d at 763; *see also In the Matter of Bristol-Myers Co.*, 102 F.T.C. 21, ¶ 790 (F.T.C. 1983) (“To increase the chances for successful communication, the corrective message should employ persuasive communication techniques similar to those used to create the beliefs initially. . . . [T]he corrective message will be more successful if the other messages in the advertisements do not contradict, conflict, or obscure the corrective message in any way”) (citations omitted).⁹

3. Implementation Issues

Reading of print versions of newspapers has declined considerably since the Court’s decision in 2006. According to a September, 2010 report on a media habits survey from the Pew Research Center for the People and the Press, about one in four Americans (26%) said that they had read a newspaper in print the day before the survey, down from 38% in 2006. Meanwhile, *online* newspaper readership continues to grow. In the same survey, 17% of Americans said they had read something on a newspaper website the day before the survey, a figure that has nearly doubled in recent years (up from 9% in 2006). In total, 37% of Americans surveyed reported that they read any newspaper. More than half of those readers (57%) read a print edition only, 30%

⁹ In the event the Court directs Defendants to publish the full-text of all five corrective statements in newspapers, Intervenors urge that Defendants not be permitted to lay out the statements in a manner that undermines their effectiveness.

read an online version only, and 13% read both versions. *See* The Pew Research Ctr. for the People and the Press, *Americans Spending More Time Following the News: Ideological News Sources, Who Watches and Why* (Sept. 2010) (available at <http://people-press.org/report/652/>) (last visited March 2, 2011).

In light of these changes in reading habits, the Public Health Intervenors recommend that the Court require these corrective statements to appear in both the print *and on-line versions* of the newspapers in the editions for which they are required. Otherwise, Defendants will be rewarded for the four or more year delay in implementing this remedy because, in the meantime, the readership of print newspapers has significantly migrated to online versions.

B. Corrective Statements For All Other Media

1. The Public Health Intervenors Support The United States' Proposed Statements For All Topics Except Second-Hand Smoke

With the exception of the statement on second-hand smoke, Intervenors support the United States' proposed statements and the extensive research on which they are based. To address the factual accuracy of these proposals, we reprint them below with annotations. We then discuss design and implementation issues related to these statements, before turning to our concerns with the second-hand smoke statement – and a proposed alternative.

Topic A: Corrective Statements for Negative Health Effects of Smoking

A Federal court is requiring tobacco companies to tell the truth about cigarette smoking. Here's the truth:

- Smoking reduces circulation, triggers asthma, and can cause infertility and erectile dysfunction.ⁱ
- Smoking during pregnancy can cause stillbirth, low birth weight, and sudden infant death syndrome.ⁱⁱ
- Smoking causes heart disease, emphysema, chronic bronchitis, acute myeloid leukemia, and cancers of the mouth, esophagus, throat, voice box, lung, stomach, kidney, bladder, pancreas, cervix and uterus.ⁱⁱⁱ
- Smoking kills 1,200 Americans. Every day.^{iv}

Topic B: Corrective Statements for Addictiveness of Smoking and Nicotine

We told Congress under oath that we believed nicotine is not addictive.^v We told you that smoking is not an addiction and all it takes to quit is willpower^{vi}. Here's the truth:

- Smoking is very addictive^{vii}. And it's not easy to quit.^{viii}
- We manipulated cigarettes to make them more addictive.^{ix}
- When you smoke, the nicotine actually changes the brain—that's why quitting is so hard.^x

Paid for by [Cigarette Manufacturer Name] under order of a Federal District court.

Topic C: Corrective Statements for Lack of Health Benefit from "Low Tar," "Light," "Ultra Light," "Mild," and "Natural" Cigarettes

We falsely marketed low tar and light cigarettes as less harmful than regular cigarettes to keep people smoking and sustain our profits.^{xi}

We knew that many smokers switch to low tar and light cigarettes rather than quitting because they believe low tar and lights are less harmful.^{xii} They are NOT.^{xiii}

Here's the truth:

- Just because lights and low tar cigarettes feel smoother, that doesn't mean they are any better for you. Light cigarettes can deliver the same amounts of tar and nicotine as regular cigarettes.^{xiv}
- ALL cigarettes cause cancer, lung disease, heart attacks and premature death—lights, low tar, ultra lights, and naturals.^{xv}

Paid for by [Cigarette Manufacturer Name] under order of a Federal District court.

Topic D: Corrective Statements for Cigarette Design Manipulation

For decades, we denied that we controlled the level of nicotine delivered in cigarettes.^{xvi}
Here's the truth:

- Cigarettes are a finely-tuned nicotine delivery device designed to addict people.^{xvii}
- We control nicotine delivery to create and sustain smokers' addiction, because that's how we keep customers coming back.^{xviii}
- We also add chemicals, such as ammonia, to enhance the impact of nicotine and make cigarettes taste less harsh.^{xix,xx}
- When you smoke, the nicotine actually changes the brain—that's why quitting is so hard.^{xxi}

Paid for by [Cigarette Manufacturer Name] under order of a Federal District court.

2. Design Elements and Implementation Issues For These Corrective Statements

The design issues addressed above with respect to the newspaper advertisements, *see supra* at 9-11, apply to the remainder of the statements as well. Thus, for each statement: the headline should be a significantly larger font than the body copy; the layout should include enough white space to make it inviting to read; and the Court should approve not only the wording, but all other aspects of the corrective statements involving the content and presentation of the corrective statements – including, *e.g.*, relative sizes, colors, fonts, and layout. As for implementation, Intervenors have several recommendations.

a. Onserts

Although in their 2006 submission Intervenors recommended that the Court require graphic images in onserts, *see* DN 5783 at 33-36, the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (June 22, 2009), will require graphic warning labels on the top half of the front and back of all cigarette packs as early as September of 2012.

Id. § 201(d). In light of this development, and in particular in the event delays in implementation mean that the Court's onsert remedy will overlap time-wise with the graphic warning labels required by the Family Smoking Act, Intervenors recommend that the onserts be placed to ensure that they in no way interfere with the new graphic warning labels, and possibly that during any overlapping time period, the court not require that the package onserts include graphic images.

The text of the onserts should be bilingual (in English and Spanish). Many companies, including the Defendants, have developed marketing materials in Spanish, as the clear second language in the U.S., or in English and Spanish. In addition, to be effective, onsert text should not be simply translated word for word to Spanish, but should be appropriately translated to Spanish to clearly communicate the corrective facts.

Other important executional variables for cigarette package onserts include the size, font, and color of the headline; the size, quality and content of any graphic visuals; the placement of facts on the front cover versus inside a folded onsert; the ease with which consumers can access, unfold and review the onsert; the size of the onsert (unfolded and folded); the size, color and font of the text on the inside panel(s); color of background; and any other visual elements that can either inhibit or enhance clear communication.

b. Point-of-Sale Displays

With respect to point-of-sale displays, it is critical to recall this Court's extensive findings concerning how retail stores are "one of Defendants' central vehicles for communication of brand imagery and promotional offers." FF 3110. In particular, the Court found that at these locations, "frequented by teenagers," Defendants "create tobacco friendly environments

containing enticing displays . . . and visible point-of-sale advertising.” *Id.*; *see also* FF 3111 (“In-store placement displays and signs are a key method by which Defendants communicate brand information and communicate a brand’s central message or image”); FF 3114 (noting a Philip Morris study which “found that the best, most visible, point of sale spots were ‘on the counter, behind the counter or cashier, and on and around the door’”).

It is against this factual backdrop that the Court must consider Defendants’ request that the Court drop this remedy, in light of the impact on retail outlets. *See* Def. Nov. 24, 2010 Status Report at 15 (DN 5841). The Court has directed that the parties address this issue in a submission on April 1, 2011, *see* Order #14 at 3, but for now Intervenor simply emphasize the importance of retaining this remedy, in light of the Court’s findings.

Defendants have also objected to having *multiple* counter and headers displays in retail outlets from several Defendant companies at the same time. *See Philip Morris*, 566 F.3d at 1142. To address this particular concern, rather than eliminate this important requirement, Intervenor recommend requiring that only one corrective statement display appear at any one time and then *extending* the time period over which these displays are required so the companies fulfill their obligations under the Court’s current Order consecutively rather than concurrently.

Other important executional variables for in-store displays include the overall size, material, layout and configuration of the display boards; the size, font, and color of the headline; the size, quality and content of graphic visuals; the color of background; and any other visual elements that can either inhibit or enhance clear communication.

Finally, bilingual (Spanish and English) or Spanish only point-of-sale displays should be used in locations where the tobacco companies provide or distribute their marketing and promotional materials in both Spanish and English or exclusively in Spanish.

c. Television Advertisements

It is critical that Defendants utilize a credible, authoritative announcer to speak the text for the television advertisements that should also be super-imposed on the TV screen. The audio and video should be in sync to ensure as clear communication as possible. *See Warner-Lambert*, 562 F.2d at 763 (approving requirement for television commercials containing corrective statement to “be presented simultaneously in both audio and visual portions”).¹⁰ If it is not possible to clearly communicate the necessary corrective information in 15 seconds, then TV ads of sufficient length to communicate the correction should be required by the Court. The text should be black on a white screen, and should be large enough and on the screen long enough to be effectively read by those with a basic reading level since over 40% of the U.S. population reads at a basic level or below.¹¹

¹⁰ *See also* Maria Grubbs Hoy and J. Craig Andrew, Adherence of Primetime Televised Advertising Disclosures to the “Clear and Conspicuous” Standard: 1990 versus 2002, 23 J Publ Pol Market 170 (Fall 2004).

¹¹ National Assessment of Adult Literacy, 2003 (available at <http://nces.ed.gov/NAAL/index.asp?file=KeyFindings/Demographics/Overall.asp&PageId=16#1>).

d. Websites

The Court should require that the corrective statements (or a clear link that takes the viewer to it on another page of the site) be prominently displayed on the home page of each Defendant's website. If the corrective information is on another page of the site, it must be clearly and prominently displayed there. The corrective statements text should be in English and appropriately translated Spanish, to aid Spanish-speaking consumers in understanding the facts. In addition, Defendants should not be allowed to undermine the corrective statements in any other part of their websites.

* * *

Intervenors recognize that the Court may require further guidance regarding these and other issues. One option the Court might consider is to appoint a Special Master to address design and implementation issues for corrective statements on a tight timetable. The Court plainly has the authority to assign these tasks to such a Special Master, who may be appointed to "address pretrial and posttrial matters that cannot be addressed effectively and timely by an available district judge" Fed. R. Civ. P. 53(a)(1)(C); *see also Cobell v. Norton*, 334 F.3d 1128, 1142 (D.C. Cir. 2003) (noting "the practice of a federal district court appointing a special master pursuant to Rule 53 to supervise implementation of a court order . . .").

3. The Court Should Choose An Alternative Statement For Second-hand Smoke

The one statement proposed by the United States with which the Public Health Intervenor do not agree is the one for second-hand smoke. As reflected in Dr. Blake's expert report, the adapted "Intervenor's" proposed statement on second-hand smoke was ranked as the most effective. Blake Report at 85. However, Dr. Blake recommended the R.J. Reynolds less-effective statement on the grounds that the "Intervenor's" proposal was "positively associated with triggering smoking urges," *id.* at 94 – *i.e.*, because of the apparent risk that the statement will create anxiety in smokers that in turn causes them to smoke.¹²

This is not a sufficient basis on which to reject the most effective message. Intervenor believe it is critical that each of the statements make clear that the statement is required by the Court and that the statement also be specific and state that it is being required because the Court found that the Defendants had engaged in decades of misleading the public. To prevent future RICO violations, consumers must be fully knowledgeable about both tobacco and that the court found that the Defendants had engaged in decades of misleading statements. The proposed statement on second-hand smoke is the only one that does not accomplish this, and the government has not justified such a departure from the approach taken with the other statements.

The proposed statement for second-hand smoke suffers from another serious flaw. Unlike each of the other proposed statements, it is not phrased as a statement of fact by the Defendants, but rather a citation to the conclusion of the Surgeon General. There is an important

¹² Dr. Blake suggests that this response may occur because the statement "communicated the harms associated with secondhand smoke more clearly and [was] therefore more impactful, thus causing an indirect evocation of smoking urges due to eliciting an emotion such as anxiety." Blake Rep. at 94.

distinction between the statement that something is factually true and beyond dispute, even by the Defendants, and simply citing a public health source that the Defendants can later disavow or undermine, as the Court found they have frequently done in the past. *See, e.g.* FF 94-163 (documenting Defendants' efforts to undermine the Surgeon General's conclusions about the dangers of smoking).

The Intervenor believe the larger risk is in consumers failing to understand the full truth about secondhand smoke and Defendants' concerted efforts to subvert the truth. Moreover, the R.J. Reynolds statement does not represent truth-telling *by* the Defendants. Rather, it allows them to say what the Surgeon General concludes. In contrast, the information presented in the proposed statement from the Public Health Intervenor accurately reflects the findings of the Court, and is crucial to ensure that consumers understand the truth about second-hand smoke in order to prevent future deceptions on this topic. For this reason and the others outlined above, the Intervenor recommend the Intervenor's version of this statement, as follows:¹³

¹³ To reflect the findings of the most recent Surgeon General's Report, issued after this Court's prior decision, the number of chemicals in secondhand smoke in this statement should be changed to 7,000. *See* U.S. Dept. of Health and Human Services, Rep. of the Surgeon General: How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease (Dec 9, 2010) (available at <http://www.surgeongeneral.gov/library/tobaccosmoke/index.html> (last visited Mar 3, 2011)). Similarly, the number killed from secondhand smoke should be changed to nearly 50,000. *See* CDC, "Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses – United States 2000-2004," MMWR 57(45), November 14, 2008 (available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm>).

For decades we denied the harms of secondhand smoke.^{xxii}

Here's the truth from the U.S. Surgeon General and National Cancer Institute:

- Secondhand smoke contains 7,000 chemicals^{xxiii} and more than 50 cancer-causing substances.^{xxiv} Chemicals include formaldehyde, benzene, vinyl chloride, arsenic, ammonia, and hydrogen cyanide.^{xxv}
- Secondhand smoke has been proven to cause lung cancer and heart attacks^{xxvi} and kills nearly 50,000 Americans each year.^{xxvii}
- There is no risk-free exposure to secondhand smoke.^{xxviii} Separating smokers from nonsmokers, cleaning the air, and ventilating buildings cannot eliminate exposures of nonsmokers to secondhand smoke.^{xxix}

Paid for by [Cigarette Manufacturer Name] under order of a Federal District court.

In the view of Intervenors, the Court should choose this statement based on Dr. Blake's report and the research on which it is based, which concluded that this statement would be the most effective in terms of both whether people "would pay attention to the statement and how easy it [is] to understand." Blake Rep. at 85.

C. Other Issues To Be Addressed

The foregoing discussion largely responds to the Court's additional inquiries concerning corrective statements. As Intervenors have demonstrated, the proposed statements are entirely factual, and thus cannot legitimately be deemed controversial. The Court plainly may compel Defendants to make these statements in light of the Court's overwhelming findings of concerted and "deliberate deception[s]" by Defendants on each of these topics over many years.

Warner-Lambert, 562 F.2d at 763.

As to further briefing, resolution of factual disputes, and an evidentiary hearing, Intervenors do not believe that the Court will need to resolve factual disputes to finalize the

corrective statements remedy, and that any disputes that may require resolution can be resolved without a hearing. As noted, Intervenors recommend that the Court permit some further briefing on design and implementation issues once the content of the corrective statement is resolved, or refer that issue to a Special Master. *See supra* at 18.

The Public Health Intervenors' overriding concern at this juncture, however, is that the corrective statements remedy be finalized and implemented as soon as practicable. As the Court recently noted, in their efforts to delay and complicate resolution of these issues, "Defendants are still trying to avoid entry of a final Remedial Order." Order #11 (DN 5873) at 2. Consistent with the Court's admonition that "Defendants will not be allowed to succeed in that endeavor," *id.*, the Public Health Intervenors urge the Court to adopt an approach that will finalize and implement the corrective statements remedy soon, and not permit Defendants to delay this vital aspect of the Court's remedial decree for many more months, or years, into the future.

Respectfully submitted,

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March 3, 2011

Attorneys for the Public Health Intervenors

Endnotes for newspaper advertisement

i

The Court has made numerous factual findings substantiating that Defendants deliberately and continuously made these statements. *See, e.g.*, Op. at 234, 255-257, 319-320, 330-331, 332-333, 740-741, 447-448, 452, 459-461, 463, 514, 636-637, 654, 828, 971, 1359, 1384, 1407.

ii

CDC. Annual Smoking-Attributable Mortality, Years of Potential Life Lost and Economic Costs—United States, 1997-2001. MMWR 2005; 54(25): 625-628. *See also* Opinion at 1505.

iii

U.S. Department of Health and Human Services. The Health Consequences of Smoking: A Report of the Surgeon General. Atlanta, GA: U.S. Department of Health and Human Services, Center for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2004.

iv

Fiore MC, Bailey WC, Cohen SJ, *et al.*, Treating Tobacco Use and Dependence. Clinical Practice Guideline. Rockville, MD: U.S. Department of Public Health and Human Services. Public Health Service. June 2000. *See* Op. at 332.

v

CDC. Cigarette Smoking Among Adults- United States, 2000. MMWR 2002; 51(29): 642-645; *See* Op. at 347.

vi

See Op. at 332, 334-335, 347, 654, 1512.

vii

NCI. Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine. Smoking and Tobacco Control Monograph No. 13. Bethesda, MD: U.S. Department of Health and Human Services, National Institutes of Health, National Cancer Institute, NIH Pub. No. 02-5074, October 2001.

viii

Pankow, JF. Et al. Conversion of Nicotine in Tobacco Smoke to Its Volatile and Available Free-Base Form Through the Action of Gaseous Ammonia. Environ. Science & Technology 1997; Vol 31 No 8, 2428-2433.

ix

Wells, K. Technology Handbook. Legacy Tobacco Documents Library. Brown and Williamson. August 22, 1995. Access Date: June 4, 2003. Bates No. 505500002/0060.

x

NCI. Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine. Smoking and Tobacco Control Monograph No. 13. Bethesda, MD: U.S. Department of Health and Human Services, National Institutes of Health, National Cancer Institute, NIH Pub. No. 02-5074, October 2001. *See also* Opinion at 219-222, 971, 1515, 1516.

xi

U.S. Department of Health and Human Services. The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General. Atlanta, GA: U.S. Department of Health and Human Services, Center for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2006.

xii

CDC. Annual Smoking-Attributable Mortality, Years of Potential Life Lost and Productivity Losses – United States, 2000-2004, MMWR 57(45), Nov. 14, 2008.

Endnotes for other corrective statements

ⁱ U.S. Department of Health and Human Services. The Health Consequences of Smoking: A Report of the Surgeon General. Atlanta, GA: U.S. Department of Health and Human Services, Center for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2004.

ⁱⁱ U.S. Department of Health and Human Services. The Health Consequences of Smoking: A Report of the Surgeon General. Atlanta, GA: U.S. Department of Health and Human Services, Center for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2004.

ⁱⁱⁱ U.S. Department of Health and Human Services. The Health Consequences of Smoking: A Report of the Surgeon General. Atlanta, GA: U.S. Department of Health and Human Services, Center for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2004.

^{iv} CDC. Annual Smoking-Attributable Mortality, Years of Potential Life Lost and Economic Costs—United States, 1997-2001. *MMWR* 2005; 54(25): 625-628.

^v Hearing on the Regulation of Tobacco Products, U.S. House of Representatives, Committee on Energy and Commerce, Subcommittee on Health and the Environment, 14 April 1994.

^{vi} The Court has made numerous factual findings substantiating that Defendants deliberately and continuously made these statements. *See, e.g.*, *Op.* at.332-333, 447-448, 452, 459-461, 463, 514, 1359, 1364.

^{vii} Fiore MC, Bailey WC, Cohen SJ, et al. Treating Tobacco Use and Dependence. Clinical Practice Guideline. Rockville, MD: U.S. Department of Public Health and Human Services. Public Health Service. June 2000. *See also Op.* at 332 and 347.

^{viii} CDC. Cigarette Smoking Among Adults- United States, 2000. *MMWR* 2002; 51(29): 642-645. *See also Op.* at 347.

^{ix} *See Op.* at 653-654, 1512-1513.

^x Fiore MC, Bailey WC, Cohen SJ, et al. Treating Tobacco Use and Dependence. Clinical Practice Guideline. Rockville, MD: U.S. Department of Public Health and Human Services. Public Health Service. June 2000.

^{xi} The Court has made numerous factual findings substantiating that Defendants deliberately and continuously made these statements. *See, e.g.*, *Op.* at.740-741, 828, 971.

^{xii} The Court has made numerous factual findings substantiating that Defendants deliberately and continuously made these statements. *See, e.g.*, *Op.* at.740-741, 828, 971.

^{xiii} NCI. Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine. Smoking and Tobacco Control Monograph No. 13. Bethesda, MD: U.S. Department of Health and Human Services, National Institutes of Health, National Cancer Institute, NIH Pub. No. 02-5074, October 2001. *See also Op.* at 219-222, 971, 1515, 1516.

xiv NCI. Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine. Smoking and Tobacco Control Monograph No. 13. Bethesda, MD: U.S. Department of Health and Human Services, National Institutes of Health, National Cancer Institute, NIH Pub. No. 02-5074, October 2001.

xv NCI. Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine. Smoking and Tobacco Control Monograph No. 13. Bethesda, MD: U.S. Department of Health and Human Services, National Institutes of Health, National Cancer Institute, NIH Pub. No. 02-5074, October 2001.

xvi The Court has made numerous factual findings substantiating that Defendants deliberately and continuously made these statements. *See, e.g.*, Op. at. 636-637, 654.

xvii *See* Op. at 653-654, 1512-1513.

xviii *See* Op. at 332, 334-335, 347, 654, 1512.

xix Pankow, JF. Et al. Conversion of Nicotine in Tobacco Smoke to Its Volatile and Available Free-Base Form Through the Action of Gaseous Ammonia. *Environ. Science & Technology* 1997; Vol 31 No 8, 2428-2433.

xx Wells, K. Technology Handbook. Legacy Tobacco Documents Library. Brown and Williamson. August 22, 1995. Access Date: June 4, 2003. Bates No. 505500002/0060.

xxi Fiore MC, Bailey WC, Cohen SJ, et al. Treating Tobacco Use and Dependence. Clinical Practice Guideline. Rockville, MD: U.S. Department of Public Health and Human Services. Public Health Service. June 2000.

xxii The Court has made numerous factual findings substantiating that Defendants deliberately and continuously made these statements. *See, e.g.*, Op. at. 1384 and 1407.

xxiii U.S. Department of Health and Human Services How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking Attributable Disease.: A Report of the Surgeon General. U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2010.

xxiv U.S. Department of Health and Human Services. The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General. Atlanta, GA: U.S. Department of Health and Human Services, Center for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2006.

xxv NCI. Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine. Smoking and Tobacco Control Monograph No. 13. Bethesda, MD: U.S. Department of Health and Human Services, National Institutes of Health, National Cancer Institute, NIH Pub. No. 02-5074, October 2001.

xxvi U.S. Department of Health and Human Services. The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General. Atlanta, GA: U.S. Department of Health and Human Services, Center for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2006.

xxvii CDC, "Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses – United States 2000-2004," *MMWR* 57(45), November 14, 2008 (available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm>).

^{xxviii} U.S. Department of Health and Human Services. The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General. Atlanta, GA: U.S. Department of Health and Human Services, Center for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2006.

^{xxix} U.S. Department of Health and Human Services. The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General. Atlanta, GA: U.S. Department of Health and Human Services, Center for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2006.

EXHIBIT 1

For decades, we denied that smoking was dangerous.

We told you that smoking and second-hand smoke were not dangerous and that smoking was not addictive. We falsely marketed “light” and “low-tar” cigarettes as less harmful than regular cigarettes to keep smokers from quitting—even when we knew they were not.

HERE’S THE TRUTH:

- Smoking kills 1200 Americans every day from cancer, heart attacks, and many other illnesses. It damages almost every organ in the body.
- Smoking is addictive and therefore very hard to quit. We even manipulated cigarettes by adding things like ammonia to make them more addictive.
- There is no health benefit from smoking “light,” “low tar,” “ultra-light,” “mild,” or “natural” cigarettes.
- Secondhand smoke is a proven cause of cancer, heart attacks, and other illnesses. It kills nearly 50,000 Americans each year.

Paid for by [Company Name] under order of a Federal District Court.

EXHIBIT 2

Type and layout specifications for “HERE’S THE TRUTH” newspaper ad

Margins:

At least .75" margin around and no more than 1" around.
(example based on 11.5" wide X 21" full-page newspaper ad)

Border:

6 point 100% black rule around entire ad border.

Fonts and Sizes: (minimum sizes and suggested leading for all copy)

All copy must print 100% Black

Headline: “For decades, we...” 110/105 pt. Helvetica Bold

Intro Copy: “We told you that...” 38/55 pt. Helvetica Bold

Subhead: “HERE’S...” 72 pt. Helvetica Bold (**ALL CAPS**)

Bulleted Copy: “Smoking kills...” 26/34 pt. Helvetica Regular (hanging square bullets)

Advertiser: “Paid for by...” 24 pt. Helvetica Bold