

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

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

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

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

v.

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

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

**BRIEF OF AMICI CURIAE THE AMERICAN MEDICAL
ASSOCIATION AND OTHERS IN SUPPORT OF THE PLAINTIFF
UNITED STATES OF AMERICA AND INTERVENORS**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties And Amici. The United States of America is the plaintiff-cross-appellant. Appellants are defendants British American Tobacco (Investments) Ltd.; R.J. Reynolds Tobacco Co; Philip Morris USA Inc.; Altria Group, Inc; Brown & Williamson Holdings, Inc.; Lorillard Tobacco Co.; The Council for Tobacco Research-U.S.A., Inc.; and The Tobacco Institute, Inc. Also appealing are the following intervenors in the district court: 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.

The following defendant has not appealed: Liggett Group, Inc.

The following entities have been granted leave to participate as amici in this Court: U.S. Chamber of Commerce; Washington Legal Foundation; National Association of Manufacturers; National Association of Convenience Stores.

The following additional entities have moved for leave to participate as amici in this Court: Public Citizen, Inc.; American College of Preventive Medicine; The American Public Health Association; Association of Maternal Child Health Programs; National Association of Local Boards of Health; and Oncology Nursing Society.

The following additional entities intervened in the district court: Elan Corporation, PLC; Impax Laboratories, Inc.; Novartis Consumer Health Inc.; Pharmacia Corp.; Pfizer, Inc.; Smithkline Beecham Corp. and GlaxoSmithkline Consumer Healthcare, L.P.; British American Tobacco Australia Services Ltd.

The following additional entities appeared as amici in the district court: Tobacco Control Legal Consortium; Regents of the University of California; Citizens' Commission to Protect the Truth; the States of Arkansas, Connecticut, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Maryland,

Massachusetts, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Tennessee, Vermont, Washington, Wisconsin, Wyoming, and the District of Columbia; Essential Action; City and County of San Francisco; Asian-Pacific Islander American Health Forum; San Francisco African American Tobacco Free Project; and the Black Network in Children's Emotional Health.

B. Rulings Under Review. The ruling under review is the final judgment and remedial order entered by the district court (Kessler, J.) on August 17, 2006, as amended by the district court's orders dated September 20, 2006, and March 16, 2007. The final judgment and order appear as Order #1015 on the district court's docket, and the orders amending the judgment appear as Order #1021 and Order #1028. The final opinion is published at 449 F. Supp. 2d 1 (D.D.C. 2006).

C. Related Cases. Aspects of this case have come before this Court in several previous appeals. See *United States v. British Am. Tobacco Australia Servs. Ltd.*, 437 F.3d 1235 (D.C. Cir. 2006) (Nos. 05-5129 & 04-5358); *United States v. Philip Morris USA Inc.*, 396 F.3d 1190 (D.C. Cir. 2005) (No. 04-5252); *United States v. British Am. Tobacco (Invs.), Ltd.*, 387 F.3d 884 (D.C. Cir. 2004) (Nos. 04-5207 & 04-5208); *United States v. Philip Morris Inc.*, 347 F.3d 951 (D.C. Cir. 2003) (No. 02-5210); *United States v. Philip Morris Inc.*, 314 F.3d 612 (D.C. Cir. 2003) (No. 02-5210). There are no other related cases of which we are aware.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 16.1, the undersigned hereby certify that of the *Amici* and all parent companies, subsidiaries or their affiliates, none have outstanding securities in the hands of the public. The *Amici* include American Medical Association, American Association of Orthopaedic Surgeons, Mississippi State Medical Association, Public Health Advocacy Institute and Society for Thoracic Surgeons.* The *Amici* seek to protect the public's health and support efforts to reduce the impact of tobacco use.

* A supplemental Motion for Leave has been filed along with this Brief to add the *Amici* American Association of Orthopaedic Surgeons and Society for Thoracic Surgeons.

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**STATEMENT PURSUANT TO FEDERAL RULE 29(C)(3)
REGARDING THE IDENTIFY AND INTERESTS OF
*AMICI CURIAE***

The *Amicus Curiae* American Medical Association (“AMA”) is the nation’s largest professional organization of physicians and medical students, with approximately 240,000 members. Founded in 1847, the AMA’s purpose is to promote the science and art of medicine and the betterment of public health. Members of the AMA practice in all fields of medical specialization and in every state. The AMA strongly opposes the use of tobacco products and seeks to reduce the health hazards inherent in smoking, including the hazards arising from second-hand smoke. The AMA supports state and local legislation that prohibits indoor smoking in areas open to the public, and in and around entrances to such areas. The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition between the AMA and the medical societies of each state, plus the District of Columbia. It was formed to represent the viewpoint of organized medicine in the courts.

The *Amicus Curiae* American Association of Orthopaedic Surgeons (“AAOS”) is a non-profit 501(c)(6) Illinois corporation founded in 1997 by the American Academy of Orthopaedic Surgeons, and engaged in health

policy and advocacy activities on behalf of musculoskeletal patients and professionals specializing in orthopaedic surgery. The AAOS has 26,000 members who are concerned with the diagnosis, care, and treatment of musculoskeletal disorders, primarily disorders of the body's bones, joints, ligaments, muscles, and tendons. Every tissue in the human body is affected by smoking, including the musculoskeletal system--bones, muscles, tendons, ligaments and nerves. AAOS is concerned that the American public is not fully aware of the harmful musculoskeletal effects of smoking. AAOS strongly recommends avoidance of smoking due to the severe and negative impact on the musculoskeletal system--the bones, muscles, tendons, ligaments and nerves in the body.

The *Amicus Curiae* American Thoracic Society (“ATS”), an international educational and scientific organization, was founded in 1905. ATS, and the approximately 18,000 physicians and scientists it represents, help prevent and fight respiratory disease around the globe through research, education, patient care and advocacy. ATS publishes a number of scientific journals that include studies on respiratory health, including the adverse health effects of exposure to tobacco. ATS members frequently provide therapy and medical care to patients with tobacco-related conditions.

The *Amicus Curiae* Mississippi State Medical Association (“MSMA”) is a physician organization serving as an advocate for its physician members, their patients and the public health in the State of Mississippi. MSMA promotes ethical, educational and clinical standards for the medical profession and the enactment of just medical laws. In addition, MSMA provides a means for members of the medical profession to unite and act on matters affecting public health and the practice of medicine. MSMA’s membership is comprised of over 3,300 physicians, residents and medical students of various specialties located throughout the state. Tobacco use is one of largest and most expensive public health problems in Mississippi. Almost all of MSMA’s members are confronted on a daily basis with the smoking related illnesses of their patients, the economic impact and the productivity losses directly caused by tobacco use in Mississippi. As a result MSMA has long been active in the fight against tobacco use, advocating for and assisting tobacco cessation programs, pursuing legislative changes such as smoking bans in public places and at youth events and demanding an increase in tobacco taxes. In 1994 Mississippi became the first state to successfully sue the tobacco industry, seeking reimbursement for the cost of medical care provided to victims of smoking-related illnesses. Over 4,700 Mississippi citizens die each year as a direct result of tobacco use and annual

health care costs in Mississippi directly caused by smoking is \$719 million, with the state's Medicaid program covering \$264 million.

The *Amicus Curiae* Public Health Advocacy Institute, Inc. ("PHAI") is a non-profit, public interest organization dedicated to protecting the health of the public. The goal of PHAI is to support and enhance a commitment to public health in individuals and institutions that shape public policy through law. PHAI is committed to research in public health law, public health policy development, providing legal technical assistance and collaborative work at the intersection of law and public health. PHAI has unusual depth and breadth of experience in tobacco control issues generally, as well as longstanding and specific expertise in the legal and policy issues relating to tobacco control. Since 1979, PHAI has provided legal information in support of tobacco control through the publication of research scholarship and direct legal and policy assistance to public health organizations, governmental agencies and individuals.

The *Amicus Curiae* Society for Thoracic Surgeons ("Society"), founded in 1964, is a not-for-profit organization representing more than 5,400 surgeons, researchers, and allied health professionals worldwide who are dedicated to ensuring the best possible heart, lung, esophageal, and other surgical procedures for the chest. The mission of the Society is to enhance

the ability of cardiothoracic surgeons to provide the highest quality patient care through education, research, and advocacy. The Society has a long history of supporting efforts to discourage tobacco use.

Each of the *Amici* share a common interest of ensuring that the tobacco industry is effectively restrained from continuing the type of misconduct that the trial court found it had engaged in. The *Amici* believe that all of the remedies proposed by the Plaintiff and the Intervenors at trial are needed to correct harmful and deeply ingrained misconceptions that the Defendants continue to perpetuate and to deter the Defendants from engaging in malfeasance that threatens millions of American children and adults.

The *Amici* support the Plaintiff and Intervenors in seeking the reversal of Federal District Court Judge Gladys Kessler's conclusion of law that certain remedies proposed by the Plaintiff and Intervenors were "not sufficiently tailored to meet the standard articulated" in an interlocutory ruling in this case. United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 923-37 (D.D.C. 2006). The *Amici* will focus on two of these remedies that are sufficiently tailored to meet the articulated standard and that these remedies must be ordered if the Defendants' wrongdoing is to be ended. Additionally, the *Amici* join the Plaintiff and Intervenors in opposing the

Defendants' in this appeal. Drawing on their combined expertise and experience in the field of tobacco control and public health, the *Amici* endeavor to provide insight into why the proposed remedies are essential if this case is to end the Defendant's ongoing wrongdoing described in Judge Kessler's Final Opinion.

SUMMARY OF ARGUMENT

The expectation was that by now, after years of controversy, the Defendants would have changed and started to demonstrate a level of responsibility that is commensurate with the lethality of their products.¹ But Judge Gladys Kessler tells us that the Defendants have not changed; that their pattern of purveying disinformation and denial to the public continues. United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1 (D.D.C. 2006). In 816 pages of findings of fact, Judge Kessler meticulously documents the Defendants' racketeering activities. Id. at 35-851. Over 136 pages alone, for example, describe the Defendants' current youth tracking and marketing activities. Id. at 556-692.

Several key remedies proposed by the Plaintiff and Intervenors at trial must be implemented if this case is to end the Defendants' racketeering conduct. The

¹ Since the start of this case, cigarettes caused the premature death of over 3.5 million Americans. CDC, Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses -- United States, 1997-2001, 54(25) MORBIDITY & MORTALITY WKLY. REP. 625 (July 1, 2005) (noting that 438,000 Americans die annually from tobacco-caused diseases). That is more deaths than caused by alcohol, AIDS, car crashes, illegal drugs, murders and suicides combined. Fred M Jacobs, The Case for Clean Indoor Air, 5(8) Journal of Carcinogenesis 1 (2006). While the Defendants may try to mitigate these and other alarming statistics by framing smoking as an informed adult choice, the truth is that approximately 80% of smokers become smokers before reaching their eighteenth birthday. CDC, Youth Tobacco Surveillance -- United States, 2001-2002, 55 (ss-3) MORBIDITY & MORTALITY WKLY. REP. 1 (MAY 19, 2006).

current remedies, although needed, are simply inadequate to do the job. This brief focuses on the need to implement two additional remedies proposed at trial: Education and Counter Marketing and Youth Smoking Reduction Targets.

The governing law in this case, Section 1964(a) of the Racketeer Influenced and Corrupt Organizations Act, allows for the implementation of these two remedies because they are aimed at preventing and restraining the Defendants' future racketeering conduct. In the interlocutory appellate ruling in this case, this Court reaffirmed the availability of remedies designed to prevent and restrain such racketeering conduct provided that the remedies "are aimed at future violations."

United States v. Philip Morris USA, Inc., 396 F.3d 1190, 198-99 (2005). To illustrate the forward-looking nature of the two remedies, this brief shows how these remedies would work to prevent and restrain racketeering conduct by the Defendants that has occurred since the conclusion of the liability phase of the trial.

ARGUMENT

I. POST-TRIAL EXAMPLES OF POTENTIAL RACKETEERING CONDUCT BY THE DEFENDANTS DEMONSTRATE THE NEED FOR ADDITIONAL REMEDIES

- A. The Education and Counter Marketing Remedy Would Comprehensively Refute Misleading Statements Made in the Future and Thus Induce the Defendants to Stop Relying on Such Statements and Accompanying Denials in Advancing their Interest and in Marketing Cigarettes.

Judge Kessler found that the Defendants are likely to continue their racketeering conduct involving the public dissemination of misleading and false product information. Philip Morris USA, Inc., 449 F. Supp. at 907-11. The misrepresentations involve the health effects of smoking, the health effects of exposure to secondhand smoke and more. Id. The Defendants' recent statements regarding nicotine addiction and the manipulation of nicotine confirm that Judge Kessler was correct in concluding that their racketeering conduct would not stop.

There is no longer any question that the nicotine in cigarettes is what makes cigarettes addictive and that the Defendants engineer their products to achieve optimal levels of addictiveness. Id. at 208. Judge Kessler found that the Defendants believe that controlling the delivery of nicotine is necessary to bolster the commercial success of their products and have thus “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.” Id. at 337. Indeed, a study by the Harvard School of Public Health published in 2007 revealed that several brands manufactured by Philip Morris, Brown and Williamson, R.J. Reynolds and Lorillard show an increase in nicotine yields from 1997 to 2005. Gregory N Connolly, et al., Trends in Nicotine Yield in Smoke and its Relationship with Design Characteristics Among Popular US Cigarette Brands, 1997-2000, 16 Tobacco Control 343 (2007). The study confirmed that increased

machine-measured levels of nicotine are “the result of increased nicotine in the tobacco rod and other design modifications.” Id. at 343.

Yet, even after the conclusion of the trial in this case, the Defendants continue to deny that they manipulate the nicotine in their cigarettes to create and sustain a powerful addiction. Philip Morris’s website currently states: “[S]ome have alleged that we use specific ingredients to affect nicotine delivery to smokers. That is simply not true.” Philip Morris USA, Inc., Product Facts, http://philipmorrisusa.com/en/product_facts/ingredients/ingredients_in_cigarettes.asp (last visited Nov. 24, 2007). In response to the Harvard study, Philip Morris attempted to explain away the results by attributing the rising nicotine yields to “random variations.” Philip Morris USA, Inc., Philip Morris USA Reports 2006 Machine Smoking Derived Nicotine Yield Numbers to the Massachusetts Department of Public Health & Texas Department of State Health Services (Dec. 6, 2006), http://www.philipmorrisusa.com/en/about_us/news_media/TX_MA_2006_report.asp (last visited Nov. 24, 2007). R.J. Reynolds likewise responded to the study with a statement claiming that the company “does not add nicotine to its cigarettes, nor does it modify its manufacturing standards to systematically increase nicotine levels over time.” Press Release, R.J. Reynolds Tobacco Co. (Feb. 26, 2007), <http://www.rjrt.com/newsroom/resourcesReleases.asp> (last visited Nov. 24, 2007). Lorillard states “ingredients should not be used in cigarettes if such use would

increase the inherent health risks of smoking, including the risks of developing diseases from smoking,” Lorillard Tobacco Co., Statement on Ingredients, <http://www.lorillard.com/index.php?id=82> (last visited Nov. 24, 2007), although Judge Kessler found that this is exactly what Lorillard and the other Defendants do so that their products achieve the optimal level of addictiveness. Philip Morris USA, Inc., 449 F. Supp. at 371.

The continuing misrepresentations and denials illustrate the need for a preventive remedy. These and other misrepresentations and denials regarding addiction and the manipulation of nicotine hide the actual risk of addiction from potential smokers and other interested parties. The misrepresentations and denials are material misrepresentations that confuse or distort the truth about nicotine addiction. As a result, potential smokers are less likely to accurately perceive the risk of becoming addicted to the nicotine in the cigarette brands being marketed to them by the Defendants. Philip Morris USA, Inc., 449 F. Supp. at 308. Those smokers who want to quit are less likely to understand the nature of their addiction and, thus, are less likely to seek, and benefit from, the assistance of medical professionals or use pharmacological treatments. Id.

The limitless variety of possible ways for the Defendants to misrepresent the health effects of their products makes a statement-by-statement prevention policy impossible. The effective way to prevent this racketeering practice is to try to

render the practice itself useless. If the misleading and false information in question is publicly and comprehensively refuted, through an Education and Counter Marketing campaign, the Defendants will be forced to adopt a different and hopefully more responsible approach to communicating information about their products. Indeed, they would put their own public image in jeopardy in the future if they returned to making such statements.

This approach is favored by the United States Supreme Court for addressing wrongful conduct involving speech. In the frequently-quoted words of Justice Brandeis, “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech ...” Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n. of New York, 447 US 557, 577 (1980) (quoting Whitney v. California, 274 U.S. 357, 377 (1927)). Although spoken in the context of evaluating government regulation of speech, Justice Brandeis’s guidance is applicable to the present case. Hundreds of lawsuits, the establishment of the 1998 Master Settlement Agreement, and numerous other private and governmental efforts have all failed to stop the Defendants’ 50-plus years of misrepresenting the harmful effects of their products while denying it, according to Judge Kessler. Philip Morris USA, Inc., 449 F. Supp. at 907-15. If this case is to end this racketeering conduct, more speech in the form of the Education and Counter Marketing campaign is needed.

The Defendants have contended that this approach is tantamount to punishment and, therefore, does not comply with this Court’s requirement that remedies imposed under Section 1964(a) be forward looking in nature. Post-Trial Brief of Joint Defendants, 2005 WL 4701051, *137. This contention is incorrect. It is true that the elimination of one or more of Defendants’ themes commonly used in their public communications and marketing, such as misleading statements on addiction and nicotine manipulation, would hurt the Defendants economically. Some loss is to be expected when wrenching profitable though illegal activities from the hands of racketeers. But the harm to the Defendants is tangential to the aim of Education and Counter Marketing. The aim is the closing down of the future utility of misleading representations regarding nicotine addiction and the other categories of misrepresentations and denials identified by Judge Kessler, which includes the health effects of smoking; nicotine and addiction-related design of cigarettes; “light” cigarettes and other like brand descriptors; marketing to youth; the health effects of environmental tobacco smoke; and the suppression of documents, information and research. Philip Morris USA, Inc., 449 F. Supp. at 854-67.

B. Youth Smoking Reduction Targets Will Force the Defendants to Comply with Their Assertion that They Do Not Market to Youth

According to Judge Kessler, “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.” Philip Morris USA, Inc., 449 F. Supp. at 691. She concluded “[t]here is therefore no reason, especially given their long history of denial and deceit, to trust assurances that they will not continue committing RICO violations denying their marketing to youth.” Id. at 912. Recent post-trial conduct by R.J. Reynolds confirms that Judge Kessler was correct.

The marketing of a new R.J. Reynolds cigarette brand, Camel No. 9, launched in 2007, illustrates this point. Camel No. 9’s catchphrase is “light and luscious.” Mike Beirne, New Products: RJR Gets Over the “Hump” with Camel No. 9 for Women, Brandweek.com, Feb. 12, 2007. The packaging and advertising blends black, fuchsia, teal and pink. Id. The packaging comes with a textured, pink foil wrapping encasing cigarettes stamped with pink camels and either pink or teal banding. Id. Promotional activities thus far have included club events, free giveaways of cigarettes and marketing items, coupons, direct emails, and advertising in fashion magazines. Id.

Although R.J. Reynolds spokespeople stress that they only market to adult females, the marketing also appears to target youth, including girls younger than state cigarette minimum age sales laws. Judge Kessler discussed in detail the R.J. Reynolds and Camel brand promotions targeting youth audiences. Philip Morris USA, Inc., 449 F. Supp. at 633-40. For instance, she reviewed a 1990 internal R.J.

Reynolds report recommending the targeting of youth through the use of “blank audio tapes with [the] Camel logo, a Camel Walkman case and other ‘entertainment-oriented incentives[.]’” as well as a “‘Camel pocket game[.]’” Id. at 637. Compare this past recommendation with the current promotional activities for Camel No. 9. The contemporary promotional equivalents are mobile phone accessories that include colorful phone stickers and plastic charms designed to dangle from the phone. See, e.g., Trinkets & Trash, About Camel No. 9, <http://www.trinketsandtrash.org/no9/no9.htm> (last visited Nov. 9, 2007) (providing images and descriptions of Camel No. 9 products and marketing). The Camel No. 9 “fashion emergency kit” is similar in theme to the “pocket game” as both are youthful portable desirables. Id. The kit contains lip gloss, plastic jewelry and mirror compacts that are branded with Camel No. 9’s color scheme and design. Id.

Additionally, R.J. Reynolds has chosen to run advertising for Camel No. 9 in magazines with high youth readership such as *Cosmopolitan*, *Glamour*, *In Style*, *Lucky* and *Marie Claire*. Id. This choice, too, evidences that the Defendants continue to target youth. Judge Kessler discussed several internal industry documents that recommended consistent and extensive advertising in certain magazines with a young readership, including *Cosmopolitan* and *In Style*. Philip Morris USA, Inc., 449 F. Supp. at 648, 650. Additionally, several years before Judge Kessler issued her decision, the Office of the California Attorney General

prosecuted R.J. Reynolds for the exact same conduct of advertising in magazines with high youth readership. People, ex rel. Lockyer v. R.J. Reynolds Tobacco Co., 116 Cal.App.4th 1253 (2004). The Court found that the advertising targeted youth below the state minimum age sales law. Id. The appearance of Camel No. 9 advertisements in magazines with high youth readership confirms that nothing has changed for R.J. Reynolds. And true to form, R.J. Reynolds is denying that the Camel No. 9 marketing targets youth.

In fashioning a remedy to respond to the Defendants' racketeering conduct involving youth, it is important to note that, although marketing cigarettes to children itself is harmful, the Defendants' related denials also have dramatic consequences and, therefore, should be addressed. The denials essentially hide the Defendants' youth marketing: the promotional strategies and tactics, the brands that are involved, the profile of the children being targeted, and more. As a result, state and local laws designed to reduce the incidence of youth smoking, including the 1998 Master Settlement Agreement in which the Defendants agreed not to target children, are undermined. The legitimate fears of parents are allayed, making them less likely to actively protect their children from tobacco marketing. Even the owners of retail stores might be less likely to prepare for the actual level of illegal cigarette sales in their stores.

Simply ordering that these denials be ended, as Judge Kessler has done, is insufficient by itself. With the launch of the Camel No. 9 campaign, it is apparent that the Defendants' marketing to youth and accompanying denials will continue. In this and other egregious cases of marketing cigarettes to youth, industry observers can sound the alarm and provide the public with, at least, some protection. However, in the future, the Defendants are likely to employ subtle forms and strategies of youth marketing that accomplish the goal of recruiting youth, but in a manner that triggers as little public scrutiny as possible. The only parties that understand, let alone can identify, these veiled forms and strategies of youth marketing are the Defendants themselves, and they have little incentive to share their information. Edward Correia, et al., The State Attorney Generals' Tobacco Suits: Equitable Remedies, 7 Cornell J.L. & Pub. Pol'y 843, 860 (1998). Judge Kessler tells us that there is "no reason, especially given their long history of denial and deceit, to trust assurances that they will not continue ... denying their marketing to youth." Philip Morris USA, Inc., 449 F. Supp. at 912.

Accordingly, the only effective remedy to address this racketeering conduct is to force the Defendants to do what they say and prevent them from marketing to children. The Youth Smoking Reduction Target remedy would force the Defendants to live up to their assertions that they do not market to youth. The remedy could be fashioned to set achievable milestones for each Defendant with a

progressive penalties scheme based on the performance of each Defendant in achieving brand-specific reductions. The infrastructure for measuring each Defendant's performance is largely in place already. The Centers for Disease Control and Prevention and state health departments around the country have tracked youth smoking prevalence for over a decade using the Youth Risk Behavioral Surveillance System, see CDC, Youth Risk Behavioral Surveillance System, [http://www.cdc.gov/HealthyYouth/yrbs/pdf/2005YRBS Overview.pdf](http://www.cdc.gov/HealthyYouth/yrbs/pdf/2005YRBS%20Overview.pdf) (last visited Nov. 24, 2007), and the School Health Profiles, see CDC, School Health Profiles, [http://www.cdc.gov/HealthyYouth/profiles/pdf/ overview.pdf](http://www.cdc.gov/HealthyYouth/profiles/pdf/overview.pdf) (last visited Nov. 24, 2007). These surveillance programs monitor the smoking rates of children according to age, socioeconomic status and other demographic features. Id. Researchers have used similar surveillance protocols for identifying which and how many children buy their cigarettes from vending machines or obtain them through some other means. CDC, Youth Tobacco Surveillance -- United States, 2001—2002, supra at 11-13. Even brand-specific data can be captured in this manner. Id. at 8-9. With this information, for example, we could observe the number of underage smokers who smoke Camel No. 9 cigarettes and hold R.J. Reynolds accountable.

The Defendants have contended that the Youth Smoking Reduction Target remedy simply amounts to a penalty. Post-Trial Brief of Joint Defendants, 2005

WL 4701051, *131. They argue that their conduct is not the only factor in determining the percentage of underage smoking and, therefore, a poor indicator of whether they are indeed marketing to underage smokers. *Id.* This contention is without merit. The notion that the Defendants promote their products at the rate of nearly \$1.5 million per hour, Fed. Trade Comm’n, Cigarette Report for 2004 and 2005 (2007), *available at* http://www.ftc.gov/reports/tobacco/2007_cigarette2004-2005.pdf, without knowing exactly how their promotional activities work, is absurd. There is no doubt that the Defendants’ own metric for deciding whether to fund a marketing campaign is the number of people who are smoking the brand being promoted. According to Judge Kessler, the “Defendants spent enormous resources tracking the behaviors and preferences of youth under twenty-one, and especially those under eighteen,” Philip Morris USA, Inc., 449 F. Supp. at 580, and they continue to do so, *Id.* at 912.

The Youth Smoking Reduction Target remedy is aimed directly at preventing future RICO violations. It directly addresses the Defendants’ denials that its marketing targets youth by forcing them to actually cease such marketing. Existing surveillance protocols easily could be fashioned to measure accurately the performance of the Defendants in this regard.

II. THE CURRENTLY ORDERED REMEDIES, ALTHOUGH NEEDED, ARE INADEQUATE TO BRING AN END TO ONGOING RACKETEERING CONDUCT

The remedies ordered in this case, although very important steps towards addressing the Defendants' racketeering conduct, are alone insufficient, if this case is to end the Defendants' racketeering conduct. For example, Judge Kessler found that the Defendants focus much of their marketing on youth, supra, §I.B., but has not provided a specific remedy that would stop the Defendants from targeting youth or eliminating the accompanying denials. Not even the corrective statements ordered by Judge Kessler are to address the Defendant's racketeering involving youth. Philip Morris USA, Inc., 449 F. Supp. at 938-39. Such racketeering conduct could dramatically increase youth smoking rates without any meaningful consequences from this case, except if the Department of Justice were to actually reopen the case.

The Defendants assert that they have learned their lesson, are adequately fenced in by existing laws and agreements, and that the public therefore does not need further protection against them through forward-looking remedies. Judge Kessler rejected this contention, pointing to the flagrant misconduct that continued through the trial. We note here that the conduct still has not stopped.

One indication of what the defendants would do if not restrained by court order is the Defendants' motion in this case following Judge Kessler's decision to allow them to continue marketing "light" and "low tar" cigarettes outside the United States. Memorandum Opinion of Judge Kessler (March 17, 2007).

Apparently, the fact that Judge Kessler found on ample evidence that this marketing was fraudulent does not mean that they do not want to keep doing it. Indeed, they continue doing it in the United States pending the appeal in this case. This is consistent with the 50-plus years of the Defendants' wrongdoing detailed throughout Judge Kessler's opinion – their only criterion for marketing and public relations campaigns is whether it will help them sell more cigarettes, completely disregarding whether doing so involves engaging in fraud. There is no reason to believe that that criterion has changed.

CONCLUSION

For the foregoing reasons, this Court should reverse Judge Kessler's decision with regard to the education and counter marketing remedy and the youth smoking reduction target remedy and with instructions for their implementation.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

We hereby certify that the foregoing brief is no more than one-half the maximum length authorized by these rules for the Plaintiff's principal brief, notwithstanding permission granted to the parties to exceed the page length limitation; the brief is in 14-point Times New Roman font and is proportionally spaced; and the brief contains fewer than 7,000 words.

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