

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) Civil Action No. 99-CV-2496 (GK)
)
 PHILIP MORRIS USA INC. (f/k/a)
 PHILIP MORRIS INCORPORATED), et al.,)
)
 Defendants.)

UNITED STATES' WRITTEN DIRECT EXAMINATION OF

MATTHEW L. MYERS

SUBMITTED PURSUANT TO ORDER #471

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Written Direct Testimony of Matthew L. Myers

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1 **I. INTRODUCTION**

2

3 **Q: Please state your name.**

4 A: Matthew L. Myers.

5 **Q: Who is your employer?**

6 A: I am president of an organization called the Campaign for Tobacco-Free Kids.

7 **Q: What is the Campaign for Tobacco-Free Kids?**

8 A: The Campaign is one of the nation's largest privately funded nonprofit advocacy
9 organizations dedicated exclusively to reducing tobacco use among young people, helping
10 smokers quit, protecting nonsmokers from the hazards of secondhand smoke, and reducing the
11 number of people who die from tobacco. The Campaign seeks to accomplish these goals by
12 working to frame tobacco as an important public health problem, countering the tobacco industry
13 in the media, working to develop a consensus about the need to adopt public policies to better
14 inform the public and to discourage tobacco use, and working to expand the number of
15 individuals and organizations who identify tobacco as a problem that needs to be addressed, all
16 with the ultimate goal of reducing the morbidity and mortality caused by tobacco.

17 **Q: What is the structure of the Campaign for Tobacco-Free Kids?**

18 A: The Campaign was originally created in fall of 1995 and formally established as a
19 Section 501(c)(3) non-profit entity in March 1996. Located in Washington, D.C., the
20 Campaign's largest funders have been the Robert Wood Johnson Foundation, the American
21 Cancer Society, and the American Health Association. The Campaign's current annual budget is
22 approximately \$14 million. The Campaign has approximately 50 employees.

23 **Q: Does the Campaign have organizational members?**

1 A: Yes. The Campaign has over 130 organizational members including every major public
2 health organization in the United States. These include groups such as the American Lung
3 Association, the American Cancer Society, the American Heart Association, the American
4 Medical Association, the American Public Health Association, the American Academy of
5 Pediatrics, and the American Academy of Family Physicians. These members have endorsed the
6 Campaign's mission statement and work with us to further our goals. Since its inception, the
7 Campaign has played a leading role in coordinating the activities of and building a consensus
8 among all of the nation's organizations concerned with reducing the harms of tobacco.

9 In addition, the Campaign's research and communications departments serve as resources
10 for the public health community at both the national and local level on a broad range of issues
11 relating to reducing the death and disease toll from all forms of tobacco use.

12 **Q: Have you ever testified in smoking and health litigation before?**

13 A: No. I have testified twice in litigation where a cigarette manufacturer was a party, but
14 these were not smoking and health cases. I testified in a case brought by Brown & Williamson
15 against CBS News concerning the accuracy of statements by a CBS news reporter relating to a
16 1981 Federal Trade Commission staff report on the major FTC investigation into cigarette
17 advertising that I supervised. I also testified a number of years ago in a case involving a
18 challenge to British American Tobacco's acquisition of the Farmers' Insurance Company.

19 **Q: When did the United States approach you with the possibility of providing**
20 **testimony in this case?**

21 A: I believe this was at the end of February or the very beginning of March 2005, about two
22 to three weeks before they submitted my name as a witness. I had not spoken to any of the
23 Department of Justice lawyers about the case before that time.

1 **Q: What subjects has the United States asked you to talk about?**

2 A: The United States has asked me to testify based upon my personal experience and
3 knowledge about a number of matters related to the tobacco industry's behavior and solutions to
4 address the ongoing impact of those behaviors from my position as an active participant in
5 tobacco related matters and as a leader in tobacco and public health since 1980.

6 **Q: Can you generally summarize your background and how that experience relates to**
7 **your testimony?**

8 A: Yes. In 1997 I was asked by State attorneys general and the White House to participate
9 in negotiations between the attorneys general and the tobacco industry because they informed me
10 that they wanted to be sure that any such negotiations effectively addressed the most serious
11 tobacco related problems caused by the tobacco industry's behavior. They told me that they were
12 asking me to participate because of my knowledge of the tobacco industry, my knowledge of the
13 views of the public health community and leading public health experts about the most pressing
14 problems with regard to tobacco, and my knowledge of the solutions identified by the leadership
15 of the public health community and public health experts to address those problems.

16 I sought to be certain that the public health portions of any agreement that resulted from
17 the 1997 negotiations were based on an accurate assessment of the problems that public health
18 leaders, public health experts and the published literature identified as the most pressing
19 problems related to youth tobacco use, public misperceptions about the hazards of tobacco use
20 and tobacco industry barriers to the efforts to reduce the number of people who die or become ill
21 from tobacco use.

22 Because the June 20, 1997 Proposed Resolution provides a good starting point for
23 understanding and addressing both the problems and solutions identified by the leaders of the

1 public health community as most pressing, I have been asked to testify about the problems that
2 led to the public health provisions of the 1997 agreement, the underpinning for the solutions
3 contained in the agreement, the extent to which those problems have or have not been resolved
4 by the Master Settlement Agreement, changes in industry behavior since the Master Settlement
5 Agreement, and the continuing need for the solutions identified in the 1997 agreement today.
6 More broadly speaking, I have been asked to convey my factual knowledge of the tobacco
7 industry and specifically the behavior of the cigarette manufacturers over the past 20 years as a
8 perspective to assist the Court in determining what steps should be implemented to meaningfully
9 change that behavior going forward.

10 **Q: Did the public health portions of the June 20, 1997 Proposed Resolution cover the**
11 **major problem areas that had been identified as most important by the public health**
12 **community, public health experts and the published literature at that time?**

13 A: Yes.

14 **Q: Did the public health provisions of the June 20, 1997 Proposed Resolution cover the**
15 **major types of solutions that had been identified by the public health community, public**
16 **health experts and the published literature at that time?**

17 A: Yes. While some of the specific provisions that resulted from the negotiations were later
18 identified as inadequate to address the identified problem, the Proposed Resolution did address
19 the most effective remedies about which there was a consensus at that time.

20 **Q: You are aware that this Court may order Defendants to take certain actions to**
21 **remedy violations of the RICO statute, correct?**

1 A: Well, I do not consider myself an expert on the RICO statute, but I am generally aware
2 that there is a “remedies” phase to this trial and that my testimony will be offered during this
3 phase. I do not know specifically what remedies the United States is formally seeking.

4

5 **II. TOBACCO AND PUBLIC HEALTH BACKGROUND**

6

7 **Q: Before we go further with your direct testimony, I would like to talk about your**
8 **background in more detail. You have been at the forefront of efforts to reduce the harms**
9 **caused by tobacco and educate the public for some time, correct?**

10 A: Yes, I have been involved in a broad range of tobacco related activities. From 1980
11 through 1981 I was the Program Advisor in charge of all tobacco related actions for the Federal
12 Trade Commission. From 1982 thru 1991 I was the lead staff person for a coalition created by
13 the American Cancer Society, the American Lung Association, and the American Heart
14 Association to address tobacco-related issues on a national level. I served as counsel to that
15 organization from 1992 to 1996. Since 1996 I have held a leadership position with the
16 Campaign for Tobacco-Free Kids, originally known as the National center for Tobacco-Free
17 Kids.

18 **Q: You are also an attorney, correct?**

19 A: Yes, I graduated from University of Michigan Law School in 1973 where I was awarded
20 the Order of the Coif during my second year. From 1973 to 1974 I served as a clerk to the Chief
21 Judge of the United States District Court for Rhode Island, Judge Raymond Pettine. From 1974
22 to 1980 I served first as a staff attorney and then as Chief Staff Counsel to the National Prison
23 Project of the American Civil Liberties Union Foundation. I am licensed to practice in the

1 District of Columbia and am a member of the bars of numerous Federal courts and U.S. Courts
2 of Appeals as well as the United States Supreme Court.

3 **Q: Let's go back to 1980 and your first position related to tobacco. Can you tell the**
4 **Court more about your work for the FTC?**

5 A: Yes. In the Fall of 1980 I was hired as a Senior Trial Attorney and Program Advisor in
6 the Division of Advertising Practices of the Bureau of Consumer Protection at the Federal Trade
7 Commission. In that capacity I was responsible for overseeing all of the FTC's enforcement
8 activities concerning tobacco, and had supervisory authority over the FTC's tar and nicotine
9 testing laboratory and report.

10 **Q: Did you participate in any major tobacco related investigations while at the FTC?**

11 A: Yes. First, I supervised the largest investigation that the FTC had ever conducted into
12 tobacco industry marketing and the impact of that marketing on the government's efforts to use
13 health warnings to inform the American public of the health hazards of using tobacco.

14 **Q: What investigation are you referring to?**

15 A: This was a broad investigation that was initiated before my arrival that led the FTC in the
16 Spring of 1981 to issue a report titled "Staff Report on the Cigarette Advertising Investigation."
17 This report was a comprehensive review of what the government knew about the health effects
18 of tobacco, and it examined in detail the public's knowledge of the health effects of tobacco
19 products, including light and low tar tobacco products. It also included the federal government's
20 most comprehensive review as of that date of tobacco industry marketing practices and their
21 impact. Finally, the report set out the Federal Trade Commission's history of involvement with
22 the tobacco issue and made recommendations for revising the then existing health warnings on
23 cigarette packages and ads.

1 **Q: Is the document that I have shown you marked JD-001032 a copy of that Staff**
2 **Report?**

3 A: Yes, it is.

4 **Q: What was the second major tobacco related FTC investigation in which you played**
5 **a role?**

6 A: While at the FTC I also initiated the investigation that ultimately resulted in litigation
7 between the FTC and Brown & Williamson because of Brown & Williamson's advertising of
8 Barclay cigarettes. The FTC alleged that the company made false and deceptive claims about the
9 tar yield of the product in both its advertising and its labeling. The outcome of this litigation was
10 that Brown & Williamson was prohibited from advertising their Barclay brand as a 1 mg
11 cigarette. The case was of particular interest because it exposed a serious weakness in the FTC's
12 system of testing the tar and nicotine levels in cigarettes and required my staff and me to look
13 more closely at the tar and nicotine testing system.

14 **Q: Was tobacco an interest of yours before you joined the FTC?**

15 A: No, I took the job because the then pending investigation into the tobacco industry's
16 marketing practices and their impact on the government's effort to educate the American public
17 about the health hazards of smoking posed an interesting and challenging professional
18 opportunity. The FTC was looking for someone to manage the tobacco program, and I had the
19 litigation and management experience to make the position a good fit.

20 **Q: What did you do after you left the FTC in 1981?**

21 A: I joined a private law firm as a partner in January 1982. From 1982 to 1996 I was a
22 principal at the firm, named Asbill, Junkin & Myers. The non-tobacco portion of my practice

1 was primarily a litigation practice with an emphasis on commercial litigation First Amendment
2 issues, environmental issues, and employment law.

3 **Q: After you left the FTC to join the law firm, did you have any tobacco-related**
4 **responsibilities?**

5 A: Yes. In March 1982, the American Cancer Society, the American Heart Association, and
6 the American Lung Association joined forces and created the Coalition on Smoking or Health.
7 They hired me to be lead staff person and first Staff Director, a position I held while I was also
8 working as a partner in the law firm. I served as Staff Director of the Coalition on Smoking or
9 Health until 1991 when I became counsel to the organization.

10 **Q: What were your responsibilities as Staff Director for the Coalition on Smoking or**
11 **Health?**

12 A: As Staff Director I worked closely with the leadership of these major public health
13 organizations and others to develop consensus positions on public policy issues related to
14 tobacco and to develop and implement a coordinated strategy in support of these public policy
15 positions. I was involved in and often was asked to take the lead for this coalition of the nations'
16 leading public health organizations on virtually every piece of Federal legislation related to
17 tobacco use between 1982 and 1996 and served as their representative and spokesperson in
18 matters before federal agencies that were dealing with tobacco and health. I also often served as
19 the liaison between these three organizations and the scientific experts dealing with tobacco and
20 health related issues in the United States and from around the world.

21 **Q: Can you give us some highlights of the legislation that you worked on in the 1980s**
22 **and 1990s?**

1 A: I worked on the Federal legislation to strengthen cigarette health warnings that was
2 enacted in 1984, legislation to ban smoking on airlines that was enacted in the 1980s, legislation
3 to increase the tax on tobacco products that was enacted in 1982, the legislation to prohibit
4 advertising of smokeless tobacco on television and radio, and to require that health warnings be
5 placed on packages and ads for smokeless tobacco products such as chewing tobacco, and
6 legislation to penalize states that didn't step up their efforts to curtail illegal tobacco sales to
7 children. As part of these efforts and other legislative efforts that were not successful I testified a
8 number of times in Congressional hearings.

9 **Q: What were your tobacco-related activities during this time related to the federal**
10 **executive branch and with regard to independent federal agencies?**

11 A: There were many. I represented the public health community before the FTC with regard
12 to the implementation of the Smokeless Tobacco Education Act, a formal matter related to an
13 FTC challenge to an advertising campaign conducted by R.J. Reynolds that the FTC and the
14 public health community concluded misrepresented the tobacco related risk of heart disease, the
15 FTC's investigation into the RJ Reynolds Joe Camel cartoon advertising campaign and other
16 matters. I drafted and filed administrative petitions and comments on behalf of the leading
17 public health groups with the FDA as well, including a number of petitions to the FDA
18 concerning tobacco advertising that the public health groups concluded made unsubstantiated
19 health claims and the public health community's comments with regard to the FDA's proposal to
20 assert jurisdiction over tobacco products in the mid 1990's. I represented public health groups
21 before the EPA with respect to secondhand smoke and OSHA with respect to smoking in the
22 workplace. I also testified on their behalf before a number of State legislatures.

1 I have also written numerous articles and given a large number of speeches on tobacco
2 and health issues.

3 **Q: What other roles did you play as Staff Director and counsel to the Coalition on**
4 **Smoking or Health?**

5 A: One important role I played was to bring together the public health groups with whom I
6 worked with the other leading public health organizations to determine whether there was a
7 consensus about the most pressing tobacco related public health problems and the solutions to
8 best address them. For example, I played a major role in the planning of two consensus
9 conferences in 1989 and 1993 that included virtually every major public health organization and
10 expert in the United States to identify priority problems with regard to tobacco use and develop
11 proposed consensus resolutions. Then during those meetings I was assigned the lead
12 responsibility in conducting the discussions with respect to tobacco marketing, and the
13 development of a consensus position among members of the public health community with
14 regard to both the problems caused by tobacco marketing as it existed then and the most effective
15 solutions to address these problems.

16 **Q: Why was this important?**

17 A: The conferences presented an opportunity to bring together all of the major experts and
18 organizations in one place, identify which problems were the most serious, and agree upon what
19 best to do to solve the problems in order to allow the public health community to set priorities
20 and bring about the agreed-upon change. It created an opportunity to bring together the best
21 experts and to bring to the discussion a thorough review of the available scientific literature. The
22 two meetings and subsequent follow up discussions reflected a broad consensus among experts,
23 advocates and the leading public health organizations.

1 **Q: Why were these conferences important?**

2 A: The conferences produced final reports that set forth the consensus view of the major
3 public health tobacco related issues and the remedies that the participants proposed, discussed,
4 and agreed upon.

5 **Q: Was one of these remedies to “put the companies out of business”?**

6 A: No, not at all. That has never been my position or the position of any public health
7 organization with whom I have worked. I personally believe it would be poor public health
8 policy and would not solve the public health problem. There are between 45 and 50 million
9 Americans addicted to tobacco. Banning the product or eliminating the current manufacturers
10 would not address the needs of those individuals, nor would it eliminate the role of tobacco in
11 our society. Our goal, and my goal personally, has always been to figure out how to best reduce
12 the incidence of death and disease caused by tobacco. This requires a complex set of solutions
13 designed to better educate all Americans, rein in the actions of the tobacco industry that
14 encourage tobacco use and misleads consumers about the relative health effects of their products,
15 provide added assistance to young people to reject tobacco, help smokers to quit, and reduce the
16 harm caused to those who continue to use tobacco.

17 **Q: Have you been recognized for your work?**

18 A: Yes, a number of times. Most recently, the Harvard School of Public Health honored me
19 last year by awarding me the Julius Richmond Award, their highest award for actions taken to
20 protect the public health. I am also a recipient of the Surgeon General’s Medallion from then
21 Surgeon General C. Everett Koop. In 2000 I was selected to co-chair a commission appointed by
22 President Clinton to propose recommendations for how to best address the problems facing
23 tobacco farmers and their communities, while best protecting the public health. This commission

1 produced a report and set of recommendations that was endorsed not only by the major public
2 health organizations, but also by the major tobacco growers' organizations. This was a
3 significant achievement. In 1998 I was appointed to the first tobacco advisory committee created
4 by the Director General of the World Health Organization to make recommendations for
5 addressing the problem of tobacco world wide.

6

7 ***III. THE 1997 PROPOSED RESOLUTION***

8

9 **Q: I want to talk now about a document that has been marked U.S. Exhibit 42978.**
10 **This is titled the “Proposed Resolution” and is dated June 20, 1997. You participated in**
11 **the months of negotiations with the cigarette manufacturers that led to the creation of this**
12 **document correct?**

13 A: Yes, I did.

14 **Q: Please tell the Court how and why you were involved in the negotiations.**

15 A: Well, these negotiations and this agreement took place in Spring of 1997. But I have to
16 back up a bit to give you the full picture. The first state attorney general actions against the
17 cigarette manufacturers were brought by a handful of states in 1994 and 1995. In March of 1996
18 I was contacted by Dr. David Burns who was working with the State attorneys general and who
19 informed me that he was asked by the State attorneys general to gain my insights and thoughts
20 about the public health components of a potential settlement between the state attorneys general
21 and Liggett & Myers. He also asked me for my perceptions about how the agreement would be
22 received by the leading public health organizations and asked me to serve as a liaison for the
23 State attorneys general in reaching out to the public health community about the proposed

1 settlement. I did so and worked closely with the attorneys general with regard to their outreach
2 to public health leaders about the 1996 Liggett settlement, a settlement that became known to
3 many as “Liggett 1”.

4 Between March 1996 and the beginning of the negotiations that led to the June 1997
5 Proposed Resolution, I worked closely with the State attorneys general and their outside lawyers,
6 advising them on the public health aspects of their cases and proposed remedies. I also
7 canvassed the leading public health organizations and experts on the efficacy, advisability, and
8 relative priority of various possible remedial actions that they should consider.

9 **Q: Who else were you engaged with between the Spring of 1996 and the beginning of**
10 **the negotiations that led to the June 20, 1997 agreement?**

11 A: Beginning in the Fall of 1996 I was in contact with one or more individuals within the
12 White House after I learned that the White House had participated in some discussions with
13 tobacco industry representatives and the State attorneys general about possible discussions
14 toward a negotiated settlement of the state cases. I first met with White House Counsel Abner
15 Mikva in the Fall of 1996. Later in 1996 I was in regular communication with Bruce Lindsey, an
16 advisor to President Clinton at the White House.

17 I made it clear to Mr. Mikva and Mr. Lindsey that the public health community was
18 concerned about any discussions that did not include public health representatives and that did
19 not fully address the priority problems that the public health community had concluded needed to
20 be addressed to bring about change in tobacco industry marketing that impacts children and
21 misleads adults. By early 1997 Mr. Lindsey would call me to inquire about possible remedial
22 actions, ask for information about the evidence in support or against various proposals and ask
23 for my conclusions about the views of public health leaders to various proposals and ideas.

1 **Q: What happened next?**

2 A: In 1996 the State attorneys general entered into a second set of negotiations with Liggett,
3 in which they asked me to participate. My role was to advise them on public health priorities
4 and to help them gauge the public health community's likely reaction to any subsequent
5 settlement with Liggett. This subsequent agreement – which became known as Liggett II – was
6 finalized in March 1997.

7 **Q: Let's move now to 1997. What happened in 1997 to accelerate the movement**
8 **toward settlement discussions?**

9 A: From my perspective a number of factors came together to put a unique set of pressures
10 on the tobacco industry to try to reach an agreement. The two Liggett settlements represented the
11 first time that the tobacco industry had split apart in their defense of their behavior in court. The
12 second Liggett settlement had put previously undisclosed tobacco industry documents into the
13 hands of the state plaintiffs. There had been a series of Congressional hearings, whistleblower
14 disclosures, and document disclosures that had put the tobacco industry on the defensive and
15 contributed to a decline in their stock prices. The FDA had formally asserted jurisdiction over
16 cigarettes and smokeless tobacco products. President Clinton had become the first sitting
17 President to speak out aggressively against the tobacco industry's practices. The first state case
18 was scheduled to go to trial within a matter of months and the tobacco industry's reputation in
19 the public was suffering. In other words, the tobacco industry was facing pressure from
20 Congress, the Executive branch, and the pending court cases, and was losing ground with the
21 public and on Wall Street.

22 **Q: How did you learn about the tobacco industry's interest in participating in**
23 **discussions about a possible negotiated settlement?**

1 A: Former Senator George Mitchell called me in March and asked if I would be willing to
2 meet with his law partners about Philip Morris's and R.J. Reynolds's interest in settlement
3 discussions with the State attorneys general. I told him that I was skeptical, but I would hear
4 what they had to say. I also told him that no one person represented the public health community
5 for this purpose. The meeting with Senator Mitchell's law partners meeting took place near the
6 end of March, but did not result in anything. They spoke generally and I told them that neither I
7 nor anyone else in the public health community would listen in the absence of a concrete
8 proposal that I could share. I did not receive anything in response to my request

9 **Q: What happened next?**

10 A: I received two telephone calls. The first was from Mike Moore, the Attorney General
11 from Mississippi who told me that he had received a call from the White House and that Bruce
12 Lindsey was urging him and the other State attorneys general to at least meet with the tobacco
13 industry to hear what they had to say. General Moore asked me to at least consider participating
14 in such a meeting. I then received a phone call from Mr. Lindsey at the White House asking me
15 to agree to such a meeting and making clear that the White House wanted my input in such a
16 meeting because of its concern that public health issues needed to be a priority in any such
17 discussions. I agreed to attend for this purpose.

18 **Q: When did you first meet with any representative of the tobacco industry?**

19 A: I believe I sat in a meeting with General Moore and a former North Carolina judge by the
20 name of Phil Carlton on or about April 1, 1997. Mr. Carlton said he represented the major
21 tobacco companies and that they, in his words, were prepared to make unprecedented change. I
22 didn't say anything, but General Moore said he was skeptical and would only agree to a follow
23 up meeting if it took place within a matter of days, included the CEO of both Philip Morris and

1 R.J. Reynolds, and included a concrete set of proposals that were responsive to a set of public
2 health demands that the State attorneys general had set out. Mr. Carlton said he would speak
3 with his contacts at Philip Morris and R.J. Reynolds. The next day I was told that Mr. Carlton
4 called either Attorney General Moore or his counsel, Richard Scruggs, and informed him that the
5 companies were prepared to meet his demands. They agreed that the meeting would take place
6 on April 3, 1997, and General Moore contacted me and asked me to participate.

7 **Q: What happened at this first meeting on April 3, 1997?**

8 A: This was a Thursday. The meeting was at a hotel in Crystal City, Virginia. George
9 Mitchell introduced everyone, then Philip Morris chairman Geoffrey Bible and R.J. Reynolds
10 chairman Steven Goldstone gave presentations. Attorney General Moore and a lawyer
11 representing the private class-action litigants spoke as well. I gave a presentation. Subsequently
12 the attorneys for the tobacco companies then went through the public health demands that the
13 State Attorneys general had given to Mr. Carlton. We talked for many hours that first day.

14 **Q: Again, without getting into the substance of any discussions, what happened next?**

15 A: Well, everyone agreed to meet again the next day, which we did. The process evolved
16 into frequent meetings in April, May and June 1997 that culminated to the June 20, 1997
17 Proposed Resolution. During many of those sessions the group broke up and a small team
18 headed by former Washington State Attorney General (now Governor) Christine Gregoire, an
19 assistant to the Massachusetts Attorney General, and me conducted the discussions that related to
20 the public health provisions of the agreement.

21 **Q: Were you formally representing the public health community during these**
22 **meetings?**

1 A: No. I was participating to insure the public health concerns were a high priority, that the
2 State attorneys general were as aware as possible of the information available to the public health
3 community, the priorities of the public health community, and the remedies that the public health
4 community, public health experts and the published literature identified as most important and
5 most effective. Thus, my role was to be an advisor, a source of information and an advocate for
6 conveying the most serious problem areas that my colleagues and I had identified. I made clear
7 that I was not serving in any formal role as a negotiator for the public health community or any
8 public health organization because I had not sought permission from my public health colleagues
9 to speak on their behalf.

10 **Q: Were you able to get agreement on all of the remedies that the public health**
11 **community had concluded were important and necessary to bring about major change?**

12 A: No. Nonetheless, I considered the remedies in the final resolution when taken in their
13 entirety as a comprehensive package to have offered the opportunity for significantly advancing
14 public health goals.

15 **Q: Although the 1997 Proposed Resolution was an agreement signed by the State**
16 **attorneys general and the major tobacco companies, did it take effect automatically or did**
17 **it require further action by anyone before its provisions took effect?**

18 A: You are correct that the document was a memorandum of understanding among the
19 parties, but its provisions of the Proposed Resolution only took effect once Congress enacted
20 legislation consistent with the agreement.

21 **Q: Why was this?**

22 A: This was because some of the measures in the Proposed Resolution, such as granting
23 Federal agency authority to the FDA, changes to the Congressionally-mandated health warnings,

1 and protection for the tobacco industry against punitive damages and class-action lawsuits, could
2 only be enacted by Congress. The June 20, 1997 Proposed Resolution was a comprehensive
3 package. None of its provisions were to take effect unless Congress acted.

4 **Q: Broadly speaking, what happened to the Proposed Resolution?**

5 A: Without getting into detail, after it was announced on June 20, 1997, there were months
6 of public debate about its provisions. Beginning in the Fall of 1997 several bills were introduced
7 in Congress to enact the agreement or some variation of it. The bill that received the most
8 serious consideration was drafted by Senator John McCain in March 1998, passed by the Senate
9 Commerce Committee in early April 1998 and debated on the floor of the Senate before falling
10 three votes short of the 60 votes needed to break a filibuster by its opponents in mid to late June
11 1998.

12 **Q: If the Proposed Resolution was never enacted into law, why is it important today?**

13 A: The June 20, 1997 Proposed Resolution is important as a stand-alone document because
14 it accurately reflects the areas that had been identified by the public health community, public
15 health experts and the published literature as most in need of corrective action. The remedies it
16 included accurately reflected the type of remedies that these groups and individuals had
17 identified as most likely to be successful in reining in the tobacco industry behavior that was
18 causing these problems and was most likely to contribute to the effort to reduce the number of
19 young people who start to smoke, correct the public's misperceptions about tobacco, help
20 addicted smokers to quit, and reduce the premature death and disease caused by tobacco. In its
21 proposed remedies, the agreement addressed many significant problems that had been
22 documented in multiple scientific studies, and therefore were of concern to the public health

1 community and propounded the remedies that had been identified by public health experts and
2 the scientific literature as having the best evidence base for addressing these problems.

3 **Q: From your experience in working to reduce youth smoking and reduce disease**
4 **caused by smoking, how do you know that?**

5 A: Over the 25 years I have been involved in tobacco and health related matters I have had
6 the opportunity to witness and evaluate every prior action that has been taken to correct the
7 problems caused by the tobacco industry's behavior. I have had the opportunity to meet with
8 and consult the very best authorities in the field across a broad spectrum of areas and to follow
9 the published literature that documented both the problems we are facing and the merits and
10 impact of a wide variety of proposed solutions. I have also had the opportunity to interact with
11 the leadership of this nation's best and most knowledgeable public health organizations and to
12 participate in their review of the evidence and their conclusions about the most well documented
13 remedies.

14 I was asked to bring that expertise to the discussions that led to the June 1997 agreement.
15 The remedies in the 1997 agreement address specific tobacco industry practices and actions
16 which had been identified in a wide variety of authoritative sources as contributing to youth
17 tobacco use and misperceptions about tobacco as well as adult misperceptions about tobacco.
18 Even more important, the June 1997 agreement reflects the consensus view of public health
19 experts that to be effective any set of remedies must be comprehensive.

20 **Q: Why do you say that?**

21 A: Experience in the United States and elsewhere in the world has demonstrated time after
22 time, for example, that if a remedy focuses on just one or two or a small number of marketing
23 practices, no matter how egregious, we do not accomplish the real goal – decreasing the impact

1 of tobacco marketing on young people or decreasing the public's misperceptions about the health
2 effects of tobacco products. Solutions that focus unduly on one or two or a small number of
3 marketing practices fail to accomplish the more significant goal because the tobacco industry in
4 the past has simply switched its marketing dollar to other areas and found new marketing
5 techniques.

6 The challenge to correcting the problems caused by the tobacco industry's marketing, for
7 example, is to come up with a set of remedies that are broad enough to actually reduce the
8 impact of tobacco marketing on young people and to correct the public's misperceptions that
9 have been and are being fostered by the tobacco industry's behavior. This can only be done by a
10 comprehensive approach that combines restrictions on tobacco industry marketing with well
11 funded, sustained, independently operated public education tobacco prevention and cessation
12 campaigns. The 1997 agreement is important because it took a comprehensive approach both in
13 terms of its marketing restrictions and in terms of its funding of both tobacco prevention and
14 tobacco cessation programs.

15

16 **IV. THE 1998 MASTER SETTLEMENT AGREEMENT**

17

18 **Q: You are familiar with the Master Settlement Agreement, the agreement signed by a**
19 **number of major cigarette manufacturers and the States in 1998 to end the State attorney**
20 **general actions in exchange for certain actions on the part of the manufacturers, correct?**

21 A: Of course. When the McCain legislation failed in the Senate in 1998, the cigarette
22 manufacturers and a number of the attorneys general went back to the negotiating table and put
23 together the Master Settlement Agreement, or MSA. The MSA was eventually signed in

1 November 1998. Neither I nor any representative of the public health community participated
2 directly in those negotiations.

3 **Q: How did the conditions in 1998 leading up to the MSA differ from those leading up**
4 **to the 1997 Proposed Resolution?**

5 A: The situation had changed in a number of important respects. Four of the most
6 aggressive attorneys general with four of the strongest cases had already settled their litigation
7 with the industry and were no longer participating. Also, a substantial number of attorneys
8 general who had not brought lawsuits or whose interest was primarily monetary had joined the
9 negotiations. Any proposal that would have required legislation including any proposal to
10 provide any tobacco company protection against liability broader than the settlement of the
11 specific cases was not a part of the discussions. In 1998, several of the remaining attorneys
12 general with the strongest public health concerns also had concerns about their cases.

13 **Q: Are the two documents, the 1997 Proposed Resolution and the 1998 MSA, similar?**

14 A: No, there are important differences. The MSA is much more limited in the scope and
15 breadth of its public health-related provisions. The differences are not because any of the
16 problems had been solved in the interim, nor are they because the evidence about what remedies
17 would be most effective or what needed to be done had changed. With the failure of the McCain
18 legislation the State attorneys general could not offer the tobacco industry any form of relief
19 from liability that would require Congressional approval, and were therefore in a far weaker
20 bargaining position than they were it just a year earlier. There were other factors that altered the
21 State attorneys general's bargaining position that also led to the MSA being weaker and narrower
22 than the Proposed Resolution.

1 **Q: How did the MSA differ from the 1997 Proposed Resolution from a public health**
2 **perspective?**

3 A: The differences are numerous and affect almost every aspect of the two agreements.

4 **Q: Can you please tell the Court the major differences?**

5 A: Yes. And I will preface this by saying that the following is meant to be illustrative and
6 not comprehensive. The 1997 agreement provided \$1 billion in the first year increasing to \$1.5
7 billion a year, adjusted for inflation, for a sustained nationwide tobacco prevention and public
8 education program that would operate independent of the tobacco industry, which would have no
9 say over its content. These funds were independent of any funds the States received and were
10 scheduled to continue indefinitely. The MSA provided for \$300 million a year for public
11 education that was guaranteed for only five years and that contained limitations on how those
12 funds could be spent. There are no requirements in the MSA that the States spend any of their
13 settlement funds for these purposes.

14 The 1997 agreement also provided \$1 billion a year for the first four years and \$1.5
15 billion a year thereafter, adjusted for inflation, to fund smoking cessation programs for smokers.
16 The MSA did not specifically provide any funds for this purpose and did not require the states to
17 spend any funds for this purpose.

18 The advertising and marketing restrictions in the 1997 agreement were much more
19 extensive than those provided by the MSA. For example, the 1997 agreement restricted tobacco
20 ads in magazines with more than 15% or 2 million youth readers to black and white text only ads
21 because of the agreed upon impact on children of colorful ads with attractive images. No such
22 restriction is found in the MSA. The 1997 agreement limited the number, type, and location of
23 tobacco ads in the retail outlet because of concern about their impact on children. No such

1 provision is in the MSA. The 1997 agreement prohibited all outdoor tobacco signs because of
2 their impact on children. The MSA limited traditional tobacco billboards, but permitted outdoor
3 signs and outward facing signs on any building or property that sells tobacco products, including
4 those near schools and playgrounds.

5 The 1997 agreement eliminated all brand name sponsorships. The MSA curtailed the
6 number of such sponsorships, but continued to allow one brand name sponsorship per company
7 even if the sponsorship includes a series of events, such as a weekly racing series, that includes
8 very large audiences and is broadcast on national television.

9 The 1997 agreement recognized the impact of free giveaways on youth tobacco use and
10 banned offers of free non-tobacco gifts with the purchase of tobacco products. The MSA
11 prohibited tobacco brand name merchandise, like a Marlboro hat, but permits tobacco
12 manufacturers to give away free non-tobacco merchandise as an inducement to buy tobacco
13 products.

14 The 1997 agreement banned all human and cartoon images in tobacco ads. The MSA
15 banned only cartoon images.

16 The 1997 agreement included a provision to counter the public's misperception that
17 tobacco products that are marketed as "light" or "low tar" are less hazardous. The MSA contains
18 no such provision.

19 The 1997 agreement provided a comprehensive set of remedies to restrict youth access to
20 tobacco, such as requiring proof of age for tobacco purchases, limits on vending machines to
21 adult-only facilities, and a ban on self service retail displays. None of these issues is addressed
22 by the MSA. In addition, the 1997 agreement banned the sales of cigarettes in packs of less than
23 20; the MSA's temporary prohibition of these sales has expired. The 1997 agreement banned all

1 free sampling because of the reported ineffectiveness on bans that limited free sampling to adults
2 only; the MSA allows free sampling in adult-only facilities, and the tobacco companies have
3 interpreted this limitation loosely.

4 The 1997 agreement sought to insure the tobacco industry's good faith compliance with
5 both the letter and spirit of the agreement going forward by imposing a mandatory surcharge on
6 the tobacco companies if certain specified youth tobacco use reductions were not met. The
7 MSA contained no such provision.

8 There are other differences between the two agreements, but these are illustrative.

9 **Q: Did you support the MSA publicly when it was announced?**

10 A: Yes. I knew that the MSA was weaker than the Proposed Resolution; but I made a
11 decision that we would have the greatest impact on our public health goals by working with the
12 State attorneys general to vigorously enforce the MSA rather than pointing out the areas not
13 covered by the agreement. We did point out that the MSA was more limited than the 1997
14 agreement, but urged public health organizations around the country to work with their State
15 attorneys general to attempt to maximize the positive impact of the MSA.

16 **Q: The Defendants in this case have repeatedly argued that there is nothing remaining**
17 **to be done now that the MSA is in place. Do you agree?**

18 A: No, I disagree with that assertion. The MSA did limit certain tobacco industry marketing
19 practices that we were concerned about, but the experience since the MSA has demonstrated that
20 the MSA's gaps are very important. The MSA has not sharply curtailed overall youth exposure
21 to tobacco industry marketing or corrected the tobacco industry's continued misleading
22 marketing of its "light" and "low tar" products, nor has it resulted in the funding of the kind of
23 sustained tobacco prevention and cessation efforts that are necessary. In fact, from an historical

1 point of view and according to the Federal Trade Commission's annual reports on tobacco
2 marketing, many of the forms of marketing that were curtailed by the MSA were already being
3 de-emphasized by the tobacco industry before the MSA, and many of the forms of marketing that
4 were left untouched by the MSA were already receiving increased funding prior to the MSA.

5 **Q: Why is a comprehensive set of solutions so critical?**

6 A: Just as the behavior of the tobacco industry has to be looked at comprehensively, so do
7 the means to remedy the impact of that behavior. One of the weaknesses of the MSA is that it
8 assumed that by restricting a small number of specific marketing tools without looking at the
9 broader picture, it would result in a fundamental change in both the amount of tobacco industry
10 marketing to which youth are exposed and the exposure of youth to the types of themes and
11 images that have the greatest impact on them. The MSA permitted the cigarette manufacturers to
12 increase its marketing in any area not specifically covered by the MSA unless the States could
13 prove that a company was "targeting" children, an extremely difficult standard to meet because it
14 requires the States to prove what a tobacco company intends.

15 **Q: When you say there are certain components of the 1997 Proposed Resolution that**
16 **remain vitally important today, what specifically are you referring to?**

17 A: I am referring to youth access restrictions, marketing and advertising restrictions,
18 counter-advertising, cessation programs, a results-oriented youth smoking prevention program,
19 banning the use of misleading "lights" and "low tar" descriptors, and disclosure of industry
20 knowledge as to product risks. In 1997 our goal was a comprehensive plan to reduce the impact
21 of tobacco marketing on children. Each component of tobacco marketing must be looked at in
22 the context of the total picture, since it is the total marketing over the years before and after the
23 MSA that continues to reach children. Again, a comprehensive plan is what we were trying to

1 achieve in 1997, and the MSA, while it does place a number of important restrictions on the
2 companies, falls short in a number of key areas.

3

4 **V. CIGARETTE ADVERTISING / MARKETING**

5

6 **Q: Let's look at those areas one by one in more detail. When you assess what remains**
7 **to be done with respect to the marketing of cigarettes, and specifically brand advertising,**
8 **what is your overall goal?**

9 A: The MSA has not achieved the goal of eliminating the marketing tactics and industry
10 actions that continue to make tobacco products appealing to children, tactics that continue to
11 expose children to tobacco marketing, and continue to mislead children about import aspects of
12 the products.

13 **Q: What did the 1997 Proposed Resolution require as to the marketing of cigarettes?**

14 A: There were a number of provisions that I think are key today. As I am sure this court has
15 heard, young people take up tobacco use for a complex set of reasons. Examinations of the
16 impact of tobacco industry advertising on young people by prestigious organizations like the
17 Institute of Medicine of the National Academy of Sciences in 1994, the National Cancer Institute
18 in 2001, the FDA in 1995 and 1996 and the Surgeon General on multiple occasions have
19 examined the ways in which tobacco marketing impacts young people and interacts with the
20 behavioral needs and wants of adolescents. These experts as well as others have noted that it is
21 important to examine both the frequency with which young people see tobacco ads and the
22 themes and images projected by tobacco ads. They have also noted that young people are very
23 price sensitive and that marketing techniques that make cigarettes much less expensive or give a

1 youth the impression that they are getting something for nothing also contribute to youth tobacco
2 use. The June 1997 agreement contained marketing restrictions not contained in the MSA that
3 sought to address each of these areas.

4 The goal of the provisions in the Proposed Resolution that dealt with children was to
5 reduce youth exposure to cigarette marketing, both in terms of reducing the amount of marketing
6 to which young people were exposed and in terms of reducing their exposure to the type of
7 marketing that has been shown to have the greatest impact on young people. By its focus on
8 what marketing impacts young people rather than on whether the tobacco industry was
9 “targeting” young people, it was *outcome* oriented. Except for the specific restrictions, the
10 MSA, in contrast, is intent oriented in that it requires the states to prove that the *intent* of the
11 cigarette manufacturers was to target young people. Outcomes are measurable and testable. The
12 companies have claimed that they have never targeted young people in any ad ever.

13 **Q: Why are these distinctions important?**

14 A: The 1994 Report of the Institute of Medicine contains a lengthy discussion of how
15 tobacco advertising interacts with the cognitive development stage of young people. The report
16 concludes it is the appeal of advertising to the emotions and attitudes of young people that is the
17 key. This report also recognizes that image advertising takes advantage of the fact that
18 adolescents’ cognitive development has not reached full maturation, and that image advertising
19 plays on the adolescent short-term outlook and their desire to find tools to enhance their image of
20 themselves as rebellious, fiercely independent, risk-taking, and cool.

21 The 1994 Report also has a discussion of the psycho-social factors that impact tobacco
22 use among kids, factors which includes image advertising. The FDA rulemaking has a lengthy
23 discussion of the evidence that the FDA used to conclude that image advertising contributes to

1 tobacco use among children. We relied on these when we drafted the provisions of the 1997
2 Proposed Resolution. The 2000 Surgeon General's Report reaches the same conclusion, as does
3 NCI Monograph 14. A number of other individual studies also document the impact of tobacco
4 marketing and youth tobacco use. The fact that 80-90% of all children who smoke cigarettes
5 smoke the three most-heavily advertised brands is also instructive.

6 Lastly, these reports also found that when young people are bombarded with tobacco
7 marketing, it impacts their perception about how many people smoke, how many of their peers
8 smoke and whether smoking is still the societal norm in the United States. This misperception is
9 important because there has been found to be a correlation with a young person's belief that the
10 majority of their peers smoke with their likelihood of smoking. Thus, quantity as well as quality
11 of tobacco marketing exposure is relevant.

12 **Q: What did the manufacturers agree to as part of the 1997 Proposed Resolution with**
13 **respect to the exposure of young people to the type of themes and images identified by these**
14 **reports and other public health experts?**

15 A: The 1997 agreement took a broad look at where youth are exposed to these type of
16 marketing images and themes and systematically sought to reduce youth exposure to them.
17 Thus, it limited ads in magazines with more than 15% or more than 2 million youth readers to
18 black and white text only. It did the same thing in retail outlets because of the data about the
19 frequency with which teens go to convenience stores. It eliminated all outdoor signs because
20 outdoor signs heavily rely on broad imagery. And it banned all brand name sponsorships,
21 particularly because of the powerful impact of music, racing and rodeo sponsorships on young
22 people.

23 **Q: Does the MSA address image-based advertising?**

1 A: Not to the same degree. It does curtail the number of sponsorships, eliminates brand
2 name clothing apparel, curtails the number of outdoor signs and eliminates the use of cartoon
3 characters, but does not meaningfully address any of the areas I have noted above.

4 **Q: What impact has the MSA on the overall exposure of youth to tobacco marketing?**

5 A: The tobacco industry has actually increased its overall marketing expenditures since the
6 MSA and has done so in locations and ways that have been identified in the reports I noted above
7 as having an impact on children. I have not seen any significant evidence that children are
8 seeing substantially less tobacco marketing. Retail outlets are filled with ads and marketing
9 materials. Many stores have signs that face outdoors or are outdoors. Some companies continue
10 to market in magazines with large number of youth readers. Brown and Williamson continues to
11 associate its products with music events and even with the demise of the Winston sponsorship of
12 the NASCAR racing series, brand name sponsorship, such as the Marlboro race team, continues
13 to reach wide audiences that include many youth.

14 **Q: What have you seen in the years that have followed the MSA?**

15 A: Subsequent to the MSA, children continue to be exposed to the types of imagery and
16 marketing that has the most impact. For example, immediately after the MSA tobacco
17 marketing in magazines with large youth readership went up until the State Attorneys General
18 opened an investigation into the practice. A number of companies have now suspended or
19 curtailed their marketing in these magazines, but there is nothing to stop them from increasing
20 their presence in these magazines once the pressure and spotlight are off.

21 **Q: Where does advertising that has been identified as appealing to young people**
22 **continue?**

1 A: This type of advertising continues, among other locations, in retail outlets, on outdoor
2 signs on or near retail stores that sell tobacco, in sports stadiums where tobacco-sponsored events
3 or teams are participating, in direct mailings, and promotional offers. For example, R.J.
4 Reynolds has been advertising new sub-brands of Camels such as Mocha Mint and Winter
5 Toffee in *Rolling Stone*, *Glamour*, *Cosmopolitan*, and *Elle* magazines. The Marlboro cowboy is
6 still in retail in some places. Reynolds has used tattoos, rebellion, and sensual imagery in its
7 advertising of Camel and Winston. The Camel “Pleasure to Burn” campaign combines
8 sensuality with rebellion. Brown & Williamson has used image advertising for its Kool brand
9 emphasizing the hip hop image in its “Kool Mixx” and “Kool House of Menthol” campaigns.
10 Lorillard’s Newport “Pleasure” advertising utilizing images of healthy people having fun, risk
11 takers, and sports. Lorillard’s advertising of its Maverick brand has used “Maverick Dudes” to
12 feed off of the image of rebellious young men. The Philip Morris image advertising for Virginia
13 Slims “Find Your Voice” campaign, using imagery that associates smoking with freedom,
14 independence, and emancipation of minority populations is another example. So what we see is
15 that many, if not all, of the most popular brands still employ image advertising that studies show
16 have youth appeal.

17 **Q: Let’s talk about outdoor signs advertising cigarette brands. What did the 1997**

18 **Proposed Resolution say here?**

19 A: It banned all outdoor tobacco product advertising.

20 **Q: You know that the MSA has provisions restricting outdoor advertising, correct?**

21 A: Yes, but the MSA is not by any means a complete solution. The MSA restricts only
22 certain limited aspects of outdoor advertising. This restriction has reduced the ubiquity of
23 tobacco advertising outdoors and represents a solid step forward, but its impact is blunted by the

1 fact that it permits signs on the premises of stores even those close to schools. Its overall impact
2 is less clear because the FTC annual reports on tobacco industry marketing expenditures
3 indicated before 1998 that the tobacco industry was already moving away from billboard
4 advertising to other areas.

5 **Q: What is the impact of the MSA permitting outdoor signs on the premises of retail**
6 **outlets that sell cigarettes?**

7 A: There are hundreds of thousands of locations today where cigarettes are sold, including
8 grocery stores, convenience stores, and gas stations. Obviously a great number of children are
9 exposed to this. You have children either alone or with parents going to the cash register to buy,
10 say, a drink and a bag of potato chips and being greeted by a wall of tobacco advertising behind
11 the register and smaller displays on nearby counters. This is part of the ubiquitousness of the
12 marketing. This marketing serves as a vehicle to accomplish one of the youth-oriented goals
13 identified by the Institute of Medicine (IOM) in its 1994 report, that is, the use of the presence of
14 tobacco marketing to create the false impression among young people that smoking is the norm
15 and most people smoke.

16 **Q: We have heard testimony in this case from the CEO of Philip Morris that the**
17 **company has placed restrictions on retailers who want to participate in the company's**
18 **"Retail Leaders" merchandising program to sell Philip Morris brands. These steps involve**
19 **"consolidating" the point of sale marketing and contractually requiring compliance with**
20 **the MSA. Isn't this a step in the direction of reducing the volume of advertising that**
21 **children are exposed to?**

22 A: In evaluating the impact of any particular change, including those changes that Philip
23 Morris has talked about in its Retail Leaders program, you have to look at the overall reach and

1 impact of that company's marketing efforts in reaching young people and exposing young people
2 to the type of marketing that has the greatest impact on them, not just on any one aspect

3 Removing a particular type of advertising, even one that has been identified as effective
4 in reaching kids is a positive step forward only if it is accompanied by a broader overall
5 reduction in the marketing that reaches children. Curtailing specific forms of advertising at the
6 retail outlet, or placing cigarettes behind the counter, will have an impact only if it is not
7 countered with significant marketing in other ways and in other areas.

8 A number of the components of the Retail Leaders Program could represent a step in the
9 right direction if they were done in such a way as to actually reduce youth exposure to tobacco
10 marketing, but you cannot determine the overall marketing foot print of Philip Morris or any
11 other company by looking at such a program in isolation. For example, Philip Morris also
12 requires retailers to display the Marlboro packages very prominently and in the line of sight of
13 patrons as they are checking out. They have also heavily discounted Marlboro, the number one
14 selling brand among children and continue to foster the presence of the western rugged imagery
15 that helped make Marlboro the cigarette smoked by more young people than any other cigarette.
16 If we are looking for a comprehensive plan to address the problems of advertising and youth, a
17 plan to reduce youth exposure, we have to obviously look far beyond what Philip Morris is doing
18 with its Retail Leaders program.

19 **Q: Another means the cigarette manufacturers employ to advertise their products is**
20 **magazine advertising. What restrictions or prohibitions does the MSA require as far as**
21 **print advertising?**

22 A: There are none.

1 **Q: What remains to be done in the way of magazine advertising to further the goals of**
2 **preventing and restraining future misconduct by the cigarette manufacturers?**

3 A: The 1997 proposal and the proposed FDA rule on magazine advertising provide good
4 benchmarks. I have already noted that they would prohibit pictures and colorful image
5 advertising in magazines read by large numbers of young people. In evaluating youth readership,
6 it is important to use industry standard data generated for measuring youth readership by a
7 reliable, third-party data collector as to what percentage of a magazine's readership is youth.
8 The names that come to mind of firms that measure readership data are MRI and Simmons. The
9 companies cannot be permitted to rely on a magazine's or a publisher's own figures of its youth
10 readership, because these estimations are biased and have proven wrong in the past. In addition,
11 we have to look at readership data, not subscribership data, if we are trying to get the best
12 estimate of how many young people are exposed to the advertising in a particular magazine,
13 because few children subscribe to magazines, even those that are heavily read by children. For
14 these reasons, the cigarette manufactures must be prohibited from advertising in magazines for
15 which they have no independent data.

16 **Q: How do you define magazines with significant youth readership?**

17 A: The FDA defined this as readership exceeding either 15% of total readership or 2 million
18 youth readers, with these numbers based on independent, verifiable, third party readership data.
19 While this 15% figure is conservative, given the U.S. population, I am comfortable with the FDA
20 definition.

21 **Q: What other major method do cigarette manufacturers use to get their brand names**
22 **in front of a significant segment of the youth population?**

1 A: We have to look at brand name sponsorships, that is, when the companies pay third
2 parties such as racing teams and concert promoters to place their brands in places where the
3 audiences and press will see them. Historically, the tobacco industry has used brand name
4 sponsorships to get cigarette brands in front of large music and sports audiences.

5 **Q: Did the 1997 Proposed Resolution look at sponsorships?**

6 A: Yes, it banned them outright.

7 **Q: What have you seen in the years following the MSA with respect to sponsorships?**

8 A: The MSA has allowed the industry in this country and overseas to continue to use brand
9 name sponsorships to gain exposure to audiences that include large numbers of children. We
10 still have music sponsorships and racing team sponsorships in the United States and overseas.
11 The fact that the MSA sponsorship limitation continues to permit each manufacturer a
12 sponsorship of racing series whose races can occur every week before audiences that can include
13 100,000 people and are broadcast nationwide is a serious loophole.

14 **Q: Why is that?**

15 A: It is important to understand that race car sponsorships do not start and finish the minute
16 the race starts and finishes. Brand name signs are plastered around racetrack and arenas, and
17 kids are exposed to the imagery often for days before and after the event. Therefore, while the
18 MSA sponsorship limitation has resulted in fewer sponsorships, it does not adequately deal with
19 this very powerful marketing mechanism.

20 **Q: How do international brand name sponsorships make the situation more difficult?**

21 A: International brand name sponsorships impact the United States via a number of routes,
22 including the media and the internet. Philip Morris in particular is the largest presence at the

1 international Formula One car racing circuit. Formula One is one of the most popular sports
2 series in the entire world, and is broadcast back here in the United States.

3 **Q: Yes, but Philip Morris claims that the sponsorship of its Formula One team is**
4 **technically paid by Philip Morris International, an affiliate who is not a signatory to the**
5 **MSA.**

6 A: As a technical matter, this is true, and illustrates out one of the loop holes in the MSA
7 that Philip Morris has been able to exploit. The Philip Morris Formula One sponsorship enables
8 the companies to get the Marlboro brand in front of a worldwide audience, including an audience
9 here in the United States. Viewers see only the Marlboro logos all over the race cars and
10 uniforms. The fact is that the source of the Marlboro Formula One racing team sponsorship is
11 indistinguishable to the American viewer from the source of Philip Morris's other brand name
12 racing sponsorship, the Marlboro Indy Car racing sponsorship. Altria, the parent of both Philip
13 Morris USA and Philip Morris International can control how the Marlboro logo is used by either
14 company.

15 **Q: I want to show you a series of documents related to Formula One racing and the**
16 **Philip Morris sponsorship. These are marked as U.S. Exhibits 93263, 93250, 92110 93339,**
17 **93340, 93341, 93342, 89461, 89462, 93256, 93274, 93276, and 93290? Have you seen these**
18 **documents before?**

19 A: Yes.

20 **Q: What do these exhibits show?**

21 A: These exhibits demonstrate how the international Philip Morris Formula One sponsorship
22 impacts audiences and viewers in the United States, particularly when the races are broadcast in

1 the United States and when photographs of the Marlboro vehicles are printed in American
2 magazines and newspapers.

3 **Q: You mentioned that the MSA doesn't do anything with regard to free give-aways of**
4 **non-tobacco items with the purchase of cigarettes. Why is this important?**

5 A: The Institute of Medicine, the FDA and others have found that promises of non-tobacco
6 gear with the purchase of a tobacco product has a significant influence on young people. The
7 studies show young people love to get free "stuff" and it makes the tobacco product seem less
8 expensive to them. It was for that reason that the FDA proposed to ban offers of non-tobacco
9 items or gifts based on a proof of purchase of a tobacco product and why this provision was
10 incorporated into the 1997 agreement. This restriction is even more important today because the
11 FTC 2002 report indicates that this is an area of dramatically increased tobacco industry
12 spending since the MSA.

13 **Q: We have looked at many marketing mechanisms that the industry uses to advertise**
14 **its cigarette brands. From your experience in working to reduce youth smoking and**
15 **reduce disease caused by smoking, what conclusions have you drawn as to the remedies this**
16 **Court should consider with respect to the marketing of cigarettes?**

17 A: The 1997 Proposed Resolution is a good starting point. All of the evidence indicates that
18 you have to take a big picture, comprehensive look at the impact of tobacco marketing and what
19 is necessary to prevent future targeting of children and to curtail the impact on young people.
20 The evidence indicates that it is a mistake to look at one or a small number of specific marketing
21 techniques or restrictions, if the real goal is to reducing overall youth exposure to the imagery
22 and marketing mechanisms that experts have identified as having the greatest impact on children
23 the experience in the United States and elsewhere.

1 **Q: Why?**

2 A: History and the more current experience with the MSA indicate that when the focus is
3 unduly on a small number of specific marketing techniques, the industry simply switches its
4 marketing dollars to the other mechanisms and tools that reach children and have the same
5 impact on children. What this means is that in order to be effective in actually reducing youth
6 exposure to the marketing tools that the tobacco industry uses and will continue to use to put
7 their product before kids and to maintain the images that have made cigarettes attractive to
8 children, you need a comprehensive solution.

9 **Q: Are restrictions on the industry's marketing techniques sufficient?**

10 A: No. It is also vitally important that each solution include a mechanism to monitor
11 tobacco industry marketing on a continuing basis, along with a mechanism for adjusting the
12 solution if changes in tobacco industry behavior result in the continuing exposure of young
13 people to that marketing and to images that have made and continue to make the product so
14 appealing to kids.

15 **Q: Can you tie this back to the 1997 Proposed Resolution?**

16 A: Yes. The 1997 agreement is instructive. The experience subsequent to the MSA
17 indicates each of the problem areas identified in 1997 that were not addressed by the MSA
18 continue to be a problem today. The 1997 agreement sought to restrict as many of the forms of
19 tobacco industry marketing that impacts young people as possible in order to accomplish the
20 ultimate goal, reducing actual youth exposure. The 1997 agreement also recognized the
21 importance of creating an ongoing mechanism for monitoring ongoing tobacco industry
22 marketing. While it gave this authority to the FDA, there is no reason why the same authority
23 could not be given to a court monitor. I do not know what specific remedies the United States

1 will ask for in this case or what the United States believes is legally permissible, but specific
2 solutions omitted from the MSA include the following:

- 3 • Restricting the advertising in youth-oriented magazines and newspapers to text-only;
- 4 • Eliminating brand name sponsorships;
- 5 • Eliminating all outdoor signs, including all signs that face outwards in enclosed areas
6 such as stores;
- 7 • Eliminating the use of humans and depictions of humans;
- 8 • Banning offers and giveaways of non-tobacco items or gifts that are linked to the
9 purchase of tobacco, whether they bear a brand name or not;
- 10 • At retail, removing all cigarette advertising from the line of sight of children, in close
11 proximity of candy and other common child-purchase items, and check out counters.
- 12 • Also at retail, limiting in-store advertising to black and white text only and limiting the
13 number of advertisements in the outlets.

14 **Q: What will be the measure of the success of any subsequent restrictions on the**
15 **marketing practices of the cigarette manufacturers?**

16 A: As important as each of these restrictions is, it is equally important not to lose sight of the
17 big picture. The measure of success is not going to be whether the industry has complied with
18 any particular restriction, it is going to be whether the restriction results in a measurable decline
19 in youth exposure to tobacco marketing and youth use of tobacco. This is the test.

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21
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23

1 **VI. THE NEED FOR INDEPENDENT COUNTER-MARKETING**

2

3 **Q: We have looked at a number of ways that the cigarette manufacturers still use to**
4 **advertise their brands and their brand images. Is counter-advertising, or counter-**
5 **marketing, an important component of a comprehensive plan to combat youth smoking?**

6 A: Yes. Again, you cannot just focus on one or two or three marketing changes and expect
7 these changes to deter the tobacco industry and to have an impact in youth smoking and
8 perceptions.

9 **Q: First of all, what do you mean by counter-marketing?**

10 A: By counter-marketing I mean a program including mass media and other avenues to
11 educate the public with a stated goal of discouraging and deglamorizing the use of tobacco
12 products, particularly among youth. The CDC defines the term more broadly as “the use of
13 commercial marketing tactics to reduce the prevalence of tobacco use.” It should not be limited
14 to mass media, but should also include funding for community based out reach efforts if
15 possible.

16 **Q: Why is counter-marketing so important as part of a comprehensive program to**
17 **reduce youth smoking?**

18 A: Again, you have to look at counter-marketing as part of a comprehensive plan to change
19 knowledge, perceptions and behavior. We are trying to counter the messages from the cigarette
20 companies, messages that they have been making for decades by numerous means and billions of
21 dollars, continue to make today, and will continue to make no matter what restrictions the court
22 places on tobacco marketing. Counter-marketing is important because we have such a vibrant
23 First Amendment, and because the manufacturers are spending more and more on the marketing

1 of their products. The reality is that the cigarette manufacturers will likely have means to
2 advertise their products in ways that will impact youth going forward. For this reason we need a
3 counter-balance, some way to educate the public and change perceptions. In my mind, the
4 resources to carry out an effective counter-marketing campaign are even more important than
5 advertising restrictions on the cigarette companies.

6 **Q: A number of states have executed and deployed their own counter-advertising**
7 **initiatives, correct?**

8 A: Yes.

9 **Q: Have these programs proven effective?**

10 A: Yes. We know from a growing body of studies that certain counter-advertising
11 campaigns work as part of a comprehensive tobacco education program. We see this in studies
12 from California, Florida, Massachusetts, and Oregon. More recent studies have reached the
13 same conclusion with regard to counter marketing as part of programs in Maine, Ohio, Indiana,
14 Washington, and Mississippi. We also know what doesn't work as part of an effective counter
15 marketing campaign. Simply telling kids that smoking causes diseases later in life like cancer
16 and emphysema has little impact on them. Telling kids that they shouldn't smoke because it is
17 an adult behavior doesn't work and may have a counter productive impact because it is almost
18 like issuing a challenge to kids about how to be adult and cool and break the rules at the same
19 time.

20 While there is no single effective counter-marketing message, experience and studies
21 provide guiding principles for the types of messages and themes that have been most effective.
22 Generally, messages that are emotional, and take advantage of young people's rebellious nature
23 and desire for independence and sexual and social success are most successful. After all, these

1 are also the themes that have been most successful in making cigarettes appealing to children.
2 Another message that evidence has demonstrated has proven effective is to show children how
3 the industry has manipulated them or failed to tell them the whole truth about their products.
4 This theme appeals to both a young person's quest for independence and to their adolescent
5 desire to express their independence from outside influences. What is most important to
6 understand is that there already exists a substantial and growing science base that demonstrates
7 the efficacy of counter marketing, particularly when part of a broader effort to educate and
8 inform and counter the marketing efforts of the tobacco industry. The studies of the successes in
9 a number of states have been peer reviewed. Other studies have not been peer reviewed but have
10 been published and reach consistent results. The CDC, the Surgeon General, an expert
11 marketing panel convened by the Columbia University School of Public Health, and other
12 experts have all found the data reliable and persuasive.

13 **Q: Of course you are aware that the MSA set a program to create and run counter-**
14 **marketing under the American Legacy Foundation, correct?**

15 A: Yes. I am familiar with the American Legacy Foundation's Truth Campaign. This
16 youth-oriented advertising campaign has been recognized by virtually everyone in the public
17 health community as highly successful in reaching young people with messages and approaches
18 that take into account the best recommendations on how to conduct marketing targeted at
19 children at risk for smoking. Several studies have documented the impact of the Truth Campaign
20 on the attitudes of young people and on overall smoking behavior.

21 **Q: While the Legacy counter-marketing program has been successful in reaching**
22 **children with an effective message, what hurdles does Legacy face going forward?**

1 A: The problem is that the funding for the Truth Campaign has been sharply curtailed as a
2 result of the provision in the MSA that permitted the tobacco companies to stop funding the
3 public education component of the agreement if the market share of the Participating
4 Manufacturers drops below a certain level. Thus, it is highly likely that unless new funding is
5 found, the public education component of the American Legacy Foundation and its ability to
6 effectively reach large number of children over the long run will be greatly diminished.

7 The other problem impacting the ability of Legacy to effectively reach large number of
8 at-risk youth are the ongoing attacks from several members of the tobacco industry to challenge
9 Truth Campaign ads that are factually truthful, as violations of the MSA prohibition against
10 advertisements that “vilify.”

11 **Q: From your perspective what has been the impact of the vilification clause in**
12 **restricting the type of ads that can be conducted under the MSA?**

13 A: The experience with the vilification clause demonstrates why it is problematic. The
14 tobacco industry has used it to challenge truthful ads that it does not like, with no clear line of
15 demarcation. Thus, it has been used to challenge ads that appear to be highly effective and to
16 take into account the best marketing advice for how to reach at-risk youth. Given the manner in
17 which the industry has used the vilification clause to challenge edgy but truthful ads, it
18 demonstrates that this clause has seriously hamstrung the ability of Legacy to carry out its
19 mandate. Consequently it makes sense that the only restriction that ought to be placed on
20 counter-marketing campaigns should be the traditional rules governing any other advertising,
21 namely libel, slander, and false advertising.

22 **Q: The cigarette companies often say they fund their own youth smoking counter-**
23 **advertising. Are you generally aware of these company programs?**

1 A: Yes.

2 **Q: Why not just continue to allow the cigarette manufacturers to fund and execute**
3 **advertising aimed at curbing youth smoking?**

4 A: The industry has said for decades that they have their own youth anti-smoking programs,
5 but every independent study of these programs has shown that they have no impact on reducing
6 tobacco use among children. One study, in fact, has indicated that the Philip Morris “Think
7 Don’t Smoke” campaign may have increased the risk and increased the susceptibility of at-risk
8 youth to tobacco use. This is a question that can only be answered by looking at the forty-year
9 history of the tobacco industry’s assertions that it does not want kids to smoke, repeated
10 promises not to market to children, and repeated claims that they were funding youth anti-
11 smoking programs because they did not want children to smoke. If you don’t review the history,
12 there is a natural tendency to look at the claims that the tobacco industry is making today about
13 the fact that they do not want children to smoke as indicating that they have turned over a new
14 leaf, but unfortunately, it is the same tune they have been singing for forty years. The same is
15 true with the programs they call youth tobacco prevention programs. These claims, and the
16 institution of tobacco industry funded youth programs, are something we have seen before on
17 multiple occasions.

18 **Q: Explain what you mean by that.**

19 A: Going back to the 1960s the industry announced with great fanfare that it was enacting its
20 advertising code. In the 1980s the industry announced it was launching several youth anti-
21 smoking programs. One was called “Helping Youth Decide”; another was called “Helping
22 Youth Say No.” There is no evidence that these programs ever had a positive effect in reducing
23 youth tobacco use. And one study found that the “HYSN” program was more likely to

1 encourage youth smoking in its suggestion was an adult activity. In the early 1990s the tobacco
2 industry launched several programs that it claimed were designed to reduce youth tobacco use.
3 One was called “It’s the Law”; the other was called “Action Against Access.” Later in the 1990s
4 the “We Card” program was loudly announced. Once again, there is no published study showing
5 that any of these programs have actually reduced youth tobacco use or illegal sales to children.

6 **Q: So what we have really seen is that the industry has played the same tune over and**
7 **over again, right?**

8 A: Yes. At some point we have to learn from history. The tobacco industry has claimed
9 repeatedly that it does not want children to smoke and that it was prepared to run anti-smoking
10 programs. The only public education campaigns that have ever been shown to be successful
11 have been operated independently of the industry.

12 **Q: Do you have any specific example of flawed industry youth smoking advertising?**

13 A: Yes. In recent years, Philip Morris, Lorillard, and R.J. Reynolds have each run
14 campaigns they claim to be youth anti-smoking campaigns. I have yet to see a single published
15 study documenting that any of these campaigns has resulted in a reduction in youth tobacco use
16 or a change in the attitudes of at-risk youth. In addition, campaigns like the Lorillard “Tobacco
17 is Whacko if You’re a Teen” on their face run contrary to every recommendation of public health
18 experts on how to impact use, because it portrays smoking as an adult activity that children are
19 too immature to engage in.

20 **Q: Are there other ways in which the Lorillard “Tobacco is Whacko if You’re a Teen”**
21 **campaign may have inhibited efforts to reduce youth tobacco use?**

22 A: Yes. When Lorillard contracted with ESPN to run the “Whacko” campaign as part of the
23 2003 Winter X Games in Colorado, Lorillard included a provision in the contract that prohibited

1 ESPN from accepting any other youth anti-smoking messages as part of that youth-oriented
2 sporting event. Thus when a Colorado-based youth organization sought permission to conduct
3 its own youth anti-smoking campaign as part of that event, ESPN turned them down.

4 Similarly, in 2002, Lorillard entered into an agreement with the National Basketball
5 Association (NBA) that would have prohibited independent youth anti-smoking campaigns as
6 part of the NBA-sponsored “Hoop It Up” tournament. In these instances, Lorillard actually used
7 the existence of its “Tobacco is Whacko” campaign as a barrier to independent youth anti-
8 smoking campaigns at popular youth events.

9 **Q: What other issues can counter-marketing address as part of a comprehensive**
10 **program to educate the public?**

11 A: There are a number of areas in addition to youth smoking. For example, there is a need
12 for public education in the areas of secondhand smoke and the use of “Light” and “Low Tar”
13 products. If we are going to charge an organization with a counter-marketing campaign to
14 counter the public’s misperceptions and better warn the American public, it would be more
15 effective if all of these elements are present.

16

17 ***VII. YOUTH ACCESS TO CIGARETTES***

18

19 **Q: What restrictions does the MSA place on the manufacturers with respect to youth**
20 **access to cigarettes?**

21 A: The MSA is silent on access.

22 **Q: What do we see today as far as how youth get access to cigarettes?**

1 A: Whether cigarettes are sold via self-service or behind the counter varies widely across the
2 country. Survey data shows in many states high levels of illegal sales of cigarettes to young
3 people. This is prompted by continued existence of self-service in some areas, weak
4 enforcement in other areas, and the lack of a consistent rule requiring government-issued
5 identification.

6 **Q: Several witnesses for Defendants in this case have spoken about their support of the**
7 **“We Card” program at retail. Doesn’t the “We Card” program solve the problem of youth**
8 **access to cigarettes?**

9 A: There is no evidence that the “We Card” program decreases youth sales or increases
10 retailer compliance with prohibitions on selling to youth. At least one study of the “We Card”
11 program found that it had no impact on illegal sales to youth. Unfortunately, the “We Card”
12 program as well as other industry sponsored programs have on more than one occasion been
13 used as the rationale for *not* funding a more effective government sponsored program. This is
14 important because the one factor that has consistently shown up in studies assessing the impact
15 on the frequency of illegal sales to youth is the level and frequency of enforcement.

16 **Q: What types of possible access restrictions are out there for this Court to consider?**

17 A: Progress on youth access to tobacco can be made by requiring that cigarettes be kept
18 behind the counter, eliminating vending machines, banning free sampling, and forbidding the
19 companies from selling its products through any retailer that does not adhere to a set of rules
20 restricting access.

21 **Q: What do we know about the effectiveness of youth access programs?**

1 A: We know that youth access restrictions alone have very little impact. However, as part of
2 a comprehensive program these restrictions do contribute to a reduction in smoking among
3 youth.

4

5 **VIII. INDUSTRY INCENTIVES TO REDUCE YOUTH SMOKING**

6

7 **Q: Mr. Myers, we have talked about a number of ways to meaningfully reduce youth**
8 **smoking as part of a broader comprehensive program. Are there any other components of**
9 **a comprehensive program that we have not addressed?**

10 A: Yes. One fundamental problem is that in the past the industry has always come up with
11 new means to thwart any restrictions, whether voluntary or forced on them. After years of
12 promises by the industry that have not resulted in meaningful change, it is time to recognize that
13 the industry will commit to a serious effort not to make their products appealing or accessible to
14 children only if they will make more money by not selling tobacco products to children than they
15 will if they sell tobacco products to children. Since any business seeks to maximize its profit for
16 its shareholders, the court should consider a remedy that builds in an adequate economic
17 incentive for each company to avoid looking for ways to circumvent the restrictions imposed by
18 the court. We need to come up with a means to change the cigarette manufacturers' incentives,
19 to make it more profitable to reduce youth smoking. In other words, we have to have a
20 mechanism to align the companies' economic interest with the stated overall goal of a
21 comprehensive remedial program.

22 **Q: Is this a novel idea?**

1 A: No. I was a part of the small group who crafted this type of incentive in the 1997
2 Proposed Resolution. Today tobacco companies have a powerful economic incentive to sell to
3 young people. 80 to 90% of all long term smokers start as children and smokers have
4 significant brand loyalty. In order to make it unprofitable for a company to compete for the
5 youth market, the economic incentive needs to take into account the lifetime of profit it makes
6 off of a new smoker who may smoke for decades. So we tried to create a plan which would
7 require the companies to pay a fine every year that youth smoking reduction targets were not
8 met. This was a novel idea at the time of the 1997 agreement since we were penalizing
9 manufacturers of products, not the retailers.

10 **Q: Was the specific way this provision was crafted in the 1997 agreement criticized**
11 **once the agreement was announced?**

12 A: Yes, and I came to agree with the criticism.

13 **Q: What is a more effective approach as far as providing the companies incentives to**
14 **reduce youth smoking, that is, aligning their economic incentives of the companies with set**
15 **reductions in youth smoking?**

16 A: Let me provide some context for my answer. Almost immediately upon the release of the
17 1997 agreement, serious flaws were pointed out in what we then called the “look back”
18 provision. The first criticism correctly noted that by imposing the penalty only on an industry-
19 wide basis, as determined by youth market share, it did not provide adequate disincentives for
20 specific companies whose brands did not meet youth smoking reduction targets. As a example,
21 Philip Morris would get 100% of the profit from a new Marlboro smoker, but would be
22 responsible for a much smaller percentage of the penalty based on Marlboro’s youth market
23 share.

1 In addition, experts calculated that the overall size of the assessment wasn't large enough
2 to provide an adequate economic incentive from the tobacco companies to exercise their
3 maximum effort not to encourage tobacco use among children. The point is that the economic
4 incentives, in this case the avoidance of serious financial penalties, have to be large enough so
5 that when the corporate officers report to the board and shareholder as to how they maximize
6 profit, it is in their economic interest for children not to be smoking, it is in their interest to meet
7 set annual reductions in youth smoking.

8

9 **IX. LIGHTS AND LOW TAR MARKETING**

10

11 **Q: Another area addressed by the 1997 Proposed Resolution was the cigarette**
12 **manufacturers' use of terms such as "Lights," "Low Tar," and "Ultra-Lights" to describe**
13 **their brands, correct?**

14 A: That's right. This is a very serious problem. As far back as the 1981 FTC Staff Report
15 that I supervised, the survey evidence indicated that a large percentage of smokers believed that
16 it had been proven that "light" and "low tar" cigarettes are less hazardous than other cigarettes.
17 Survey data cited by the National Cancer Institute in its 2001 Monograph that contained a
18 comprehensive examination of the health risks associated with cigarettes marketed as "light,"
19 "low tar," or "mild" indicates that consumers continue to falsely believe that these cigarettes
20 have been proven to be less hazardous than other cigarettes. Survey data published even more
21 recently indicates that the public continues to be unaware of the consensus among public health
22 experts in the United States that these products are not less hazardous than other tobacco
23 products. In a very practical sense, consumers have been misled into believing that these

1 products are safer than other products when the scientific evidence indicates that they are not
2 safer.

3 **Q: What do you mean by consumers have been misled?**

4 A: For decades the tobacco companies have marketed these products in ways that have
5 contributed to the public's belief that these products have been proven to be safer than other
6 products. The terms themselves have contributed to these impressions, as have the marketing
7 themes that have emphasized that certain brands have lower levels of tar on machine tests than
8 other brands.

9 **Q: But isn't the government itself partly responsible?**

10 A: I believe the tobacco industry has unfairly attempted to shift responsibility to the
11 government by wrongly asserting that the government made them come up with a tar and
12 nicotine testing system and then publish the machine-generated tar and nicotine results, and
13 wrongly asserting that the FTC fully understood that its testing system did not predict the amount
14 of tar and nicotine smokers actually received.

15 Let me address the second concern first because it is an issue I examined when I was at
16 the FTC and have followed closely. From the beginning, the FTC acknowledged that the FTC
17 testing method did not provide ratings that represented either an average or usual dosage of tar
18 and nicotine but indicated that such ratings would allow consumers to compare brands based
19 upon testing under a controlled system. However, the FTC did not contemplate and was not
20 aware that tobacco companies could or would manipulate or design cigarettes which would
21 produce lower tar and nicotine yields when tested on the machine while permitting consumers to
22 extract higher levels of tar and nicotine or delivering higher levels of tar and nicotine to
23 consumers in ways that could not be detected by the testing method.

1 As reflected in the position that the FTC took in the case against Brown and Williamson
2 concerning Barclay cigarettes that I worked on, while the FTC knew the machine tests did not
3 accurately predict the exact amount of tar and nicotine a consumer receives because different
4 consumers smoke differently, they did believe that the tests gave consumers relevant information
5 that would enable consumers to judge which products would result in them receiving more tar
6 and which ones would result in them receiving less tar. As reflected in the findings in the
7 National Cancer Institute Monograph 13, this perception is inaccurate and the FTC testing
8 system does not provide a reliable predictor of which cigarettes provide consumers more or less
9 tar, let alone predict the relative tar delivery ratio when actually consumed by a smoker.

10 **Q: But wasn't it the FTC that demanded that tobacco companies disclose tar and**
11 **nicotine numbers?**

12 A: That too is an inaccurate statement of what occurred. It was the tobacco companies who
13 for decades wanted to use tar and nicotine figures to promote their products and the FTC who
14 was constantly attempting to find ways to prevent them from using tar and nicotine claims from
15 misleading consumers.

16 On several occasions in the 1950's the FTC challenged tar and nicotine claims made by
17 various tobacco companies. In 1960, Earl Kintner, then Chairman of the FTC, issued a statement
18 which described an agreement by the tobacco companies that there would be no more tar and
19 nicotine level claims made in cigarette advertising because the FTC perceived those claims to be
20 deceptive. In 1966, the FTC issued a press release stating only that a statement of tar and
21 nicotine content expressed in milligrams of mainstream smoke of a cigarette consistent with the
22 FTC testing method would not be a violation of any provision of law administered by the
23 Commission. Falsely believing that it had come up with a testing system that gave consumers

1 reliable information about the relative tar delivery of different products, in 1970, the FTC
2 proposed a trade regulation rule that would have required disclosure of tar and nicotine ratings in
3 cigarette advertising. That rulemaking was suspended when eight cigarette manufacturers agreed
4 to include the ratings in advertising. The FTC was not a party to that agreement.

5 Thus, no administrative rule was ever promulgated, and the system of placing tar and
6 nicotine ratings in advertising was never established pursuant to law or regulation. Rather, the
7 FTC undertook to conduct testing and the industry disclosed these numbers voluntarily. This
8 fact was referred to in an opinion rendered by the Honorable Gerard Gessell of the United States
9 District Court for the District of Columbia, in which he stated that the voluntary agreement has
10 “no legal effect.” Federal Trade Comm’n v. Brown & Williamson Tobacco Corp., 580 F.Supp.
11 981, 986 (D.D.C. 1983) *aff’d* in part, 778 F2d 35 (D.C. Cir. 1985).

12 **Q: What are some possible solutions in the area of low tar products to remedy what**
13 **Defendants have done?**

14 A: Consumers are conditioned to believe that a product with less of something harmful is
15 itself less harmful. As the result of literally decades of marketing, consumers today falsely
16 believe that calling a product “light” or “low tar” translates into the ingestion of less tar and
17 fewer carcinogens. Given that these messages have been communicated powerfully with
18 imagery as well as with specific themes for so long, it appears that the only effective way to
19 begin to correct this inaccurate perception is to eliminate the use of these terms altogether and to
20 simultaneously fund a public education campaign to address the issue.

21 **Q: Isn’t a simple warning that different smokers may smoke the same cigarette**
22 **differently enough of a warning to advise consumers of what may happen if they smoke a**
23 **“Light” or “Low Tar” cigarette?**

1 A: No.

2 **Q: Why not?**

3 A: Tobacco industry marketing of these products has been promoting themes of safety for
4 decades. These misperceptions are deeply ingrained in the minds of smokers. Studies have
5 indicated that disclaimers are inadequate to correct these types of perceptions once they have
6 been deeply ingrained and cannot compete against the ongoing impact of the direct advertising
7 for these products.

8 **Q: What did the 1997 Proposed Resolution provide with respect to the use of these**
9 **descriptors?**

10 A: The 1997 Proposed Resolution would have permitted the continued use of these
11 descriptors with a disclaimer, but this is an instance where information that has become available
12 since 1997 demonstrates that the solution in the 1997 agreement is inadequate.

13

14 **X. CESSATION PROGRAM**

15

16 **Q: One final area I want to talk about is the funding of a smoking cessation program.**
17 **What did the 1997 Proposed Resolution state with respect to cessation?**

18 A: The 1997 agreement provided \$1 billion a year for the first four years and \$1.5 billion a
19 year thereafter, adjusted for inflation, to fund smoking cessation programs for smokers who want
20 to quit. In contrast, the MSA did not devote one penny or even one word to cessation.

21 **Q: Why is the funding of a cessation program an important part of a comprehensive**
22 **plan to reduce the harms caused by smoking?**

1 A: Tobacco contains nicotine, a highly addictive substance and many tobacco users are
2 addicted. The tobacco industry has often in the past claimed that tobacco use is not addictive,
3 claims that are not offset by any acknowledgement on an website. The tobacco industry could
4 have warned and could still warn consumers about the addictive nature of its products, by adding
5 an addiction warning, but it does not. Only one company did so for a brief time- Liggett – but
6 when Philip Morris bought the brands on which the addiction warning appeared, Philip Morris
7 removed the warning.

8 In the United States today we have 45 to 50 million smokers. According to the CDC,
9 every day another 2000 children become regular smokers. Many of them will become addicted
10 before they are old enough to purchase tobacco products legally. New smokers who will need
11 help quitting are in part a result of the tobacco industry’s continued marketing and continued
12 failure to make adequate disclosures to potential smokers. In addition, many smokers are
13 dissuaded from quitting by the continued marketing of products as “light” and “low tar” because
14 consumers switch rather than quit, falsely believing that low tar cigarettes reduce their risk of
15 disease. While most smokers who quit do so on their own, today we have the tools to help
16 smokers quit that can significantly improve their chance of success.

17 **Q: How will the funding and establishment of a cessation program prevent and restrain**
18 **the future wrongful activities of the cigarette manufacturers?**

19 A: Many new smokers are as a result of industry marketing and many smokers do not quit
20 because they falsely believe that “light’ and ”low tar” cigarettes provide them a way to reduce
21 their risk of disease without quitting. Many smokers report that they would like to quit not long
22 after they become regular addicted smokers. In fact, studies show that seventy percent of
23 smokers report that they want to quit. If the tobacco industry were required to help fund a

1 program to help this pool of smokers to quit, it would serve as a powerful disincentive for the
2 industry to try to attract these consumers as teens to smoke, or to try to keep them smoking by
3 the use of false promises of safety.

4

5 ***XI. CONCLUDING OBSERVATIONS***

6

7 **Q: Mr. Myers, you are aware that this Court may have to craft an order to bind the**
8 **actions of the Defendants going forward. You have talked about a number of specific**
9 **provisions of the 1997 agreement, contrasted them to what is missing in the MSA, and**
10 **discussed some ongoing problems. What do you want the Court to take away from your**
11 **testimony?**

12 A: I think there are several equally important observations from what has happened since
13 the MSA that relate in part to the proposed remedies in the 1997 agreement.

14 First, any remedial action must be looked at in its entirety as a package with overarching
15 goals clearly articulated. For example, the ongoing impact of continued tobacco marketing
16 remains a serious problem if we are concerned about youth tobacco use. Thus, in evaluating any
17 remedy, it is essential to go beyond asking whether a particular marketing technique impacts
18 children to asking what combination of marketing restrictions and counter-marketing campaigns
19 are necessary to bring about the desired reduction in youth exposure to marketing that makes
20 tobacco products appealing to them.

21 Experience demonstrates that piecemeal solutions, like a small number of individual
22 marketing restrictions by themselves, will only result in the increased use of the remaining
23 marketing tools if too many are left available. This was the experience after the adoption by

1 Congress of a ban on TV advertising of tobacco products and the experience post-MSA. It has
2 also been the experience in other countries that adopted partial restrictions on tobacco marketing.

3 **Q: What is the second observation?**

4 Counter-marketing campaigns, especially when combined with funding for community
5 programming, have been shown repeatedly in peer reviewed studies and in numerous real life
6 experiences to be highly effective in countering tobacco industry marketing and affecting teen
7 attitudes, knowledge and behavior. This should be a part of any set of remedies. It may be the
8 most important component of any set of remedies and should be a priority. The inclusion of
9 counter-marketing in any set of remedies is made more important because First Amendment
10 concerns mean that there cannot be a complete ban on tobacco marketing in the United States as
11 has been adopted in other countries. Thus, there will be significant tobacco marketing going
12 forward and the best way to address the power of the tobacco industry's continued marketing
13 will be ongoing, well-funded, sustained counter-marketing by a third party entirely independent
14 of the tobacco industry.

15 **Q: What is the final observation?**

16 A: Any remedies should take into account the long history of what has transpired. This is
17 not the first time the tobacco industry's behavior has come under scrutiny and it is not the first
18 time the tobacco industry has promised to be truthful to the American public, to avoid marketing
19 that impacts children, to fund programs to discourage tobacco use among children and to do all
20 that they can to reduce the harm caused by their products. These are promises that the industry
21 has made repeatedly over the last 50 years whenever it was under pressure. The examples are
22 legion. They begin with the "Frank Statement" the industry made in the 1950's and continued
23 with the promises they made to Congress after the release of the first Surgeon General's report

1 on tobacco in 1964 and the very public adoption by the industry in the 1960s of a Voluntary
2 Advertising Code they said would prevent any marketing to children.

3 Similarly, in 1970 immediately after the TV ad ban was enacted, Philip Morris promised
4 it would not circumvent the goal of the advertising ban by sponsoring televised sporting events,
5 only to begin its sponsorship of the “Virginia Slims” tennis tournaments shortly thereafter. In
6 the 1980s the industry sought to fend off Congressional action by announcing its own youth
7 prevention programs called “Helping Youth Decide” and “Helping Youth Say No.” There is no
8 evidence either actually reduced youth tobacco use.

9 Indeed, a review of every Congressional hearing on tobacco since 1964 reveals that the
10 tobacco industry has always claimed it has never targeted youth in any advertisement or
11 advertising campaign and has never wanted children to smoke. The evidence and the industry’s
12 own documents tell a different story. In light of these assertions over the years, their current
13 claims that they do not and will not market to children and that they have made permanent
14 change ring hollow.

15 Finally, in light of the promises the industry has made over the years and the myriad
16 ways it has found to continue business as usual even after the MSA, it is important to have a
17 mechanism to monitor the industry’s behavior on an ongoing basis to address unanticipated
18 actions and provide a mechanism for preventing continued wrongdoing.