

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

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

Defendants

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

MOTION FOR LEAVE TO PARTICIPATE AS AMICI CURIAE

The States of Arkansas, Connecticut, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Tennessee, Vermont, Washington, Wisconsin, Wyoming and the District of Columbia (collectively, the "Applicant States"), by and through their undersigned counsel, hereby move for leave to participate in this action as *amici curiae* by filing the brief attached hereto as Exhibit A.

The Applicant States are parties to the Master Settlement Agreement ("MSA") with several of the Defendants in this action or their affiliates. The MSA addresses two important matters relevant to the proposed Final Judgment and Order submitted by the United States in this action. First, Section VI of the MSA established a national foundation (named the "American Legacy Foundation") to carry out "a comprehensive, coordinated program of public education and study" (Section VI(a)) and whose functions include "carrying out a nationwide sustained advertising and education program to (A) counter the use by Youth of Tobacco Products, and (B) educate consumers about the cause and prevention of diseases associated with the use of Tobacco Products" (Section VI(f)(1)). Section IV.C. of the proposed Final Judgment and Order

would require the Defendants to provide funding for the Foundation at \$400 million annually for ten years. Second, Section IV of the MSA created an obligation for the “Original Participating Manufacturers” (or “OPMs”)¹ and “Tobacco-Related Organizations”² under the MSA to maintain Internet document websites accessible to the public through June 30, 2010. This subject is dealt with in Section IV.F. of the proposed Final Judgment and Order, which would require the Defendants to maintain such websites through June 30, 2030 and would impose additional specific requirements related to them.

The Applicant States, having been involved in creating the American Legacy Foundation through the MSA, have an interest in ensuring continued funding for it now that the major source of funding under the MSA is no longer available.³ Since 2004, that funding has been contingent on the MSA Participating Manufacturers having a collective market share of 99.05%, but their market share now is well below that level. Additionally, having obtained the major tobacco companies’ agreement to create and maintain publicly accessible Internet document websites, which have proved valuable as a research tool and in connection with public education programs, the Applicant States have an interest in the continued existence of those websites.

The Applicant States wish to file the attached brief in order to assist the Court in understanding the reasons behind the creation of the American Legacy Foundation and the document websites and why continued funding for the Foundation and continued availability of the websites are appropriate to prevent and restrain future unlawful conduct by the Defendants.

¹ Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company, Philip Morris Incorporated, and R.J. Reynolds Tobacco Company and their successors.

² The Council for Tobacco Research-U.S.A., Inc., the Tobacco Institute, Inc., and the Center for Indoor Air Research, Inc., and their successors.

³ The Attorneys General of two Applicant States – Attorney General Lawrence Wasden of Idaho and Attorney General William Sorrell of Vermont – are members of the Foundation’s Board of Directors.

The Attorneys General of the Applicant States include the Attorneys General who have been most closely involved with MSA matters since 1998, including past and present chairs of the Tobacco Committee of the National Association of Attorneys General (“NAAG”), and two past Presidents of NAAG. (Pursuant to Section VIII(a) of the MSA, NAAG provides “coordination and facilitation for the implementation and enforcement of [the MSA] on behalf of the Attorneys General of the Settling States.”) Because of their experience with – and continuing interest in – these issues, the Applicant States can offer “unique information and perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Cobell v. Norton*, 246 F.Supp.2d 59, 62 (D.D.C. 2003) (quoting *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1064 (7th Cir. 1997).

Pursuant to LCvR 7.0(m), Counsel for the Applicant States has conferred with the other parties to this case concerning their position on this motion. Counsel for Plaintiff and for the Intervenors do not oppose the motion, while counsel for Defendants oppose it.

For the foregoing reasons, the Applicant States respectfully request leave to participate in this action as *amici curiae* with leave to file the attached brief.

Respectfully submitted,

Applicant States

By:



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September 12, 2005

Exhibit A

UNITED STATES DISTRICT COURT
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Defendants

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

**BRIEF OF *AMICI CURIAE* STATES OF ARKANSAS, CONNECTICUT, HAWAII,
IDAHO, IOWA, KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS,
NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, OHIO, OKLAHOMA,
OREGON, TENNESSEE, VERMONT, WASHINGTON, WISCONSIN, WYOMING,
AND THE DISTRICT OF COLUMBIA IN SUPPORT OF THE POSITION OF THE
PLAINTIFF UNITED STATES OF AMERICA REGARDING REMEDIES**

PRELIMINARY STATEMENT

The Master Settlement Agreement (“MSA” or the “Agreement”) of November 23, 1998, settled the claims of 46 States and six other governmental entities (“Settling States”)¹ against the major tobacco manufacturers. The United States, Plaintiff in this action, has submitted a proposed Final Judgment and Order (“proposed Order”) that would grant relief against Defendants if the Court finds the Defendants liable under the Racketeer Influenced and Corrupt Organizations Act (“RICO”). Aspects of the proposed Order address subjects that are also addressed in the MSA. Because of their expertise gained from nearly seven years in enforcing the MSA, *Amici Curiae* States offer the following observations regarding the provisions of the

¹ The MSA was signed by the Attorneys General of 46 States, the Commonwealth of Puerto Rico, the District of Columbia, and four territories. Four other States (Florida, Minnesota, Mississippi and Texas) settled their claims against the tobacco companies before the MSA was executed.

proposed Order concerning two matters that resulted from the MSA: continued funding for the American Legacy Foundation and continuation of document websites.²

I. THE COURT SHOULD APPROVE CONTINUED FUNDING FOR THE AMERICAN LEGACY FOUNDATION

Section VI(d) of the MSA directed the National Association of Attorneys General (“NAAG”),³ “through its executive committee, [t]o provide for the creation of the Foundation,” which was to be “organized exclusively for charitable, scientific, and educational purposes within the meaning of Internal Revenue Code section 501(c)(3).” The Foundation, now known as the American Legacy Foundation, was established under Delaware law in March 1999. It carries out programs relating to youth tobacco use prevention, adult cessation, reduction of tobacco use among “priority populations” (*i.e.*, vulnerable groups, including minorities, that have been targeted by the tobacco industry), research, the awarding of grants to support innovative projects in tobacco control, and technical assistance and training to public and private organizations at the State and local levels.

² This brief does not, of course, address all provisions of the proposed Order. Failure to address any provision of the proposed Order (such as the proposed level of funding for cessation programs) should not be construed as implying that Amici Curiae States either favor such provision or oppose it.

³ As explained on NAAG’s website:

The National Association of Attorneys General (NAAG) was founded in 1907 to help Attorneys General fulfill the responsibilities of their office and to assist in the delivery of high quality legal services to the states and territorial jurisdictions. . . . The Association fosters interstate cooperation on legal and law enforcement issues, conducts policy research and analysis of issues, and facilitates communication between the states’ chief legal officers and all levels of government. The Association’s members are the Attorneys General of the 50 states and the District of Columbia, the Commonwealths of Puerto Rico (Secretary of Justice) and the Northern Mariana Islands, and the territories of American Samoa, Guam, and the Virgin Islands. The U.S. Attorney General is an honorary member.

http://www.naag.org/naag/about_naag.php (visited September 8, 2005). NAAG appoints from its membership two of the Foundation’s 11 directors, but is not otherwise involved in the Foundation’s governance. At present, those two directors are Idaho Attorney General Lawrence Wasden and Vermont Attorney General William Sorrell, who are signers of this brief.

The Foundation's principal program is the "truth®" campaign, which was initiated in 2000. The campaign's effectiveness, particularly as compared with "anti-smoking campaigns" conducted by the tobacco companies, has been documented in peer-reviewed research published in the American Journal of Public Health. In June 2002, a group of researchers found that "[e]xposure to 'truth' countermarketing advertisements was consistently associated with an increase in anti-tobacco attitudes and beliefs, whereas exposure to Philip Morris youth-smoking prevention advertisements generally was not." Farrelly, Healton, Davis, Messeri, Hersey and Haviland, *Getting to the Truth: Evaluating National Tobacco Countermarketing Campaigns*, 92 Am. J. Pub. Health 901 (June 2002). Indeed, the study found that the Philip Morris youth-smoking prevention campaign was associated with a significant *increase* in the intent of teens to smoke. *Id.* at 905.

A more recent study has concluded that the truth® campaign "was associated with substantial declines in youth smoking and has accelerated recent declines in youth smoking prevalence." Farrelly, Davis, Haviland, Messeri and Healton, *Evidence of a Dose-Response Relationship between "truth" Antismoking Ads and Youth Smoking Prevalence*, 95 Am. J. Pub. Health 425 (March 2005). truth® accounted for 22 percent of the decline in youth smoking between 2000 and 2002. *Id.* This translates into approximately 300,000 teenagers who did not start smoking who otherwise would have. This is a remarkable public health success and is precisely the type of result the States hoped to achieve in entering into the MSA.⁴

In addition to the truth® campaign, the Foundation has carried out other programs that have benefited the States' efforts to reduce youth smoking, including a youth empowerment

⁴ *Amici Curiae* States understand that the Defendants have attacked the validity and reliability of the research referred to above, and refer the Court to the *amicus* brief submitted by the Citizens' Commission to Protect the Truth, which addresses that subject.

grant program that has supported State-level youth activism programs in 19 States and the District of Columbia.

Section VI(b) of the MSA required the OPMs collectively to pay \$25 million per year to the Foundation through 2008. Section VI(c) required the OPMs collectively to pay \$300 million per year (subject to certain adjustments) for the benefit of the Foundation's National Public Education Fund. Section IX(e), however, provided that beginning with the 2004 payment, the payment under Section VI(c) would be made only in years in which the market shares of all MSA Participating Manufacturers equaled or exceeded 99.05%. That market share has, for the past several years, been well below that level. As a consequence, the OPMs have not made payments for the benefit of the National Public Education Fund since 2003, and there is no prospect that they will be obligated to do so for the foreseeable future.

If the Court determines that the Defendants' conduct violated RICO and that injunctive relief is warranted, *Amici Curiae* States submit that an effective public education program would be appropriate "to prevent and restrain violations" of RICO in the future. 18 U.S.C. § 1964(a). Although the MSA placed restrictions on such tobacco advertising methods as cartoons, billboards, brand name merchandise, and brand name sponsorships, MSA §§ III(b), (c), (d), (f), it did not eliminate the exposure of children to cigarette advertising. There are other forms of advertising and promotion, not specifically addressed in the MSA, that result in large and continuing exposure of youth to cigarette advertising. A substantial and well-funded public education program like that carried out by the Foundation is needed to counteract the effects of that exposure, particularly in light of the fact that many State legislatures have significantly reduced funding for State smoking-prevention programs.

For the foregoing reasons, *Amici Curiae* States support the concept of continued significant funding for the Foundation “to continue and supplement its activities and functions as specified in Section VI of the Master Settlement Agreement,” as well as programs to educate the public about the comparative disease risks of low and ultra low tar cigarettes and secondhand smoke, as provided in Section IV.C.1. of the proposed Order.

II. THE COURT SHOULD APPROVE CREATION AND MAINTENANCE OF DOCUMENT WEBSITES

The document websites that have been established pursuant to Section IV of the MSA were intended by the Settling States to be – and they have been – beneficial in several ways. First, they have helped support public education programs by providing documents and other information that those programs have used in exposing the tobacco industry’s methods – the same methods that have given rise to the RICO allegations in the present case. By exposing those methods, the education programs have helped instill resistance among consumers – and particularly young potential smokers – to the companies’ advertising and promotional efforts.


Second, the websites have been a rich source of information for scholars about the tobacco industry. Numerous articles have been published in peer-reviewed journals bringing to light information about the industry. *See, e.g.,* Cummings, Morely, Horan, Steger, Leavall, *Marketing to America's youth: evidence from corporate documents*, 11 *Tobacco Control* i5 (2002); Wayne and Connolly, *How cigarette design can affect youth initiation into smoking: Camel cigarettes 1983-93*, 11 *Tobacco Control* i32 (2002).

Third, the tobacco companies’ knowledge that their actions and documents are subject to public scrutiny, and that access is easily available to these document websites, can act as an important deterrent against future RICO violations.

The *Amici Curiae* States therefore support requirements that the Defendants extend the lives of their websites from June 30, 2010, to June 30, 2030, and that the obligation to create a website be extended to Defendants Liggett and BATCo. Without these requirements, the document websites established under the MSA will likely disappear after June 30, 2010, and any person or organization wishing to provide for continued access will have to do so at its own expense, and will not have access to documents that would otherwise have had to be posted after that date under Section IV(e) of the MSA.⁵

Respectfully submitted,

Amici Curiae States

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September 12, 2005

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⁵ The University of California at San Francisco has created a website that contains documents posted by the OPMs on their websites, but at considerable expense and effort.

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CERTIFICATE OF SERVICE

I certify that copies of the Brief of *Amici Curiae* by the States of Arkansas, Connecticut, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Tennessee, Vermont, Washington, Wisconsin, Wyoming, and the District of Columbia, and the accompanying Motion for Leave and Proposed Order have all been served on the parties to this action by having copies delivered by electronic mail on this 12th day of September, 2005 to counsel for the government (Ms. Eubanks), counsel for defendants (Mr. Redgrave) and counsel for Intervenors (Ms. Meyer) and by having a complete set of the papers also mailed this 12th day of September, 2005 to counsel for the plaintiffs, defendants and intervenors. The following parties were served:

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