

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

<hr/>)	
UNITED STATES OF AMERICA,)	
)	
	Plaintiff,)	
and)	
)	Civil Action
TOBACCO-FREE KIDS ACTION FUND, <i>et al.</i> ,)	No. 99-CV-02496 (GK)
)	
	Plaintiff-Intervenors,)	Next scheduled appearance:
)	None Scheduled
v.)	
)	
PHILIP MORRIS USA INC.,)	
f/k/a PHILIP MORRIS INC., <i>et al.</i> ,)	
)	
	Defendants.)	
<hr/>)	

UNITED STATES' PRAECIPE RESPONDING TO ORDER #1025

The Court has directed the parties to address certain questions pertinent to its October 16, 2006 Proposal for Corrective Statements. Order #1025. Through this filing, the United States responds to the specific questions posed by the Court, as follows:

- (1) The practical impact of adopting the proposal contained in the submissions of the Government and Plaintiff-Intervenors, including that the Court consult with appropriate independent experts, to be paid by Defendants, to evaluate any proposed corrective statements, and that the Court undertake basic market testing research to evaluate the effectiveness of such statements**

The United States' proposal is practical. Consulting with an independent advertising and market research firm will serve to minimize the need for the Court to deal with the detailed design and development aspects of the statements in the first instance. The marketing firm will design and test the statements for effectiveness based on the proposals already submitted and any further guidance provided by this Court. Only after completion of market testing and a review of

the results will the Court make its final determination about the statements to be disseminated.

As the Department of Justice is the “enforcing agent for [the Court’s final] decree,” Final Op. at 1644, it is its considered recommendation that its proposal be adopted to ensure meaningful enforcement of the corrective statement remedy.

In fact, if independent experts are not consulted, the Court will either have to make these precise design determinations – aspects of message communication that can have a major impact, according to the evidence elicited in this case, *see, e.g.*, Krugman WD at 187-197 (testimony regarding ineffectiveness of cigarette warnings) – or else leave all such decisions to the discretion of defendants. The latter option is clearly inappropriate given this Court’s findings with respect to defendants’ lengthy record of manipulation and deception through its communication with the public.

To the extent there is a concern about an unwarranted delay associated with this process, there is no indication that significant, or perhaps any, delay will be incurred. If the Court adopts the United States’ proposal, a marketing firm could be retained immediately to develop and test the statements, based upon the proposals already submitted, as directed by the Court. Because the majority of the corrective statements are not currently scheduled to begin to be disseminated until February 2007, there should not be delay¹. Defendants can arrange for the purchase of media time/space and engage in other logistical planning while the statements are being tested by the market research firm.

With respect to the onserts, Philip Morris has argued that it will be unable to meet the

¹ According to the Court’s Final Order, some of the defendants are scheduled to publish the corrective statements in full page newspaper advertisements beginning in December 2006. To the extent the statements are not finalized by that time, the United States recommends that the commencement of dissemination via newspaper ads be moved to February 2007 – the date dissemination begins with respect to the other media.

Court's timeline if it does not receive the final language by November 9, 2006. *See Philip Morris USA's Proposed Corrective Statements as Compelled by the Final Judgment and Remedial Order*, at 9. There are at least two options to address this concern that will cause little, if any, delay in the overall process. First, the Court could order defendants to include the corrective statement in which the Court has the most confidence absent market testing in their February 2007 onsert installment. That could certainly be accomplished by November 9. In the meantime, evaluative market testing can be done on that corrective statement, as well as the other statements. Thereafter, beginning with the June 2007 onsert installment, the Court can order defendants to publish independently developed, market tested corrective statements.

A second option is to order all the proposed statements to undergo initial market testing, with at least one statement to be fully evaluated and completed by mid-December. The Court could then commence dissemination of the corrective statements in all media excluding onserts in February 2007, pushing back the commencement date for the onserts to March 2007.

Although this would create a month delay in dissemination of the statements on onserts, it may well provide the level of comfort in the effectiveness of the remedy that warrants such a relatively minimal delay. Given the significance of this remedy, the possibility of a short delay is justified to achieve the purpose of the statements.

(2) Whether the corrective statements should indicate that they are being issued pursuant to Court order

R.J. Reynolds and Brown & Williamson jointly maintain that each of the corrective statements should include a declaration to the effect that "this message is furnished by [defendant] pursuant to a Court Order." *See Certain Joint Defendants' Submission of Proposed Corrective Statements Pursuant to Order #1015 (RJR and B&W Proposal)*. Lorillard maintains

that each of the corrective statements include the clarification that “The following statement is made by Lorillard Tobacco Company pursuant to a court Order in *United States of America, et al. v. Philip Morris USA, Inc., et al.*, Civil Action No. 99-2496 (GK) (Order #1015, Aug. 17, 2006, at 4; Final Op. at 1636) (on appeal).” *See* Lorillard Tobacco Company’s Proposed Corrective Statements Required by Order #1015. The Intervenors in this action also recommend that the messages contain a clear statement to the effect that “a Federal District Court is requiring us to make this statement.” *See* Plaintiff-Intervenors’ Proposed Corrective Statements and Supporting Memorandum.

The United States does not know whether the purpose of the remedy will be served by inclusion of such declarations in the corrective statements. Without market testing, it is difficult to know the impact or effectiveness of that communication. This example makes clear the need to market test the statements to gauge their impact on the consuming public. An independent marketing firm should test the messages with and without the declaration, determining which form of the communication serves to best correct the existing misperceptions.

(3) Whether the Court should approve all relevant details of such corrective statements, such as print size, colors, spacing and format, voice-over in television advertisements, etc.

The Court should adopt an integrated proposal for corrective statements that addresses both content and format. As the Court is well aware, defendants have an incentive to comply with the letter of the Court’s order while creating and disseminating communications that avoid their intended effects. While defendants’ October 16 submissions addressed only the text and not the format or other details of how the corrective statements will be communicated to the public, each defendant attempted, in different ways, to limit or nullify the effectiveness of the

statements. Defendants' submissions demonstrate, starkly, that the implementation of the corrective statements cannot be left to their discretion. As described above, the Court can achieve this result without involving itself in decisions about minutiae by retaining independent consultants with expertise in developing effective multimedia communications.

In ordering the corrective statements, the Court found that “[t]he trial record amply demonstrates that Defendants have made false, deceptive, and misleading public statements about cigarettes and smoking from at least January 1954 [and] that certain Defendants’ public statements communicating their positions on smoking and health issues continue to omit material information or present information in a misleading fashion” even today. Final Op. at 1632. The Court expressly found that while “certain language in some of Defendants’ most recent positions on smoking and health issues . . . represent a step forward[,]” *id.* at 1633, those recent changes were not sufficient to prevent and restrain future fraudulent statements, much less correct their “decades of denial and distortion.” *Id.* Moreover, the Court found that “[e]vidence in the record also amply demonstrates that certain of Defendants’ public statements communicating their positions on smoking and health issues continue to omit material information or present information in a misleading and incomplete fashion.” *Id.* at 1632. Clearly, it is the Court’s intent that the corrective statements will not simply be a pro forma utterance of mandated words, but rather, will have the effect of actually correcting defendants’ ongoing false statements.

Defendants, however, have each proposed text that makes no progress beyond the first step forward acknowledged by the Court and that may constitute continuing affirmative statements that are fraudulent. For example:

- No defendant's statement actually concedes that secondhand smoke causes disease in nonsmokers.
- No defendant's statement admits that it manipulates the design of cigarettes to enhance the delivery of nicotine regardless of the machine-rated delivery levels of nicotine.
- BATCo's proposed statements regarding nicotine manipulation completely fail to acknowledge the Court's finding that BATCo manipulates nicotine delivery in cigarettes to create and sustain addiction. As such, the statement is affirmatively misleading. BATCo also continues to acknowledge only "health effects" from smoking, rather than any of the actual fatal diseases caused by smoking.
- Philip Morris's proposed statements are virtually identical to its existing website statements (which the Court clearly found to be only a "first step" toward correcting its decades of deceit); the only change in content is its statement that the nicotine in cigarettes is addictive and that "well-known" design features affect the delivery of nicotine.²
- Lorillard's and Reynolds American's statements do not concede that smoking and secondhand smoke causes disease and are couched in language that cannot effectively communicate the intended message in any media; the statements are long, cluttered, and technical.

A more complete comparison between each defendant's existing statements and its proposed "corrective" statements is set forth in a chart, attached hereto as Exhibit A. This comparison amply demonstrates defendants' intention to limit the effect of the corrective

² Philip Morris has presented no evidence that any design features are "well known" to consumers.

statements. Consequently, the Court should foreclose defendants' ability to influence in any way the format or content of the statements.

Defendants complain that the United States is seeking remedial relief beyond that which they had an opportunity to litigate, pursuant to *United States v. Microsoft*. This is not true. The remedy that Defendants make corrective statements to help dispel the misperceptions created by their fifty plus years of deceiving the American public has long been a part of the United States' case. The genesis of the United States' request for corrective statements dates back to its complaint. The Amended Complaint expressly requests an injunctive order that, "each defendant fund, but have no part of or influence over the control of or decision making relating to, a legitimate and sustained corrective public education campaign, administered and controlled by an independent third party, relating to the public health issues of cigarette smoking and nicotine addiction." and that "each defendant make corrective statements regarding the health risks of cigarette smoking and the addictive properties of nicotine in future advertising, marketing, and promotion of their tobacco products." See Amended Cplt. § VII.B.2.f. and h. The United States disclosed in discovery this same remedy. See United States' Responses to Joint Defendants' Fourth Set of Continuing Interrogatories to Plaintiff, (Dec. 14, 2001) at 43 (same); United States' Supplemental Responses to Joint Defendants' Fourth Set of Continuing Interrogatories to Plaintiff, (Mar. 29, 2004) (same); U.S. Proposed Conclusions of Law, (July 2004) at 76-79 (corrective statements necessary to eviscerate ongoing fraud).

The United States developed testimony at trial on this issue as well. Eriksen WD (remedies) at 11 (recommendation that the Court order corrective communications devised by an independent third party). Defendants had a full and fair opportunity to take discovery on and

litigate this issue during the remedies phase of the trial. Defendants cross-examined Dr. Eriksen at trial and were in no way limited on the scope of their cross-examination. *See* Trial Tr. 21102-21122. Defendants' tactical decision not to examine Dr. Eriksen about his opinion that an independent third party should develop the corrective statements cannot now be exploited to minimize the effectiveness of the ordered remedies.

The United States submitted its proposed remedial order at the conclusion of trial. The proposed order states that, "[t]he IO shall have authority to retain appropriate consultants to assist in the development, design, coordination, and execution of the affirmative communications as ordered herein, in order to ensure scientific accuracy, and to ensure maximum exposure and comprehension by smokers and the general public." *See* United States' Notice of Filing Proposed Final Judgment and Order Pursuant to Order #964-A at § IV.E.3. Although the Court rejected the proposal to order monitors, this decision does not limit the Court's own ability to control a remedial scheme that it did impose.

The salient point, however, is that an effort to make the remedial action effective and meaningful is not a request for a new or different remedy – it is nothing more than the implementation of a long requested, court-ordered remedy. To be sure, statements disseminated to the public with an intended purpose of correcting misperceptions – and certainly those disseminated by an industry found to have engaged in a long running and overarching campaign to deceive the public on these very issues, through a similar process, and in the same media in which the statements are to be disseminated – ought be independently tested to achieve a level of confidence that the statements will meet their intended purpose.

Dated: October 30, 2006
Washington, DC

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

STUART SCHIFFER
Deputy Assistant Attorney General

/s/ _____
LINDA M. McMAHON
DC Bar No. 446130

/s/ _____
MICHELLE GLUCK

United States Department of Justice
Post Office Box 14524
Ben Franklin Station
Washington, DC 20044

Attorneys for Plaintiff
United States of America