UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, and TOBACCO-FREE KIDS ACTION FUND, *et al*., Plaintiff-Intervenors, v. PHILIP MORRIS USA, INC., *et al.*, Defendants.	Civil Action No. 99-CV-2496 (GK) Next scheduled court appearance: **OCTOBER 15, 2012**

PUBLIC HEALTH INTERVENORS' SUPPLEMENTAL BRIEF CONCERNING THE CORRECTIVE STATEMENT REMEDY

The Public Health Intervenors submit the following Supplemental Brief in support of the proposed Corrective Statements. Intervenors have previously detailed their legal arguments, and recommendations, concerning the content and implementation of the corrective statements remedy, and those matters will not be repeated here.[1]

However, several recent legal and factual developments lend further support to the Court requiring that the proposed Corrective Statements be issued expeditiously. *First*, in a pair of rulings the D.C. Circuit recently affirmed (a) that the Remedial Order in this case remains appropriate and necessary because "the defendants still exhibit[ ] a reasonable likelihood of

[1] As we have explained, Intervenors support the first four of the proposed Corrective Statements (*see* U.S. Submission of Proposed Corrective Statements and Expert Report (DN 5875, Feb. 23, 2011), but have proposed an alternative Corrective Statement for secondhand smoke, as well as an alternative version of the newspaper advertisement that incorporates all five statements. *See* Int. Resp. To U.S. Submission of Proposed Corr. Stmts. (DN 5883, Mar. 3, 2011); Int. Reply To Defs.' Resp. To U.S. Proposed Corr. Stmts. (DN 5890, Mar. 16, 2011).

committing future RICO violations," *United States v. Philip Morris USA, Inc.*, 686 F.3d 832, 837 (D.C. Cir. 2012) (hereafter "*Vacatur Ruling*"), and (b) that the Court has *broad* authority to impose appropriate remedial measures. *United States v. Philip Morris USA, Inc.*, 686 F.3d 839 (D.C. Cir. 2012) (hereafter "*Marketing Data Ruling*") (declining to disrupt clarification of the disaggregated marketing remedy).

Second, the D.C. Circuit and Sixth Circuit Courts of Appeals have both issued rulings in response to tobacco industry challenges to warning label requirements and other measures required by the Family Smoking Prevention and Tobacco Control Act ("Family Smoking Prevention Act" or "FDA Act"), Pub. L. No. 111-31, 123 Stat. 1776 (2009). *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012); *R.J. Reynolds Tobacco Co. v. Food and Drug Admin.* ("*R.J. Reynolds*"), No. 11-5332, 2012 WL 3632003 (D.C. Cir. Aug. 24, 2012). While, as we will explain, neither decision controls remedial measures this Court may impose under RICO, the challenges reinforce the continued importance of the Court's corrective statements remedy, and the First Amendment analyses in these recent decisions further demonstrate that Defendants' First Amendment objections to the proposed Corrective Statements have no merit.

Finally, although specific examples of ongoing misconduct are not required to impose the corrective statements remedy, in fact, as this Court predicted, Defendants *do* continue to mislead consumers and the public concerning, *inter alia*, the health effects and addictiveness of smoking, and the availability of "light" cigarettes. *See infra* at 10. This ongoing conduct also only serves to further reinforce the need for mandating prompt issuance of the proposed Corrective Statements.

DISCUSSION

A. The D.C. Circuit's Recent Twin Rulings In This Case Reinforce The Need For, And Appropriateness Of, The Proposed Corrective Statements.

One of Defendants' central objections to the proposed Corrective Statements under consideration has been that they are inappropriate and unnecessary in light of the Family Smoking Prevention Act, which, they have argued, precludes them from continuing to carry out their fraud. *See, e.g.,* Defs.' Resp. to U.S. Submission of Proposed Corr. Stats ("Def. Resp.") (DN 5881, Mar. 3, 2011), at 1-2. Indeed, Defendants argued that the new statute "eliminates this Court's jurisdiction to order *any* corrective statements." *Id.* at 1.

The D.C. Circuit's recent, sweeping rejection of Defendants' bid for vacatur of this Court's 2006 ruling wholly disposes of this line of argument. Thus, the D.C. Circuit affirmed this Court's ruling that Defendants are likely to continue their misconduct *despite* the FDA Act, *see United States v. Philip Morris USA, Inc.,* 787 F. Supp. 2d 68, 75-77 (D.D.C. 2011), explaining that "in light of the defendants' history of non-compliance with various legal requirements, there was no reason for the district court to" assume that Defendants will comply with the new statute. *Vacatur Ruling*, 686 F.3d at 836. Thus, the D.C. Circuit concluded, for the *second* time, that the remedial measures this Court has imposed to address Defendants' RICO violations – including the corrective statements remedy, *id.* at 834 – are appropriate in light of Defendants' "reasonable likelihood of committing future RICO violations." *Id.* (citing *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1131-34 (D.C. Cir. 2009)).

The D.C. Circuit's recent decision also reinforces that the *particular* proposed Corrective Statements under consideration here are necessary. The Court emphasized that "'broad,'" 686

F.3d at 835, and "sweeping," *id.* at 836, remedies are "'warranted to prevent further violations where (as here,) a proclivity for unlawful conduct has been shown,'" *id.* at 835 (quoting 566 F.3d at 1137), and, in particular, are *necessary* because Defendants will have "'countless (future) opportunities and temptations to take similar unlawful actions in order to maximize their revenues.'" 686 F.3d at 834 (quoting *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 909 (D.D.C. 2006). Indeed, the Court reaffirmed that there remains a "'reasonably likelihood that (d)efendants' RICO violations will continue *in most of the areas in which they have committed violations in the pas*t.'" 686 F.3d at 834 (quoting 449 F. Supp. 2d at 909-12) (emphasis added).

Thus, in the *Vacatur Ruling*, as in the 2009 affirmance of the Court's 2006 ruling, 566 F.3d 1095, the D.C. Circuit recognized that *broad* remedies are needed precisely because Defendants' misconduct is so pervasive. The recent *Marketing Data Ruling* stands for the same proposition, for there the Court decided not to *hear* Defendants' arguments that this Court had modified the disaggregated marketing data remedy to require that "a significantly larger amount of data [be] disclosed," 686 F.3d at 843, on the grounds that review of this Court's broad discretion in implementing the Remedial Order is inappropriate in light of the "length *and breadth* of the injunction" necessary to address Defendants' misconduct. *Id.* at 845 (emphasis added). In short, the D.C. Circuit has made clear that *strong* remedial measures are necessary and appropriate in this case, and that this Court has broad discretion to refine the details of the remedies the Court has already approved.

Finally, the *Vacatur Ruling* also entirely disposes of Defendants' particular objection to the corrective statement on light cigarettes – *i.e.,* that the Court lacks authority to impose such a

corrective statement because the FDA Act "now prohibits Defendants from using descriptors such as 'low tar' and 'light.'" Def. Resp. at 2. As the D.C. Circuit explained in affirming this Court's "refusal to vacate the portions of the injunctions that overlapped with certain restrictions in the Act," those remedies remain necessary because Defendants are "not likely to comply with those particular restrictions," 686 F.3d at 837, n.1 – which is certainly true for "light" cigarettes, where Defendants have taken measures to inform consumers that these products remain available in colored packs. *See infra* at 10.

B. The Recent Appellate Rulings on Aspects Of The FDA Act And Implementing Regulations Also Fully Support The Proposed Corrective Statements.

The D.C. Circuit and Sixth Circuit's recent rulings addressing the First Amendment implications of components of the FDA Act also fully support the proposed Corrective Statements. Judge Brown – who also authored the *Vacatur Ruling* – wrote, in reviewing the FDA's proposed graphic warning labels for cigarette packages, that for purposes of the First Amendment, compelled statements that are "factual and uncontroversial" need only be "reasonably related" to the interest the statements are designed to advance. *R.J. Reynolds*, 2012 WL at *4. Here, as the D.C. Circuit explained in reviewing the propriety of the corrective statements remedy in general, that test is satisfied so long as the corrective statements "are geared towards thwarting prospective efforts by Defendants to either directly mislead consumers or capitalize on their prior deceptions by continuing to advertise in a manner that builds on consumers' existing misperceptions." 566 F.3d at 1144-45.

The proposed Corrective Statements amply meet this standard; indeed, Judge Brown specifically referred to *this case* as involving "false or misleading claims" that warrant the very

kind of corrective statements – including a declaration that prior statements were deceptive – that the D.C. Circuit has explained may be appropriate for an "*egregious case of deliberate deception*," *Warner-Lambert v. F.T.C.*, 562 F.2d 749, 762-63 (D.C. Cir. 1977) (emphasis added). *See* R.J. Reynolds, 2012 WL at *6-7 and n.10.

The fact that the panel majority in *R.J. Reynolds* found that the *specific* graphic warning labels the government had mandated failed to pass muster under the First Amendment does not undercut the proposed Corrective Statements here for two reasons. First, the Court's principal concern in that case was that the agency had not demonstrated that the proposed graphic warnings advanced the agency's stated interest in reducing smoking rates. *Id.* at *10 ("FDA has not provided a shred of evidence . . . showing that the graphic warnings will 'directly advance' its interest in reducing the number of Americans who smoke"). Here, by contrast, the proposed Corrective Statements will serve the broad remedial purpose of preventing and restraining future RICO violations because, as the D.C. Circuit explained, Defendants "will be impaired in making false and misleading assurances about, for instance, smoking-related diseases or the addictiveness of nicotine – as the district court found they continue to do – if they must at the same time communicate *the opposite, truthful message about these matters to consumers*." 566 F.3d at 1140 (emphasis added) (citations omitted).

Second, while explaining that FDA is authorized to mandate "clear statements that [are] both indisputably accurate and not subject to misinterpretation," the D.C. Circuit panel majority, reaching a factual conclusion which we do not think is supported by the record, concluded that the graphic warnings failed to offer information and instead evoked an emotional response – an outcome the panel found insufficient to sustain FDA's action in issuing the specific graphic

warnings at issue. *R.J. Reynolds, 2012 WL at* *8-9. Here, by contrast, as Intervenors have demonstrated, the content of the proposed Corrective Statements are factually accurate, not subject to misinterpretation, and unquestionably designed to communicate specific information in a straightforward manner. *See*, *e.g.,* Int. Resp. at 13-14 (citing evidentiary support demonstrating the factual accuracy of each assertion). Accordingly, the Court need only be satisfied that the Statements are reasonably related to the remedial objective here. *See also, Spirit Airlines, Inc. v. Dep't. of Transp.*, 687 F.3d 403, 412 (D.C. Cir. 2012) (where requirements are "'directed at *misleading* commercial speech,' and where they 'impose a disclosure requirement rather than an affirmative limitation on speech,' *Zauderer*, and not *Central Hudson*, applies") (emphasis in original) (quoting *Milavetz, Gallop & Milavetz*, *P.A. v. United States*, 130 S. Ct. 1324, 1339 (2010)); *Disc. Tobacco City & Lottery,* 674 F.3d at 556.[2]

Nonetheless, by setting aside the graphic warning labels the D.C. Circuit did impact one of the Public Health Intervenors' proposals: whether to modify the onsert remedy to take the graphic warning labels into account. *See* Int. Resp. at 14-15 (raising concerns with having both appear on packs at the same time). Since the graphic warning labels will not be appearing on

[2] Indeed, as the Sixth Circuit concluded in rejecting a facial challenge to the graphic warning labels mandate, had the FDA required graphic warnings such as "a nonsmoker's and smoker's lungs displayed side-by-side [or] a picture or drawing of a person suffering from a smoking-related medical condition," the warnings would have been entirely factual and appropriate. *Id.* at 559. Thus, the mere fact that Defendants strenuously disagree with the proposed Corrective Statements here cannot render them inaccurate or controversial. Def. Resp. at 6-13. Rather, since the whole point of corrective statements is to address a defendant's misleading representations, a corrective statements remedy plainly is not limited to statements the *defendant* approves. *Id.* at 555 (emphasizing that a "commercial speaker's 'constitutionally protected interest in *not* providing factual information in his advertising is minimal'")(quoting *Zauderer v. Office of Disc. Counsel of Supreme Ct. of Ohio,* , 471 U.S. 626, 651 (1985)).

packs for the time being, the Court should carry out the onsert remedy and require that the proposed Corrective Statements appear on pack onserts as required by the Remedial Order.[3]

C. Defendants' Conduct Since The Court's Ruling Only Further Demonstrates The Need To Implement The Proposed Corrective Statements.

As noted, in implementing the corrective statements remedy, the Court need not find specific examples of Defendants' ongoing misconduct. Rather, as with all aspects of the Court's Remedial Order, the Court is authorized to impose measures reasonably calculated to address anticipated future violations, the existence of which can be "established by inferences *from past conduct alone*." 566 F.3d at 1132 (emphasis added) (citations omitted). Further, because the Court concluded that there is a "reasonable likelihood of further violations," it is empowered to address anticipated future violations without pointing to specific examples. *Id.* at 1131; *see also* 449 F. Supp. 2d at 909 (finding that "as long as Defendants are in the business of selling and marketing tobacco products, they will have countless 'opportunities' and temptations to take similar unlawful actions in order to maximize their revenues, just as they have done for the past five decades").

Nevertheless, particularly in considering Defendants' strident objections to the proposed Corrective Statements, the Court need not turn a blind eye to the fact that Defendants *have* continued to engage in misrepresentations in "the areas in which they have committed violations in the past.'" 686 F.3d at 834 (quoting 449 F. Supp. 2d at 909-12) (emphasis added). For

[3] As Intervenors have noted, there are a number of other implementation issues that will need to be resolved – by the Court, or a Special Master – before Corrective Statements can be issued. These include whether to require that the statements appear in Spanish and be included in the internet versions of newspapers, as well as other more detailed executional variables. *See*, *e.g.,* Int. Resp. at 9-12.

example, on May 11, 2011, the Chairman and Chief Executive Officer ("CEO") of Philip Morris International ("PMI"), who was until 2008 the Chairman and CEO of Altria, publicly stated at an annual shareholder meeting in New York that "*it is not that hard to quit*" smoking. *See Philip Morris International Head Says It's Not That Hard To Quit Tobacco*, Associated Press, May 11, 2011 (emphasis added)[4]; *see also* NBC Nightly News, May 11, 2011 (available at: http://video.msnbc.msn.com/nightly-news/42998047#42998047) (last visited September 24, 2012). Similarly, as Intervenors previously informed the Court, in April and May 2012, Altria ran print advertisements stating that its companies "communicate openly about the health risk of tobacco, including on our websites," Int. Notice of Filing, Attachments (DN 5972, June 7, 2012), when, in fact, the website for Philip Morris USA does not relay full information to consumers. *See* Int. Resp. To Nov. 17, 2011 Order at 6-7 (DN 5956, Dec. 20, 2011) (noting that website simply says that "Public health officials have concluded that secondhand smoke from cigarettes causes disease," without stating whether that conclusion is accurate).

The fact that high-ranking tobacco officials and Defendants continue to make such false pronouncements highlights the continued need for the Court to require Defendants to issue corrective statements that provide "*the opposite, truthful message[s]*," 566 F.3d at 1140 – which plainly should include, *inter alia*, the proposed Corrective Statement on addiction, in which Altria and the other companies will be required to tell the public that "Smoking is very addictive"

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[4] available at: http://www2.wsls.com/business/2011/may/11/philip-morris-international-head-says-its-not-hard-ar-1031730/ (last visited September 24, 2012). Regardless of whether PMI sells cigarettes in the United States, the fact that the statement was made *in the United States* by a high-ranking official of an American tobacco company plainly makes it relevant to the corrective statements remedy.

and that "it's not easy to quit." *See* U.S. Proposed Corrective Statement, Topic B.

Defendants have also communicated to retailers and consumers that the cigarettes previously labeled as "light" and "low tar" remain available in repackaged form. *See*, *e.g.,* Int. Reply To Defs.' Resp. at 18 (DN 5890, Mar. 16, 2011); *see also, e.g.,* Duff Wilson, *F.D.A. Seeks Explanation of Marlboro Marketing*, N.Y. Times, June 17, 2010, at B6 (reporting that "notes [were] placed on the last packs of Marlboro Lights reading, 'Your Marlboro Lights package is changing, but your cigarette stays the same,' and explaining, '[i]n the future, ask for Marlboro in the gold pack'"). Predictably, Defendants have claimed that such advertising is permissible in order to allow consumers "to distinguish products from each other or to distinguish cigarettes based on taste." Defs.' Reply (DN 5893) at 10.

However, this defense of these activities, and these ongoing communications, also serve to highlight the need for corrective statements to inform smokers, and potential smokers, the truth about these particular "products" (*i.e.*, "lights") – including that "Just because [they] feel smoother, that doesn't mean they are any better for you." U.S. Proposed Corrective Statement, Topic C.

In short, not only are Defendants' protestations against the specific proposed Corrective Statements at issue here wholly without merit, they ring particularly hollow in light of Defendants' continuing conduct since the Court issued its ruling more than six years ago. Accordingly, the Court should impose the proposed Corrective Statements as soon as practicable.

Respectfully submitted,

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