UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	**Civil Action No. 99-2496 (GK)**
and	:	
	:	
TOBACCO-FREE KIDS ACTION FUND, AMERICAN CANCER SOCIETY, AMERICAN HEART ASSOCIATION, AMERICAN LUNG ASSOCIATION, AMERICANS FOR NONSMOKERS' RIGHTS, and NATIONAL AFRICAN AMERICAN TOBACCO PREVENTION NETWORK,	:	
	:	
Intervenors,	:	
	:	
v.	:	
	:	
PHILIP MORRIS USA, INC., (f/k/a Philip Morris, Inc.), *et al.*,	:	
	:	
Defendants.	:	

AMENDED FINAL OPINION[1]

[1] This Amended Memorandum Opinion corrects the citation on page 1536, line 11 to read: United States v. Local 1084-1, Int'l Longshoremen's Ass'n., 812 F. Supp. 1303, 1310-15 (S.D.N.Y. 1993); and deletes the last sentence on page 1552, n. 23.

I. INTRODUCTION

A. Overview

On September 22, 1999, the United States brought this massive lawsuit against nine cigarette manufacturers of cigarettes and two tobacco-related trade organizations. The Government alleged that Defendants have violated, and continue to violate, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, by engaging in a lengthy, unlawful conspiracy to deceive the American public about the health effects of smoking and environmental tobacco smoke, the addictiveness of nicotine, the health benefits from low tar, "light" cigarettes, and their manipulation of the design and composition of cigarettes in order to sustain nicotine addiction. As Justice O'Connor noted in Food and Drug Administration, et al. v. Brown & Williamson Tobacco Corporation, et al., 529 U.S. 120, 125 (2000), "[t]his case involves one of the most troubling public health problems facing our Nation today: the thousands of premature deaths that occur each year because of tobacco use."

In particular, the Government has argued that, for approximately fifty years, the Defendants have falsely and fraudulently denied: (1) that smoking causes lung cancer and emphysema (also known as chronic obstructive pulmonary disease ("COPD")), as well as many other types of cancer; (2) that environmental tobacco smoke causes lung cancer and endangers the respiratory and auditory systems of children; (3) that nicotine is a highly addictive drug which they manipulated in order to sustain addiction; (4) that they marketed and promoted low tar/light cigarettes as less harmful when in fact they were not; (5) that they intentionally marketed to young people under the age of twenty-one and denied doing so; and (6) that they concealed evidence, destroyed documents, and abused the

attorney-client privilege to prevent the public from knowing about the dangers of smoking and to protect the industry from adverse litigation results.

The following voluminous Findings of Fact demonstrate that there is overwhelming evidence to support most of the Government's allegations. As the Conclusions of Law explain in great detail, the Government has established that Defendants (1) have conspired together to violate the substantive provisions of RICO, pursuant to 18 U.S.C. § 1962 (d), and (2) have in fact violated those provisions of the statute, pursuant to 18 U.S.C. § 1962 (c). Accordingly, the Court is entering a Final Judgment and Remedial Order which seeks to prevent and restrain any such violations of RICO in the future.

In particular, the Court is enjoining Defendants from further use of deceptive brand descriptors which implicitly or explicitly convey to the smoker and potential smoker that they are less hazardous to health than full flavor cigarettes, including the popular descriptors "low tar," "light," "ultra light," "mild," and "natural." The Court is also ordering Defendants to issue corrective statements in major newspapers, on the three leading television networks, on cigarette "onserts," and in retail displays, regarding (1) the adverse health effects of smoking; (2) the addictiveness of smoking and nicotine; (3) the lack of any significant health benefit from smoking "low tar," "light," "ultra light," "mild," and "natural" cigarettes; (4) Defendants' manipulation of cigarette design and composition to ensure optimum nicotine delivery; and (5) the adverse health effects of exposure to secondhand smoke.

Finally, the Court is ordering Defendants to disclose their disaggregated marketing data to the Government in the same form and on the same schedule which they now follow in disclosing this material to the Federal Trade Commission. All such data shall be deemed "confidential" and "highly

sensitive trade secret information" subject to the protective Orders which have long been in place in this litigation.

Unfortunately, a number of significant remedies proposed by the Government could not be considered by the Court because of a ruling by the Court of Appeals in United States v. Philip Morris, USA, Inc., et al., 396 F.3d 1196 (D.C. Cir. 2005). In that opinion, the Court held that, because the RICO statute allows only forward-looking remedies to prevent and restrain violations of the Act, and does not allow backward-looking remedies, disgorgement (i.e., forfeiture of ill-gotten gains from past conduct) is not a permissible remedy.

Applying this same legal standard, as it is bound to do, this Court was also precluded from considering other remedies proposed by the Government, such as a comprehensive smoker cessation program to help those addicted to nicotine fight their habit, a counter marketing program run by an independent entity to combat Defendants' seductive appeals to the youth market; and a schedule of monetary penalties for failing to meet pre-set goals for reducing the incidence of youth smoking.

The seven-year history of this extraordinarily complex case involved the exchange of millions of documents, the entry of more than 1,000 Orders, and a trial which lasted approximately nine months with 84 witnesses testifying in open court. Those statistics, and the mountains of paper and millions of dollars of billable lawyer hours they reflect, should not, however, obscure what this case is really about. It is about an industry, and in particular these Defendants, that survives, and profits, from selling a highly addictive product which causes diseases that lead to a staggering number of deaths per year, an immeasurable amount of human suffering and economic loss, and a profound burden on our national health care system. Defendants have known many of these facts for at least 50 years or more. Despite that knowledge, they have consistently, repeatedly, and with

enormous skill and sophistication, denied these facts to the public, to the Government, and to the public health community. Moreover, in order to sustain the economic viability of their companies, Defendants have denied that they marketed and advertised their products to children under the age of eighteen and to young people between the ages of eighteen and twenty-one in order to ensure an adequate supply of "replacement smokers," as older ones fall by the wayside through death, illness, or cessation of smoking. In short, Defendants have marketed and sold their lethal product with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that success exacted.

Finally, a word must be said about the role of lawyers in this fifty-year history of deceiving smokers, potential smokers, and the American public about the hazards of smoking and second hand smoke, and the addictiveness of nicotine. At every stage, lawyers played an absolutely central role in the creation and perpetuation of the Enterprise and the implementation of its fraudulent schemes. They devised and coordinated both national and international strategy; they directed scientists as to what research they should and should not undertake; they vetted scientific research papers and reports as well as public relations materials to ensure that the interests of the Enterprise would be protected; they identified "friendly" scientific witnesses, subsidized them with grants from the Center for Tobacco Research and the Center for Indoor Air Research, paid them enormous fees, and often hid the relationship between those witnesses and the industry; and they devised and carried out document destruction policies and took shelter behind baseless assertions of the attorney client privilege.[2]

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[2] It would appear this situation continues even to the present. For example, in this very litigation, a former long-time career government lawyer was so intent on representing a company (continued...)

What a sad and disquieting chapter in the history of an honorable and often courageous profession.

B. Preliminary Guidance for the Reader

Courts must decide every case that walks in the courthouse door, even when it presents the kind of jurisprudential, public policy, evidentiary, and case management problems inherent in this litigation. From the day this lawsuit was filed, it has garnered much media attention. Recognizing this, the Court hopes to assist the intrepid reader with her task by explaining certain principles and procedures that it has followed.

First and foremost, the Court has decided that, as fact finder, its obligation is to present to the appellate courts, the parties, and the public all the relevant facts which have been proven by a preponderance of this massive body of evidence consisting of testimony (including written direct examination, in-court cross examination, and re-direct examination of witnesses in this trial, as well as deposition and trial testimony of witnesses in related cases), and thousands of exhibits. By virtue of this procedure, the appellate courts will have before them all the factual determinations they need to decide the numerous legal issues which will unquestionably be raised.

Certain consequences flow from the decision to present the most complete factual picture possible. Even though this Opinion is unusually long and detailed, on occasion, there are very few facts presented on important issues and questions leap off the page to the reader. In those instances, it should be understood that the parties presented no further evidence and the Court has stated

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[2](...continued)
aligned with the Defendants that he grossly misrepresented in his pleadings and declaration to the Court the degree and substance of his earlier participation as government counsel in related litigation involving the Food and Drug Administration. As a result, he was disqualified from representing Defendant-Intervenor BATAS. See Order #915.

Most of the witnesses whose testimony was most vehemently attacked by the Defendants (such as Dr. David R. Kessler,[3] Dr. Michael C. Fiore, Dr. Jeffrey Wigand, and Dr. Cheryl Healton) were only relied upon for undisputed or relatively insignificant background facts (as with Dr. Kessler and Dr. Wigand), or testified about remedies which this Court could not consider on the merits under the Court of Appeals decision discussed above (as in the case of Dr. Fiore and Dr. Healton).

Much of the Defendants' criticisms of Government witnesses focused on the fact that these witnesses had been long-time, devoted members of "the public health community." To suggest that they were presenting inaccurate, untruthful, or unreliable testimony because they had spent their professional lives trying to improve the public health of this country is patently absurd. It is equivalent to arguing that all the Defendants' witnesses were biased, inaccurate, untruthful, and unreliable because the great majority of them had earned enormous amounts of money working and/or consulting for Defendants and other large corporations, and therefore were so devoted to the cause of corporate America that nothing they testified to, even though presented under oath in a court of law, should be believed. Such simplistic attacks on the credibility of the sophisticated and knowledgeable witnesses who testified in this case are foolish.

All of this is not to deny that there were significant differences in the overall qualifications of the Government's witnesses and the Defendants' witnesses. There were. The Government's witnesses, viewed as a whole, were far more experienced, credentialed, and active in the area of smoking and health, whatever their particular area of specialty, than were the Defendants'. Many of the Government experts had participated extensively, over many years, in the long and drawn-out

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[3] As the Court has noted for the record on numerous occasions, Dr. Kessler is not related in any way.

process of ascertaining the consensus of scientific opinions embodied in each Surgeon General's Report. Virtually every one had taught at a well-regarded academic institution and written numerous peer-reviewed articles in their particular area of specialty. Many of the Government witnesses continued "hands on," clinical work in their fields despite heavy commitments for research, writing, teaching, and lecturing to their peers.

The Defendants' witnesses were obviously well educated in their areas of specialty. Indeed, as was mentioned on many occasions, Defendants even presented the testimony of an impressive Nobel Prize winner. However, rarely did these witnesses have the depth and breadth of experience of the Government witnesses. Many had worked only in large corporations, and many for only one or two such employers. Many -- although not all -- had written relatively few peer-reviewed articles. Many of the highest paid experts of Defendants, while well credentialed in their particular fields, such as economics, presented relatively narrow testimony tailored to the particular problem or issue they were retained to opine on for purposes of this litigation. A few of Defendants' experts had done virtually no individual research and written virtually no peer-reviewed articles, and a few were unfamiliar with the relevant facts and/or the major scientific literature on the issue about which they testified.

While the testimony of each person -- expert or fact witness -- was evaluated on its own merits, there can be no denying that, as a group, the Government's witnesses were far more knowledgeable, experienced, and active in their respective fields.

Finally, despite the length and detail of the Findings of Fact, the evidentiary picture must be viewed in its totality in order to fully appreciate how massive the case is against the Defendants, how

irresponsible their actions have been, and how heedless they have been of the public welfare and the suffering caused by the cigarettes they sell.[4]

II. PROCEDURAL HISTORY

Plaintiff, the United States of America ("the Government") brought this suit in 1999 against eleven tobacco-related entities ("Defendants")[5] to recover health care expenditures the Government has paid or will pay to treat tobacco-related illnesses allegedly caused by Defendants' unlawful conduct. The Government also asked this Court to enjoin Defendants from engaging in fraudulent and other unlawful conduct and to order Defendants to disgorge the proceeds of their past unlawful activity.

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[4] One cannot help wondering whether this litigation was the best vehicle for attempting to hold Defendants accountable for their indifference to the health of American citizens. In a democracy, it is the body elected by the people, namely Congress, that should step up to the plate and address national issues with such enormous economic, public health, commercial, and social ramifications, rather than the courts which are limited to deciding only the particular case presented to them in litigation. However, this will certainly not be the first, nor the last, time that litigants seek to use the courts and existing legislation to address broad-scale economic and social problems which might be far better and more appropriately grappled with by our elected representatives.

[5] The eleven Defendants were: Philip Morris, Inc., now Philip Morris USA, Inc. ("Philip Morris"), R.J. Reynolds Tobacco Co., now Reynolds American ("R.J. Reynolds"), Brown & Williamson Tobacco Co., now part of Reynolds American ("Brown & Williamson"), Lorillard Tobacco Company ("Lorillard"), The Liggett Group, Inc. ("Liggett"), American Tobacco Co., merged with Brown & Williamson which is now part of Reynolds American ("American Tobacco"), Philip Morris Cos., now Altria ("Altria"), B.A.T. Industries p.l.c. ("BAT Ind."), now part of BATCo, British American Tobacco (Investments) Ltd. ("BATCo"), The Council for Tobacco Research--U.S.A., Inc. ("CTR"), and The Tobacco Institute, Inc. ("TI"). The latter two entities do not manufacture or sell tobacco products, but are alleged to be co-conspirators in Defendants' tortious activities. BAT Ind. has been dismissed for lack of personal jurisdiction. All Defendants but Liggett joined together in common defense (the "Joint Defendants"). In 2003, the Court granted the Motion of British American Tobacco Australian Services, Ltd. ("BATAS") to intervene for the limited purpose of asserting and protecting its interests in litigation documents. Order #449.