

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Civil Action No. 99-CV-2496 (GK)
)	
v.)	
)	
PHILIP MORRIS USA INC., <i>et al.</i> ,)	
)	
Defendants.)	
)	
)	

JOINT STATUS REPORT REGARDING CORRECTIVE STATEMENTS

Pursuant to Order #67-Remand (Dkt. No. 6208; issued June 27, 2017), the United States and Public Health Intervenors (collectively “Plaintiffs”); Philip Morris USA Inc., Altria Group, Inc., and R.J. Reynolds Tobacco Company (individually, as successor in interest to Brown & Williamson Tobacco Corporation, and as successor to Lorillard Tobacco Company) (collectively “Defendants”); and ITG Brands, LLC, Commonwealth Brands, Inc., and Commonwealth-Altadis, Inc. (collectively “Remedies Parties”) respectfully submit this joint status report regarding the Corrective Statements remedy.

First, since this Court issued Order #67-Remand, the parties have discussed steps to move forward expeditiously to the implementation of the corrective statements. The parties plan to update and submit for this Court’s consideration proposed Consent Order language to incorporate the revised text across all executions (newspapers, television, websites, and onserts); and to make other conforming changes to the Consent Order. Among possible changes to the Consent Order, Plaintiffs have proposed that the parties replace the agreed-upon Trigger Date mechanism with a date certain for implementation to begin in newspapers, television, and company websites, and a

second date certain for implementation to begin on onserts; and that the parties remove the tobacco companies' reservation of rights to appeal.

Plaintiffs have identified at least one potential timing issue. In conjunction with and to facilitate the parties' discussions about the Consent Order, the parties have started the process of exchanging mock-ups to accompany the anticipated Consent Order. New mockups for company websites are expected to take several weeks longer to prepare than new mockups for the other media channels, and two of those other media channels, newspapers and television, will need less preparation time but will require a certain amount of time to arrange media buys. As a result, plaintiffs have proposed that if the parties do not reach agreement on website mockups by the recommended filing date below, the parties should submit a (partial) proposed consent order accompanied by mockups for newspapers and television, and setting a date certain for implementation to begin in those media formats, with the expectation that website mockups (and companion consent-order language) would be submitted at a later date. For their part, Defendants and the Remedies Parties have not agreed to any of Plaintiffs' suggested changes and continue to maintain that all parties' agreement is necessary to amend the implementation order by consent.

The parties intend to address these and other issues as part of their discussions.

The parties respectfully request that the Court require them to apply their best efforts, by August 11, 2017, to submit an agreed upon (Proposed) Second Superseding Consent Order, or to provide a further status report to the Court outlining the status of finalizing mockups and any other remaining issues concerning the implementation of the corrective-statements remedy in these media channels. The parties are attaching a (proposed) Order for the Court to consider and, if acceptable, to enter.

Second, in Order #67-Remand, the Court invited any “objections or comments” to the text of the Corrective Statements set forth in pages 5-7 of the Court’s June 27 Memorandum Opinion (Dkt. No. 6209). The parties have differing views on this issue, as outlined below. The parties jointly ask that the Court consider and rule on the comments below to avoid any delays in the work described in the previous paragraph. Page 2 of the attached (proposed) Order provides separate options for the Court to credit or disregard the comments of Defendants and the Remedies Parties.

Defendants’ and Remedies Parties’ position: In its most recent corrective-statements decision, the D.C. Circuit held that the prior topic descriptor in the preamble to Statement C “was not previously considered and is indeed backward-looking.” 855 F.3d 321, 328 (D.C. Cir. 2017). The D.C. Circuit offered three alternative topic descriptions that it held “would be permissible under both RICO and the First Amendment.” *Id.* at 329. This Court adopted the first of the three alternatives proposed by the D.C. Circuit—“about low tar and light cigarettes being as harmful as regular cigarettes.” The corrective statements, of course, constitute the Court’s conclusions, which Defendants and the Remedies Parties are compelled to disseminate in a variety of media. Defendants and the Remedies Parties intend to fully comply with the Court’s order regarding the content and dissemination of these statements. For these reasons, Defendants and the Remedies Parties defer to the Court’s judgment as among the three alternative topic descriptions suggested by the D.C. Circuit. Because the Court has solicited comments, Defendants and the Remedies Parties observe that the second of the alternative descriptions—“about the harmfulness of low tar and light cigarettes”—is simple, clear, and direct. 855 F.3d at 329. It also uses fewer words than the other alternatives. The Court has previously noted that shortening the preamble text may make reading the statements easier for the public. Feb. 8, 2016 Mem. Opinion (Dkt. 6185), at 6.

The option the Court previously chose and that Plaintiffs prefer is awkwardly phrased to incorporate the conclusion that low-tar and light cigarettes are “as harmful as regular cigarettes.” That is superfluous, as the Court’s conclusion regarding the comparative effects of such cigarettes is made clear in the first bullet point.

Plaintiffs’ position: For two major reasons, the United States and the Public Health Intervenor concur with the Court’s “strong view” that Option 1 is the best Statement C introduction that the Court of Appeals suggested. Mem. Op. accompanying Order #67-Remand at 4. First, Statement C is meant to *compare* the health effects of light/low-tar cigarettes as against the health effects of regular cigarettes. As the Court explained when it set out the topic in 2006, Statement C is to address “the *lack* of any significant health *benefit* from smoking ‘low tar,’ ‘light,’ ‘ultra light,’ ‘mild,’ and ‘natural,’ cigarettes.” *United States v. Philip Morris USA Inc.*, 449 F. Supp. 2d 1, 938-39 (D.D.C. 2006) (emphases added), *aff’d in relevant part*, 566 F.3d 1095 (D.C. Cir. 2009) (*per curiam*), *cert. denied*, 561 U.S. 1025 (2010). A “lack of any significant benefit” necessarily indicates a comparison to something else. The Court of Appeals found that the tobacco companies’ “false statements” about “whether ‘light’ cigarettes were *less harmful than other cigarettes*” suggested that they themselves consider such comparisons “material.” *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1122 (D.C. Cir. 2009) (*per curiam*) (emphasis added). The Option 1 introduction correctly frames Statement C as a *comparison* of light/low-tar *as against* regular cigarettes; while Option 2 would wrongly frame it as focused just upon light/low-tar cigarettes.

Plaintiffs also consider Option 1 the better introduction because it is simpler and easier to understand. A reference to “harm” is easily understood by consumers. Slightly more

complex—and the only natural way to use a cognate of “harm” to make a comparison—is to say that one thing is “as harmful as” something else, as Option 1 does. But the key to the tobacco companies’ preferred Option 2 is the word “harmfulness,” which is the hardest term (and least likely to be used in most consumers’ daily lives) of the three. It makes no sense for the Court to *drop* the central point of Statement C—its “as harmful as” comparison between light/low-tar and regular cigarettes—to further *complicate* the text with the word “harmfulness.” The Court was correct to choose Option 1, and the companies make no claim that reconsideration is warranted on grounds such as mistake of law or fact, changed circumstances, or manifest error.

Third, the parties are in agreement that the final versions of corrective statements to be published by the Remedies Parties as inserts and on websites should include the slight modifications regarding ITG Brands, LLC ordered in Order #56-Remand, conformed to accord with the D.C. Circuit’s most recent corrective-statements decision. The language provided in Order #67-Remand did not include this modification, but the (Proposed) Second Superseding Consent Order that the parties expect to submit will reflect that language.

The parties respectfully ask the Court to consider the attached (proposed) Order as well as the comments set forth above with respect to the topic description for Statement C and fill out and enter the (proposed) Order accordingly.

Dated: July 11, 2017

Respectfully submitted,

/s/ Anand Agneshwar

Anand Agneshwar

ARNOLD & PORTER KAYE SCHOLER LLP

250 West 55th Street

New York, NY 10019-9710

Telephone: (212) 836-8011

Fax: (212) 836-8689

Miguel A. Estrada (D.C. Bar No. 456289)

GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
Telephone: (202) 955-8257
Fax: (202) 530-9016

Thomas J. Frederick
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, Illinois 60601-9703
Telephone: (312) 558-6700
Fax: (202) 558-5700

*Attorneys for Defendants Altria Group, Inc.
and Philip Morris USA Inc.*

Peter J. Biersteker (D.C. Bar No. 358108)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
Telephone: (202) 879-3939
Fax: (202) 626-1700

Jeffrey A. Mandell (D.C. Bar No. 999791)
STAFFORD ROSENBAUM LLP
222 West Washington Avenue, Suite 900
Madison, Wisconsin 53703
Telephone: (608) 256-0226
Fax: (608) 259-2600

Geoffrey K. Beach (D.C. Bar No. 439763)
WOMBLE CARLYLE SANDRIDGE &
RICE, LLP
One West Fourth Street
Winston-Salem, NC 27101
Telephone: (336) 721-3600
Fax: (336) 721-3660

*Attorneys for Defendant R.J. Reynolds
Tobacco Company (individually, as
successor in interest to Brown & Williamson
Tobacco Corporation, and as successor to
Lorillard Tobacco Company)*

Robert J. Brookhiser, Jr. (D.C. Bar No.
202168)
Elizabeth B. McCallum (D.C. Bar No.
451361)
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5304
Telephone: (202) 861-1500
Fax: (202) 861-1783

*Attorneys for Post-Judgment Parties
Regarding Remedies ITG Brands, LLC,
Commonwealth Brands, Inc. and
Commonwealth-Altadis, Inc.*

JOSHUA WILKENFELD, Acting Director
ANDREW CLARK, Assistant Director
Consumer Protection Branch

_____/s/_____
DANIEL K. CRANE-HIRSCH
Trial Attorney
Civil Division
United States Department of Justice
PO Box 386
Washington, DC 20044-0386
Telephone: 202-616-8242 (Crane-Hirsch)
Facsimile: 202-514-8742
E-mail address:
daniel.crane-hirsch@usdoj.gov
*Attorneys for Plaintiff United States of
America*

_____/s/_____
Katherine A. Meyer (D.C. Bar 244301)
MEYER GLITZENSTEIN & EUBANKS
LLC
4115 Wisconsin Ave., N.W. Suite 210
Washington, DC 20016
202-588-5206
meyer@meyerglitz.com
*Attorneys for the Public Health
Plaintiff-Intervenors*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 11, 2017, I filed a copy of the foregoing, which will electronically serve all counsel of record who have entered an appearance in this case.

Dated: July 11, 2017

Respectfully submitted,

/s/ Anand Agneshwar

Anand Agneshwar
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019-9710
Telephone: (212) 836-8011
Fax: (212) 836-8689

*Attorney for Defendants
Altria Group, Inc. and Philip Morris USA
Inc.*