UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. PHILIP MORRIS USA INC., *et al.*, Defendants. and ITG BRANDS, LLC, *et al.*, Post-Judgment Parties Regarding Remedies	)	Civil Action No. 99-CV-2496 (PLF)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' AND REMEDIES PARTIES' MOTION FOR REFERRAL TO THE SPECIAL MASTER FOR MEDIATION, OR, IN THE ALTERNATIVE, FOR CLARIFICATION

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 2

I. Mockup Designs 3

II. Past Special Master and Mediation Referrals in this Case 8

III. This Court's Prior Finding of Fact that Mandatory Mediation in an Injunctive Order is a "Time-Consuming" "Impediment to Enforcement," and Prior Refusal to Order Plaintiffs to Enter Mandatory Mediation over Potential Violations of the Court's Remedial Order 9

ARGUMENT 9

I. There Is Neither Reason nor Authority to Impose Mandatory Mediation 10

A. The Court Lacks Authority to Order Compelled Mediation under the Present Circumstances. 10

B. Compelled Mediation Is Not Appropriate in the Circumstances Here 12

II. The Court Should Not Bar Plaintiffs from Seeking to Enforce the Court's Remedial Order As to Two Companies' (Unidentified) Mockup Proposals for Five Cigarette Brand Websites. 15

A. This Court's Remedial Orders Do Not Require Endless Negotiations before Plaintiffs May Seek Enforcement. 16

B. The Court Should Not Accept the Tobacco Companies' *Ipse Dixit* Assertions that Unidentified Mockup Changes Meet the Requirements of Order #64-Remand. 16

III. If the Court Wishes to Reach the Question, Order #64-Remand Is in Force and Enforceable as to the Companies' Websites and Onserts 18

CONCLUSION 22

INTRODUCTION

The D.C. Circuit's April 2017 decision on this Court's corrective-statement remedy remanded for some specific, extremely limited textual edits: Deletion of four words, "Here is the truth," from the preamble of all five statements; and recasting of one statement to remove a four-word reference to "selling and advertising" low-tar and light cigarettes "as" less harmful. *United States v. Philip Morris USA Inc.*, 855 F.3d 321, 328, 329 (D.C. Cir. 2017). The decision upheld all other language for this long overdue remedy, and closed with these pointed words:

> [W]e see no reason why extensive proceedings will be required in the district court. With minor revisions mandated in this opinion, the district court can simply issue an order requiring the correct[ive] statements remedy to go forward.

Id. at 329.

The tobacco companies[1] urge the Court to make a mockery of this emphatic instruction by imposing mandatory mediation, over Plaintiffs' objections, about the *display* of the statements on their websites and onserts—a process that would only further delay this remedy. Order #64-Remand already requires posting the statements on the companies' websites and onserts, and specifies how they must do it. Plaintiffs have voluntarily forsworn enforcement as to websites until March 11, 2018 (and later yet for onserts), but the companies seemly believe they effectively have an open-ended stay, because the Court of Appeals directed eight words eliminated.

There is no authority for the Court to order mandatory mediation in the present circumstances, and the companies cite none. Even if there were such authority, the Court considered and rejected the tobacco companies' previous bid for compulsory mediation, which it

[1] The "tobacco companies" refers to Defendants (Altria, Philip Morris USA, and R.J. Reynolds Tobacco ("RJRT")) and the Remedies Parties (ITG Brands, Commonwealth Brands, and Commonwealth-Altadis) collectively.

found "leads to time-consuming enforcement efforts"; the Court therefore refused to impose compulsory mediation as "an impediment to enforcement of [the Court's] Remedial Order." *United States v. Philip Morris USA, Inc.*, 793 F. Supp. 2d 164, 172 (D.D.C. 2011) ("*2011 Decision*").The tobacco companies make no mention of this prior holding, much less seek to distinguish it, or even explain why the Court should adopt "such an impediment to enforcement of its Remedial Order" now that *another* six years have passed.

The tobacco companies' motion, in the alternative, asks the Court to bar Plaintiffs from seeking enforcement as to (unidentified) website mockup proposals for cigarette brands accounting for *two-thirds* of all U.S. cigarette sales. However helpful advance consultations may be, Plaintiffs have no enforceable duty to discuss and opine upon the companies' proposals. Even if there were such a duty, Plaintiffs amply satisfied it months ago. To seek the comfort of knowing in advance whether their planned website postings will conform to Order #64-Remand, the companies could easily have submitted their actual proposals to the Court and explained why they believe they satisfy the Order. That they did not do so speaks volumes. The Court should not reward the companies' effort to forestall implementation of Order #64-Remand by barring its enforcement as to their unidentified proposals.

The companies' motion also contends that Order #64-Remand is no longer in force and has no effect as to websites and onserts. Curiously, however, the companies' motion conspicuously does *not* ask the Court to rule on this. In any event, as explained more fully below, the tobacco companies' arguments are groundless.

BACKGROUND

The corrective statement remedy at issue was originally required by Judge Kessler on August 17, 2006. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 938-39 (D.D.C. 2006). Nevertheless, after years of litigation, including numerous trips to the D.C. Circuit and

many years of mediation, this remedy still has yet to be implemented with respect to either onserts or websites.

I. Mockup Designs

Several portions of the parties' 2016 consent order, Order #64-Remand (Dkt. No. 6195; issued 4/19/2016), are pertinent here. First, its definition section sets out the 2016 text for the Court-ordered statements. *Id*. at 2-4. Second, the order sets out various minimum specifications for the appearance of the corrective statements on company websites, in each of three chronological phases. *Id*. at 16-22. Third, the order incorporates various website mockup designs by reference, and provides a safe harbor for "[a]ny existing Covered Website that is not redesigned . . . as long as it is substantially similar to and meets the specifications depicted in" the mockups that Order #64-Remand incorporated by reference. *Id*. at 13-14, 19-20, 21. Finally, the order provides that for "any new or redesigned Covered Website," the corrective-statement display must have "comparative prominence" "at least as great as in any of the mock ups" that Order #64-Remand incorporates by reference. *Id*. at 13. (This is the "comparative prominence" requirement referenced throughout this brief.)

Notably, the mockup designs for Philip Morris and RJRT that Order #64-Remand incorporates by reference are the mockup designs from 2014. *Id*. at 7 (defining the term "Website Mock ups," for Defendants Philip Morris and RJRT, to refer "to the mock ups filed as Exhibit F to the April 2014 Praecipe") (in turn referencing Dkt. No. 6081-6 to 6081-10; filed Apr. 22, 2014).[2] Those 2014 Philip Morris and RJRT mockup designs—incorporated by

[2] Order #64-Remand provided new website mockups only for Remedies Party ITG Brands. The Remedies Parties, including ITG Brands, became parties in 2015, after entry of the 2014 consent order (which was Order #51-Remand). *See* Order #56-Remand (Dkt. 6151; issued 6/8/2015).

reference in the 2016 consent order—depicted statement text from 2014 that the D.C. Circuit had, in the interim, struck down at Defendants' behest.

Even before Order #64-Remand issued, the tobacco companies had already noticed an appeal from the then-current statement text, and Order #64-Remand preserved their right to file a further appeal from Order #64-Remand itself, to the extent that it replicated the then-current wording. *Id*. at 31-32. It provided that, "Should the language of the Corrective Statements be changed as a result of further litigation, the parties reserve the right to seek different requirements than those stated herein." *Id*. at 32. It does not require the parties to agree on a new consent order if the language is changed as a result of further litigation; does not require mandatory mediation if the language is changed; does not provide that it will be unenforceable if the language is changed; and does not provide that its website requirements are suspended or stayed unless and until the parties agree on new mockup displays that satisfy the "comparative prominence" requirement. Instead, Order #64-Remand ties the tobacco companies' performance to a "Trigger Date," which it defines in terms of the exhaustion of all appeals. *Id*. at 6. By Plaintiffs' calculation, that happened June 26, 2017. Ex. 1 at 2 n.1 (ltr. dated 11/3/2017, Crane-Hirsch to Agneshwar).

As anticipated, the tobacco companies filed a notice of appeal from Order #64-Remand (to challenge the statement language), and the D.C. Circuit consolidated the two appeals. In its April 25, 2017, decision, the D.C. Circuit directed some changes to "the preamble language in [the district court's] corrective-statement remedy," but did not reverse or vacate Order #64-Remand. *Philip Morris USA Inc.*, 855 F.3d at 329. It closed its decision by observing, "we see no reason why extensive proceedings will be required in the district court. With the minor revisions

mandated in this opinion, the district court can simply issue an order requiring the corrected statements remedy to go forward." *Id*.

Within a week of receiving the mandate, this Court *sua sponte* issued a memorandum opinion and an order setting out revised text for the corrective statements. Memorandum Opinion and Order #67-Remand (Dkt. Nos. 6208 & 6209; both issued June 27, 2017).

In October 2017, the parties reached a further Consent Order as to Newspapers and Television, Order #72-Remand. This consent order changed the statement language from the 2016 language in Order #64-Remand. It effected the required alterations to both the English and Spanish texts, and with tobacco companies' full assent, reiterated the "revised text for corrective statements" that the Court had *sua sponte* ordered in its Order #67-Remand and accompanying Memorandum-Opinion, and did so in its "Definitions" section, without limitation as to newspapers or television. Order #72-Remand, at 2-4. The same order also directed specific Spanish text for the statements, again without limitations as to newspaper or television. *Id*. at 5 (defining "Spanish version" and incorporating Exhibits 1 and 2 of the Parties' consent motion, Dkt. No. 6223-1 & 6223-2 (filed 10/2/17)). Even for the Remedies Parties—not otherwise affected by Order #72-Remand—the consent order's definition of "Spanish version" changed the Remedies Parties' Spanish text from what Order #64-Remand had provided. *Id*. at 12.

The parties have also discussed a possible new consent order as to onserts and websites, to include new mockup designs. The companies could retain the benefit of Order #64-Remand's safe harbor for "[a]ny existing Covered Website that is not redesigned" by using the same mockup designs that are incorporated by reference in Order #64-Remand. Order #64-Remand at 13-14, 19-20, 21. But the companies have or wish to change their website designs, and are

therefore subject to Order #64-Remand's "comparative prominence" provision for new and redesigned websites. *Id*. at 13.

After six months, of the 14 websites for which the companies have proposed new or redesigned mockup designs, the parties have reached agreement on nine. Only three of these are for cigarette brands: Newport, Winston, and Kool, which in 2017, together accounted for about 16% of cigarettes sold at retail in the U.S. Bonnie Herzog & Patty Kanada, *Equity Research: Nielsen: Tobacco 'All Channel' Data 12/30* at 2 ex. 1 (Jan. 9, 2018). The six others that have been agreed are for the companies' corporate websites (Altria, Philip Morris USA, RJRT, and ITG Brands) and document-disclosure websites (Philip Morris USA and RJRT).

The tobacco companies have *not* secured Plaintiffs' agreement for redesigned mockups for five websites—all five of them for cigarette brands, together accounting for about 68% of cigarettes sold at retail in the U.S. in 2017 (Marlboro, Camel, Pall Mall, L&M, and Parliament). *Id*. The market leader, Marlboro, alone accounts for about 45% of the U.S. retail market, *id*., and its website alone accounted for about 100 million "consumer connections" during the first 9 months of 2017. *Altria Group, Inc. Investor Day 2017* at 23 (Nov. 2, 2017) (Fair Disclosure Wire transcript) (comments of Kevin C. Crosthwaite, Philip Morris USA Inc. President & CEO).

On remand, discussions regarding website mockups proceeded slowly. Plaintiffs received the first of the tobacco companies' initial redesigned website mockups in late July 2017; the bulk of the initial mockups arrived in mid and late August; and the last was not received until the first week in September. Plaintiffs provided detailed feedback on every one. The tobacco companies provided further iterations, and Plaintiffs have either accepted or provided further detailed feedback on every iteration of every mockup and every other proposal—some 40 to date. By November 2017, however, progress had begun to stall.

Plaintiffs and Remedies Party ITG Brands have reached agreement on all substantial questions related to websites. But RJRT's last new mockups came on November 17, 2017, for the Camel and Pall Mall sites, and the last substantive communication about those mockups was a December 22 email from Plaintiffs to RJRT. Philip Morris's last actual mockups were sent on November 9, 2017, for Parliament and Marlboro, followed by a PowerPoint illustration of a potential new Marlboro mockup on January 3, 2018[3]; the last substantive communication was January 8, when—at Philip Morris's request—Plaintiffs identified specific modifications that we believed would satisfy the comparative prominence requirement. Plaintiffs have not heard back from Philip Morris since then.[4] Contrary to the tobacco companies, the parties are decidedly not "in striking distance of an agreement on implementation." *See* Defs.' Mem. at 5.

On November 3, 2017, Plaintiffs advised the tobacco companies that Order #64-Remand remained in force and enforceable, and that although Plaintiffs had not been seeking enforcement of Order #64-Remand while the parties discussed the companies' proposed redesigns, implementation could not be delayed indefinitely. Ex. 1 (ltr. dated 11/3/2017, Crane-Hirsch to Agneshwar et al.) On December 15, 2017, Plaintiffs informed the companies that if no agreement were reached, Plaintiffs would consider the Trigger Date to be January 12, 2018, such that the clock would start ticking on that date, and would look for website compliance to begin

[3] The January 3 illustration pasted two PowerPoint text boxes on top of a screenshot of the November 9 Marlboro mockup. No specifications were shown, leaving the parties unclear in a phone call the same day whether the PowerPoint was meant to depict the same or different typefaces, typesizes, font colors, background colors, and border styles than the November 9 Marlboro mockup.

[4] Philip Morris sent only one L&M mockup, on August 25, 2017, and sent its last Parliament mockup on November 9, 2017. Philip Morris's lawyers have indicated that they anticipate that the companies' L&M and Parliament websites will follow the style of its (eventual) Marlboro website redesign, but have not provided Plaintiffs any conforming mockups.

eight weeks later. Plaintiffs advised the Court of the same in the parties' January 2018 status report. Dkt. No. 6243 at 3 (filed 1/19/2018).

Regarding onserts, Plaintiffs requested RJRT and ITG Brands in August 2017 to agree to have a right-facing triangle on the front of each onsert, to replace the colon that formerly signaled that the text of the corrective statement continues on the reverse of the onsert. On January 25, 2018, Plaintiffs sent ITG Brands a native-format version of a mockup Plaintiffs originally sent on August 15, 2017 (in response to an ITG Brands request earlier the same day); but otherwise RJRT and ITG Brands have not yet responded.

II. Past Special Master and Mediation Referrals in this Case

In 2000, pursuant to Fed. R. Civ. P. 53, Judge Kessler appointed the Hon. Richard A. Levie, a retired judge of the D.C. Superior Court, to serve as a special master for certain specified pretrial matters, and then substantially expanded his duties in 2011. Order #41 (Dkt. No. 227; issued 12/22/2000); Order #51 (Dkt. No. 265; issued 3/27/2001). The Special Master filed his last Report and Recommendation under those appointments on September 7, 2004, two weeks before trial began. Report & Recommendation #172 of the Special Master (Dkt. No. 3622; issued 9/7/2004). During the sixth month of the nine-month trial, the Court formally terminated the order of reference. Order #909 (Dkt. 5135; issued 4/1/2005).

After the case was tried, appealed, and remanded back to the district court in 2010, Judge Kessler named Judge Levie in 2011—by consent of the parties—to serve as a mediator on two issues arising from the Court's 2006 post-trial remedies order. *See* Order #14-Remand, at 2 (Dkt. No. 5878; issued 2/25/11) (document coding issues); Order #15-Remand (Dkt. No. 5895; issued 3/24/2011) (document posting). Subsequent mediation referrals were either issued by consent, *e.g.*, Order #36-Remand (Dkt. No. 6002; issued 1/28/2013), or, if issued *sua sponte*, were not objected to by any of the parties. Order #34-Remand, at 4.

III. This Court's Prior Finding of Fact that Mandatory Mediation in an Injunctive Order is a "Time-Consuming" "Impediment to Enforcement," and Prior Refusal to Order Plaintiffs to Enter Mandatory Mediation over Potential Violations of the Court's Remedial Order

In 2011, this Court considered and rejected various prophylactic rulings that the tobacco companies sought "in order to preempt potential future litigation." *2011 Decision*, 793 F. Supp. 2d at 169. Among the considered and rejected forms of relief was mandatory mediation. *Id*. at 172-73. Referring to the Master Settlement Agreement ("MSA") between the tobacco companies and 52 jurisdictions, including 46 state Attorneys General, the Court observed that it had "already found that the [MSA's] mandatory consultation and discussion rule 'leads to time-consuming enforcement efforts' and is one of several structural issues making the MSA 'a far less powerful enforcement mechanism than Defendants claim.'" *Id*. at 172 (quoting post-trial findings of fact in *Philip Morris USA, Inc.*, 449 F. Supp. 2d at 844, 914-15). Accordingly, the Court rejected the companies' 2011 bid for compulsory mediation as a pre-condition to any future enforcement effort. As the Court put it, "Defendants have offered no reason why the Court should now, nearly five years after issuance of Order #1015, introduce such an impediment to enforcement of its Remedial Order." *2011 Decision*, 793 F. Supp. 2d at 172.

ARGUMENT

The tobacco companies' motion advances two requests for relief: (1) to order Plaintiffs to enter mandatory and seemingly open-ended mediation before Judge Levie on whether the companies' proposed designs for websites and onserts comply with Order #64-Remand; or (2) in the alternative, to prohibit Plaintiffs from seeking to enforce the Court's remedial order as to potential future implementations of (unidentified) mockup proposals for the websites of cigarette brands that account for two-thirds of cigarettes sold at retail in the U.S.

The motion does not actually provide an argument to support either form of requested relief.[5] But even on the merits, there is neither reason nor authority to impose mandatory mediation at this juncture. The Court should refuse (as it has before) to order mandatory mediation as a "time-consuming" "impediment to enforcement," and should not prohibit Plaintiffs from seeking to enforce the Court's remedial order as to the companies' (unidentified) websites and onserts.[6]

I. There Is Neither Reason nor Authority to Impose Mandatory Mediation

Neither this Court's Local Civil Rule 84 under the Alternative Dispute Resolution Act of 1998, nor Order #64-Remand, nor any "inherent power," would authorize the Court to order extrajudicial mediation before Judge Levie over Plaintiffs' objections. Even were compulsory mediation before Judge Levie authorized, the tobacco companies have failed to demonstrate that it would hasten implementation on websites and onserts or otherwise be of any use here.

A. The Court Lacks Authority to Order Compelled Mediation under the Present Circumstances.

The tobacco companies have not identified any source of authority for compelling mediation over Plaintiffs' objections here. While there are five potential sources for such authority: the court's local rules, an applicable statute, the Federal Rules of Civil Procedure, the

[5] That alone is sufficient reason to deny the motion; motions must be supported "by a statement of the specific points of law and authority," Local Civil Rule 7(a), "to ensure that the nonmovant and the court are provided notice of what is sought and the legal basis for the motion." *Abdah v. Bush*, No. CIV.A. 04-01254 HHK, 2008 WL 114872, at *1 n.2 (D.D.C. Jan. 9, 2008) (Kennedy, J.). Consequently, both of the tobacco companies' requests should be denied. *See, e.g.*, *Kennedy-Jarvis v. Wells*, 113 F. Supp. 3d 144, 150 (D.D.C. 2015) (Moss, J.); *Schoenman v. F.B.I.*, 857 F. Supp. 2d 76, 82 n.6 (D.D.C. 2012) (Kollar-Kotelly, J.).

[6] Within their requests for relief, the companies interweave an argument for the dubious proposition that Order #64-Remand is no longer in force and has no effect as to websites and onserts. Curiously, however, their motion conspicuously does *not* ask the Court to rule on this. In any event, as explained more fully below, the tobacco companies' arguments are groundless.

court's inherent powers), *In re Atl. Pipe Corp.*, 304 F.3d 135, 140 (1st Cir. 2002), and a pre-existing mandatory mediation clause, *Cunningham & Assocs., PLC v. ARAG, LLC*, 842 F. Supp. 2d 25, 29 (D.D.C. 2012), none of these is present here.

This Court's local rules governing the administration of this District's Mediation Program, Local Civil Rules 84–84.10, implement this District's only mechanism to require mandatory mediation; s*ee* Local Civ. R. 84(b) & 84.4(a)(2). Because the Local Civil Rules prescribe how this District handles compulsory mediation, any such referral must be consistent with those rules. *See* Fed. R. Civ. P. 83(b) ("A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules"). Under this Court's Local Civil Rules, when the Court makes a referral (including for mandatory mediation), the Court's mediation staff appoints a mediator from the Court's panel. Local Civ. R. 84.5(a). The Court's panel of mediators consists of volunteer lawyers who have specified experience, skills, and temperament. Local Civ. R. 84.3(a), (b). Although Judge Levie undoubtedly possesses the experience, skills, and temperament generally needed to be a mediator (even if not expertise in graphic design or layout), he is not to Plaintiffs' knowledge a member of the Court's panel of mediators and certainly has not previously been asked to serve on a volunteer basis in this case. The tobacco companies make no claims to the contrary.

The only pertinent statute is the Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658 ("ADR Act"), but it does not independently authorize mandatory mediation. Rather, the ADR Act requires each district court to adopt local rules making alternative dispute resolution processes available, and specifically authorizes district courts' local rules to impose mandatory mediation in certain cases. 28 U.S.C. § 652(a). The ADR Act is not a free-standing authorization for individual judges "to disregard a district-wide ADR plan (or the absence of

one) and fashion innovative procedures for use in specific cases." *In re Atl. Pipe Corp.*, 304 F.3d at 142. The ADR Act thus authorizes this District's Mediation Program and Local Civil Rules 84–84.10, but does not independently authorize mandatory mediation referrals.

The Federal Rules of Civil Procedure are no more helpful to the companies' position. One provision authorizes compelled settlement attendance at a pre-trial conference, Fed. R. Civ. P. 16(c)(1), and another authorizes pre-trial orders on "settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule," *id.*, Rule 16(c)(2)(*I*), but this case is post-trial; and in any event, as we have seen, no statute or local rule would authorize compelling mediation before Judge Levie in the present circumstances.

Nor would "inherent power" authorize mandatory mediation here. Within this Circuit, "[a] judicial claim to an 'inherent power' . . . must either be documented by historical practice or supported by an irrefutable showing that the exercise of an undoubted authority would otherwise be set to naught." *Cobell v. Norton*, 334 F.3d 1128, 1141 (D.C. Cir. 2003) (internal citations omitted). Although some courts have found an inherent power to order mandatory mediation, they have justified doing so by appeals to expediency, rather than anything resembling the D.C. Circuit's stringent *Cobell* standard. *E.g.*, *In re Atl. Pipe Corp.*, 304 F.3d at 143-44.

Finally, neither Order #64-Remand nor any other agreement would authorize the Court to compel mandatory mediation over Plaintiffs' objections. In theory, the parties could have agreed upon a compulsory mediation clause; but as this Court found the last time the tobacco companies sought such a process, compulsory mediation would be a "time-consuming" "impediment to enforcement of [the Court's] remedial order." *2011 Decision*, 793 F. Supp. 2d at 172.

B. Compelled Mediation Is Not Appropriate in the Circumstances Here

Even if there was a legal basis to compel mediation before Judge Levie, the tobacco companies fail to establish that the Court would be warranted in doing so here, based on their

inability to persuade Plaintiffs to agree to any of their website proposals for five cigarette brands that account for two-thirds of the U.S. market.

The companies baldly assert that, "*[b]y its own terms,* Order #64-Remand . . . requires the parties to agree upon a new consent order if, as here, the D.C. Circuit altered the wording of the corrective statements." Defs.' Mem. at 9 (emphasis added). But the companies cite no such provision. Instead, they point only to language that *"reserved the right"* of the parties to *"seek"* modifications. That the parties are empowered to seek modifications of Order #64-Remand hardly means that they are required to do so, and such a "reservation of right" plainly does not render Order #64-Remand void or unenforceable. Moreover, any hypothesized "requirement" for the parties to reach agreement on new website implementations every time the companies wanted to redesign their websites would deprive Plaintiffs—and the Court—of the ability to enforce compliance if necessary. The parties conspicuously did not agree to such terms, and the Court refused to impose them (as a "time-consuming" "impediment to enforcement") the last time the companies asked. *2011 Decision*, 793 F. Supp. 2d at 172.

Thus, contrary to the companies' suggestion, there is simply no legal requirement for the parties to reach prior agreement on any new website mockups that the companies might wish to deploy. Nevertheless, Plaintiffs have already provided six months' worth of feedback and opinions about which proposed website redesigns meet Order #64-Remand's "comparative prominence" requirement, and on January 8, 2018, even set out for Philip Morris USA (in response to its request) ways it could propose new redesigns that comply with this requirement.

But even without Plaintiffs' agreement, the tobacco companies have ample means to ensure that their website displays both depict the current Court-ordered statement text and also comply with the requirements of Order #64-Remand. They chose not to present any of their

proposed new mockup designs to the Court to let the Court rule upon "comparative prominence." They make no claim that it is impossible for Philip Morris and RJRT to qualify for Order #64-Remand's safe harbor, by having their "existing Covered Websites" avoid a "redesign" and instead use the 2014 mockup designs that Order #64-Remand incorporates by reference. Order #64-Remand at 13-14, 19-20, 21. All they do is insist that—having been unsuccessful in getting Plaintiffs to accept their new mockup designs after half a year of trying—the Court should order compulsory mediation. This would only *further* delay implementation of this remedy.

Even were there authority to compel mediation in the present circumstances, it would be a poor idea. "When mediation is forced upon unwilling litigants, it stands to reason that the likelihood of settlement is diminished. Requiring parties to invest substantial amounts of time and money in mediation under such circumstances may well be inefficient." *In re Atl. Pipe Corp.*, 304 F.3d at 144; *see also* Fed. R. Civ. P. 16, Adv. Comm. Notes, 1993 amdts., Subdiv. (c)(9) ("the unwillingness of a party to be available, even by telephone, for a settlement conference may be a clear signal that the time and expense involved in pursuing settlement is likely to be unproductive").

To be sure, in some circumstances, a court may be warranted in believing "that compulsory mediation could yield significant benefits even if one or more parties object," such as when parties object due to "unfamiliarity with the process" or fears that agreeing "would be perceived as a lack of confidence," or in disputes "involving multiple claims and parties" with different interests. *In re Atl. Pipe Corp.*, 304 F.3d at 144-45. None of these circumstances apply here. The problem is more fundamental: The tobacco companies give no reason to believe that a mediator would have more success than the parties have over the past six months in persuading one side that—in the event no agreement were reached—the other side would be more likely to

persuade the Court of its views on "comparative prominence." Nor do the tobacco companies suggest a mediator would have any more expertise than the parties in assessing the "comparative prominence" of the companies' proposals to change their website designs. Nor, importantly, do they suggest there is even reason to think that a mediator would shorten the companies' considerable turnaround time to generate a new mockup in response to feedback from Plaintiffs—typically over two weeks and in several instances over a month (at least up through November 9 and 17, 2017, when Philip Morris and RJRT last provided any new mockups).

Indeed, it is particularly inappropriate for the companies to urge mediation where progress has been stymied by their ceasing engagement after Plaintiffs' most recent detailed feedback to RJRT on December 22, and to Philip Morris on January 8 (and at that, to the January 3, 2018 PowerPoint illustration of a potential Marlboro mockup). And it is notable indeed that, amongst the 14 websites for which the companies have proposed new mockup designs, the five about which they seek mandatory mediation are for cigarette brands—brands that account for two-thirds of the cigarettes sold in the United States, with the website of the leading U.S. brand alone yielding over 100 million consumer interactions in the first three months of 2017. The companies' latest bid for forced mediation should be seen for what it is—a further ploy to achieve further delay before they implement this important remedy.

II. The Court Should Not Bar Plaintiffs from Seeking to Enforce the Court's Remedial Order As to Two Companies' (Unidentified) Mockup Proposals for Five Cigarette Brand Websites.

In the alternative, the tobacco companies request an order prohibiting Plaintiffs from seeking to enforce Order #64-Remand as to website implementations that execute their (unidentified) proposed new mockup designs. Defs.' Mem. at 2, 12-14. The tobacco companies cite no authority that would support such a radical proposition; do not share their proposed new designs with the Court (or even identify which precise proposals they are talking about); and

certainly do not purport to explain how their proposals—whichever ones they are talking about—achieve "comparative prominence" with the 2014 mockup designs that are incorporated by reference in Order #64-Remand. Finally, they companies offer no basis for the Court to preclude Plaintiffs from seeking to enforce the Court's remedial order.

A. This Court's Remedial Orders Do Not Require Endless Negotiations before Plaintiffs May Seek Enforcement.

The tobacco companies never state the authority by which they think the Court should prohibit Plaintiffs from seeking enforcement as to the websites for cigarette brands that account for *two-thirds* of U.S. cigarette sales. The closest they come is suggesting that Plaintiffs violated a conjectural duty to negotiate adequately about their proposed new designs. *See* Defs.' Mem. at 12-13. But nothing in Order #64-Remand requires the companies' to secure Plaintiffs' agreement for proposed redesigns before they may (or must) begin their website implementation; any such requirement would only delay implementation. Still less does Order #64-Remand require Plaintiffs to engage in six months' worth of discussions. In any event, the companies are well aware of Plaintiffs' positions, and have not substantively responded to Plaintiffs' December 22, 2017, critiques to RJRT, or January 8, 2018, solicited feedback to Philip Morris.

B. The Court Should Not Accept the Tobacco Companies' *Ipse Dixit* Assertions that Unidentified Mockup Changes Meet the Requirements of Order #64-Remand.

To date, the tobacco companies have been unable to persuade Plaintiffs that any of their proposed mockup-design changes for five cigarette-brand websites meet the "comparative prominence" standards of Order #64-Remand. But their motion does not actually ask the Court to consider their proposals (whichever of them they are talking about) and *rule* that any of them actually do meet the "comparative prominence" standard. Instead, the companies ask, in the alternative, for an order prohibiting Plaintiffs from arguing that the companies' (unspecified) potential implementations do not meet the standard. But the companies' alternative request is

fatally ambiguous about what particular potential website implementations the Court would shield from enforcement efforts if it granted their request. *See* Fed. R. Civ. P. 7(b)(1)(C) ("The motion must . . . state the relief sought.")[7]

If the companies want certainty, there are at least two ways they could achieve it. First, they could use Order #64-Remand's safe harbor for "Covered Website[s] that [are] not redesigned," by adopting implementations "substantially similar to" the 2014 mockup designs that Order #64-Remand incorporates by reference. Order #64-Remand at 13-14, 19-20, 21 (incorporating by reference Dkt. Nos. 6081-6 to 6081-10, filed 4/22/2014). Second, they could submit specific proposed new designs and comparative-prominence arguments, in a motion "ask[ing] the Court to construe the scope of its Order by applying it in a concrete context or particular factual situation." *2011 Decision*, 793 F. Supp. 2d at 168-69. But the tobacco companies pursue neither of these avenues.

As already noted, their motion does not provide the Court with copies of any proposals (or even identify which specific proposals they are talking about). More oddly yet, they present no actual argument or analysis to support their bald assertion that their proposals (whichever ones they are talking about) meet Order #64-Remand's "comparative prominence" standard. The totality of their "comparative prominence" presentation is to assert that "Plaintiffs are wrong"

[7] In particular, the motion is unclear whether the companies seek to preclude enforcement, ***for Marlboro,*** as to Philip Morris's November 9, 2017, Marlboro mockup or instead its January 3, 2018, PowerPoint potential Marlboro mockup illustration (the one that leaves unclear typeface, typesizes, font colors, background color, and border style); ***for Parliament,*** as to Philip Morris's November 9 Parliament mockup, or a potential Parliament implementation that follows the style of the January 3 PowerPoint potential Marlboro mockup illustration; and ***for L&M,*** Philip Morris's only actual L&M mockup from August 25, 2017, a potential L&M implementation that follows the style of Philip Morris's November 9 Parliament and Marlboro mockups, or a potential L&M implementation that follows the style of the January 3 PowerPoint potential Marlboro mockup illustration.

and that the companies' (unidentified) mockups "are at least as prominent as the ones accepted in conjunction with Order #64-Remand." Defs.' Mem. at 14.[8]

III. If the Court Wishes to Reach the Question, Order #64-Remand Is in Force and Enforceable as to the Companies' Websites and Onserts

Plaintiffs advised the tobacco companies on November 3, 2017, that our forbearance in seeking enforcement of Order #64-Remand to that date did not mean that the companies could remain free of all obligations as long as they prolonged discussions. Ex. 1, 11/3/17 ltr., Crane-Hirsch to Agneshwar. After further exchanges on this topic on January 5 and 10, 2018, the tobacco companies' current motion asserts that Order #64-Remand is not in force or enforceable —albeit disjointedly, *see* Defs.' Mem. at 7-8; *id*. at 9-10—but does not actually ask the Court to rule on it, and does not request any relief that depends upon the Court's ruling on it. *See* Fed. R. Civ. P. 7(b)(1)(C) ("The motion must . . . state the relief sought."). Accordingly, the Court does not need to reach this issue at all. Nevertheless, to the extent the Court may wish to provide guidance, Plaintiffs summarize here why Order #64-Remand remains in force and enforceable as to websites and onserts. As Plaintiffs advised the tobacco companies December 15, 2017 (and advised the Court in the parties' January 2018 status report), Plaintiffs will treat January 12, 2018, as the Order #64-Remand "trigger date," such that we will look for website compliance as of eight weeks later. (Dkt. No. 6243 at 3; filed 1/19/2018.)

Nothing within or outside Order #64-Remand says or even suggests that its terms for fonts, typesizes, layouts, or other non-textual matters are no longer enforceable. As the tobacco companies note, "the scope of a consent decree must be discerned within its four corners, and not

[8] The companies' resort to such *ipse dixit* is unsurprising, given RJRT's failure to engage with Plaintiffs' most recent critique, on December 22, of RJRT's November 9 Camel and Pall Mall mockups, and given Philip Morris's failure to engage after Plaintiffs emailed it on January 8, at Philip Morris's request, to identify various ways Philip Morris could propose Marlboro mockup designs that comply with the "comparative prominence" requirement.

by reference to what might satisfy the purposes of one of the parties to it." Defs.' Mem. at 10 (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971)). Despite the companies' wishful thinking, no provision of Order #64-Remand says that if they succeeded on appeal in getting changes to the statements' text, the order would be nullified. Instead, Order #64-Remand provides that, "Should the language of the Corrective Statements be changed as a result of further litigation, the parties *reserve the right to seek* different requirements than those stated herein." Order #64-Remand, at 32 (emphasis added). The tobacco companies have not even asserted this right to seek "different requirements."

In fact, the tobacco companies make the patently absurd argument that *Plaintiffs* are somehow unilaterally altering Order #64-Remand (or perhaps that Plaintiffs have *already* somehow done this; the position is unclear) because the D.C. Circuit granted the *companies'* request to modify the statements' text. *See* Defs.' Mem. at 10. This stands matters on their head; it was the tobacco companies that sought changes to that court-ordered language, and Plaintiffs who urged that it be left unchanged. In any event, the statement language in Order #64-Remand has already been changed. The October 2017 Consent Order as to Newspapers and Television, Order #72-Remand, effected the required alterations to both the English and Spanish texts, and did so with the tobacco companies' full assent. That order reiterated the June 27, 2017, "revised text for corrective statements" that the Court set in Order #67-Remand, in a "Definitions" section and without limitation as to newspapers or television. Order #72-Remand, at 2-4. The order also directed specific Spanish text for the statements, again without reference to limitations to newspaper or television. *Id*. at 5 (defining "Spanish version" and incorporating Exhibits 1 and 2 of the Parties' consent motion, Dkt. No. 6223-1 & 6223-2 (filed 10/2/17)). Even for the

Remedies Parties—not otherwise affected by this order—Order #72-Remand changes the Remedies Parties' Spanish text from what Order #64-Remand had provided. *Id*. at 12.

Moreover, in Order #72-Remand, the parties repeatedly recognized the vitality of Order #64-Remand. Indeed, Order #72-Remand expressly addressed the two media channels at issue in the instant motion, stating that "[t]his Order does not address publication of the Corrective Statements on websites or package onserts; *those issues have been addressed in Order #64-Remand and nothing in this Order changes those provisions*." Order #72-Remand, at 12 (emphasis added). For good measure, Order #72-Remand also recognized the vitality of Order #64-Remand's "Trigger Date" associated deadlines: "For clarity, nothing in this Order alters the definition of Trigger Date or the implementation deadlines for websites or package onserts as set forth in Order #64-Remand." *Id*. at 6. Although the tobacco companies agreed to these provisions just a few months ago, their current motion ignores them.

Order #72-Remand recognized that there might be a superseding agreement on websites and onserts, but it referred to such a potential agreement as hypothetical and indefinite: "*Any subsequent agreement* on publication of Corrective Statements on package onserts or websites will be addressed in a further (proposed) Consent Order that the parties *intend* to submit subsequently." *Id*. at 12 (emphases added). Note especially that sentence's reference to "agreement": *If* the parties reached any "subsequent agreement" on the specified topics, that "agreement" would be "addressed" in a further (proposed) consent order. But such expressions of inchoate intentions would not even support an enforceable "agreement to agree" under contract law—much less effect a rescission of the definite terms of Order #64-Remand. The fact that the parties have *not* been able to agree on all aspects of implementation does not give the tobacco companies carte blanche to ignore the deadlines contained in Order #64-Remand.

The four references to Order #64-Remand in Order #72-Remand are irreconcilable with any suggestion that Order #64-Remand no longer requires "publication of the Corrective Statements on websites or package onserts." Order #72-Remand, at 12. These four Order #72-Remand provisions are likewise irreconcilable with any suggestion that the tobacco companies may indefinitely postpone their Order #64-Remand obligations as to websites and onserts by protracting discussions—for months or years on end—about potential new mockup designs.

To be sure, Plaintiffs have spent half a year seeking to accommodate the tobacco companies' asserted desire for certainty. But, contrary to the companies' efforts to turn Plaintiffs' accommodation against them, Plaintiffs' willingness to provide feedback and opine upon mockup design proposals has not somehow made Order #64-Remand unenforceable.

The tobacco companies contend that Order #64-Remand is rendered somehow uncertain —necessitating a new consent order, to be achieved if need be by compelled mediation—because their most recent appeal deletes eight more words from the text. Defs.' Mem. at 11 ("Without a further agreement, Defendants and the Remedies Parties would need to guess at whether their efforts to implement the corrective statements consistent with the D.C. Circuit's mandate comply with Plaintiffs' interpretation of Order #64-Remand as refracted through the D.C. Circuit's prior opinions."). But no one proposes to enforce Order #64-Remand's superseded text, and the tobacco companies know exactly what the current text is: The text that the Court ordered on remand on June 27, 2017, in Order #67-Remand and its accompanying Memorandum Opinion, and then definitively adopted, both for English and Spanish, in the October 2017 Consent Order as to Newspapers and TV (Order #72-Remand). The tobacco companies offer not even one example of alleged "uncertainty" about compliant ways to present the current Court-ordered text on their websites. *Cf. 2011 Decision*, 793 F. Supp. 2d at 168 ("It is significant that Defendants

fail to identify anywhere in their Motion which provisions of [the relevant remedial order] are 'ambiguous' or 'vague.'"). Review of the 2014 mockup designs (Dkt. Nos. 6081-6 to 6081-10; filed 4/22/2014) will show that they easily accommodate the shortened text. Indeed, in agreeing to Order #64-Remand in 2016, Defendants had no trouble relying on the 2014 mockup designs —mockups that depicted text that an intervening D.C. Circuit decision had already changed on appeal. The mere fact that the Court of Appeals' April 17, 2017, decision directed the removal of eight more words does not indefinitely stay implementation of this remedy. On the contrary, the Court of Appeals made clear that, with these "minor revisions," "the district court can simply issue an order requiring the corrective statements remedy to go forward." *Philip Morris USA Inc.*, 855 F.3d at 329. This Court has already done so. Its Order #67-Remand and accompanying opinion from June 27, 2017, set out the new language; and the companies accepted that language, as well as conforming Spanish text, in Order #72-Remand. The surest way to ensure prompt and full website and onsert implementation is to deny the companies' motion.

CONCLUSION

For all of the foregoing reasons, Defendants' motion should be denied.

Dated: February 6, 2018

Respectfully submitted,

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November 3, 2017

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Re: *United States v. Philip Morris USA*, No. 99-CV-2496 (D.D.C.)

Dear Counsel:

Plaintiffs are pleased the parties were able to work together to prepare the recent consent order for newspapers and television, with the result that the corrective statements will generally begin appearing in newspapers Sunday, November 26, and on television the following week.

I write here to address the timing for the statements to begin being disseminated on the two other media channels currently at issue, namely, the tobacco companies' websites and package onserts. As you know, the 2016 Consent Order, Order #64-Remand, included start dates for these media channels, which, according to our calculation, were to be August 27, 2017 for

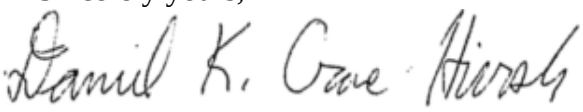
websites and January 2018 for onserts.[1] The parties' recent consent order for newspapers and television expressly stated it did not affect Order #64-Remand's provisions for websites and onserts; but Plaintiffs have naturally not sought to enforce those start dates during the many months that the parties have been working to reach agreement on mockups.

Plaintiffs continue to contemplate that the parties will reach agreement on website and onsert mockups and be able to submit to the Court a full (proposed) Consent Order on websites and onserts, including implementation dates. But in the event the parties are unable to file such a full (proposed) consent order as to websites and mockups by November 17, we suggest having our joint filings that day include a less ambitious Consent Motion, agreeing to re-set the Trigger Date for onserts and websites as of the date the parties propose for the next joint status report (likely December 8 or 15). We would anticipate a proviso that the new Trigger Date could be further postponed by agreement of the parties filed with the Court. Such a less-ambitious Consent Motion would remove any doubt about whether and when the tobacco companies' obligations under Order #64-Remand begin.

We have enclosed a draft (Proposed) Order to modify the trigger date. Please let us have your views. As above, this would be needed only if the parties are still unable to file a full (proposed) Consent Order for websites and mockups by November 17. We expect all involved will continue working toward that more ambitious goal for November 17.

Thank you for your assistance in this matter.

Sincerely yours,



Daniel K. Crane-Hirsch
Trial attorney

Enclosure: Draft "(Proposed) Order # ___-Remand (Modifying Trigger Date in Order #64-Remand)"

Cc: Katherine A. Meyer, *via email to* kmeyer@meyerglitz.com

[1] Our calculations are as follows. Order #64-Remand ties the start date for each media channel to a "Trigger Date." Because Defendants did not file a cert. petition, the Trigger Date is defined as 60 days after the conclusion of litigation in the D.C. Circuit.

The judgment of the D.C. Circuit was entered April 25, so we calculate the Trigger Date as the first business day 60 days later, Monday, June 26. By its terms, Order #64-Remand called for "Phase 1" of the website corrective statements to begin the 8th Sunday following the Trigger Date, which we calculate as Sunday, August 27.

In a similar way, Order #64-Remand calls for onserts to begin no later than 30 weeks after the Trigger Date, which we calculate as January 22, 2018.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. PHILIP MORRIS USA INC., *et al.*, Defendants. and ITG BRANDS, LLC, *et al.*, Post-Judgment Parties Regarding Remedies	Civil Action No. 99-CV-2496 (PLF)

(PROPOSED)
ORDER # ___-REMAND

Upon consideration of the Defendants' and Post-Judgment Parties Regarding Remedies' Motion for Mediation Order of Referral to the Special Master for Mediation, or, in the Alternative, for Clarification Scheduling Order (Dkt. No. 6245; filed 1/24/2018), Plaintiffs' Opposition thereto, (Dkt. No. 6247; filed 2/6/18), any replies in support thereof, and the entire record in this matter, it is hereby

ORDERED that the Motion is **DENIED.**

Dated: February ___, 2018

PAUL L. FRIEDMAN
United States District Judge