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

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| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | Civil Action No. 99-CV-2496 (PLF) |
| | ) | |
| | ) | Oral Argument Requested |
| v. | ) | |
| | ) | |
| PHILIP MORRIS USA INC., *et al.*, | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |
| | ) | |

**REPLY BRIEF OF DEFENDANTS AND REMEDIES PARTIES IN SUPPORT OF MOTION FOR REFERRAL TO THE SPECIAL MASTER, OR, IN THE ALTERNATIVE, FOR CLARIFICATION**

It is unsurprising but unfortunate that Plaintiffs' opposition (Dkt. No. 6247; filed Feb. 6, 2018 ("Resp.")), in pushing for implementation on the remaining items now, spins a tale of tobacco company delay. The narrative they tell is demonstrably false, belied by Plaintiffs' own conduct over the past five years. Nonetheless, there are a few facts on which the parties can undeniably agree.

It is true that Defendants took issue with the requirement and the language of the corrective-statements remedy and appealed aspects of both. But that was Defendants' right, and the D.C. Circuit has sided with Defendants in every appeal over the language of the corrective statements for the past five years.

It is equally true that from late-2012, when Judge Kessler ordered the parties to try to reach agreement on the implementation aspects of the remedy — the details of how the statements would look, what font size and type face would be used, where on the websites the statements would appear, etc. — Defendants have steadfastly negotiated in good faith with the aim of reaching agreement. The Remedies Parties have similarly negotiated in good faith on

implementation issues with the aim of reaching agreement, starting in June 2015 when they joined the litigation upon purchase of the Winston, Salem, Kool, and Maverick brands. And with the help of Judge Richard Levie, the parties have always done just that.

Finally, it is true that an impasse remains on a few issues. But that common occurrence should not overshadow the significant progress the parties have made. The parties reached complete agreement on how the statements would be implemented on newspapers and television. Those TV and newspaper implementations have been running for the past three months. To this point, audiences across the country have seen them in 60 television spots on three major networks, and in over 180 full-page publications in 46 newspapers in 32 states. The statements also have been posted on those newspapers' websites. The parties have also reached complete agreement on nine websites (including all of the Remedies Parties' websites) and all but one tiny detail on some companies' onserts. Newspapers coast-to-coast have covered the implementation of the corrective-statements remedy, and the statements have now been seen by virtually the entire country. That is hardly the result of delay tactics.

Until recently, Plaintiffs repeatedly stood hand-in-hand with Defendants and the Remedies Parties in describing the substantial progress made during these negotiations. As recently as January 19, 2018, Plaintiffs joined a status report explaining that "the parties have made significant progress toward a (proposed) Consent Order that would include agreed-upon mockups for the websites and onserts in which the required Corrective Statements will appear. The parties continue to work on those issues in good faith." Joint Status Report Regarding Corrective Statements at 1-2 (Dkt. No. 6244; filed Jan. 19, 2018). That submission also reported that "[a]ll parties continue to seek a consensual agreement in short order." *Id.* at 2.

The parties are now within steps of a total agreement, needing minimal help to close the deal. But Plaintiffs have suddenly stopped short, insisting that Defendants either capitulate to Plaintiffs' every demand or proceed on their own at risk of contempt. That is no solution. The principles to which the parties agree now in their mockups will guide them for years to come as current websites are redesigned or are shut down and others take their place. That is why Defendants cannot simply accede to Plaintiffs' demands. But that does not mean negotiations should stop just shy of the finish line. Defendants (joined by the Remedies Parties[1]) believe Judge Levie should assist the parties in finalizing an agreement, and they remain optimistic that he will be able to do so.

Defendants respond to Plaintiffs' various arguments below. Contrary to Plaintiffs' assertions, an order referring these few remaining issues to Judge Levie is well within this Court's authority to enter and offers the most expeditious and efficient path forward. Plaintiffs cannot enforce the terms of Order #64-Remand consistent with the language of the Order itself, the history of this matter, fundamental principles of constitutional law, and federal procedural rules. And, as a matter of fairness, in the absence of a new superseding consent order, Defendants should be allowed to implement the latest version of the disputed mockups.

[1] As noted in prior submissions, the Remedies Parties and Plaintiffs have no substantial differences remaining as to the Remedies Parties' website mockups. However, the Remedies Parties believe that mediation is appropriate in these circumstances and would be useful in helping the parties reach agreement on implementation, and thus join Defendants' request for it.

## ARGUMENT

### I. Referring the Remaining Implementation Issues to the Special Master for Mediation Is Well Within the Court's Authority and Is the Most Practical Approach

#### A. This Court Has Authority to Require Mediation, as It Has Done in the Past

Although Plaintiffs parenthetically note that Judge Levie lacks "expertise in graphic design or layout," Resp. at 11, they dispute neither that Judge Levie is intimately familiar with the implementation requirements for websites and onserts nor that he is eminently qualified to assist the parties in reaching resolution. After all, he helped broker the parties' prior detailed agreements on executions, including all the details and design requirements, of the website mockups the parties reached agreement on when finalizing prior implementation consent orders.

Rather than focus on a pragmatic approach, Plaintiffs make formalistic arguments that this Court lacks authority to refer these implementation issues to Judge Levie. Plaintiffs' arguments are not only unhelpful but also legally incorrect.

*First*, the Court previously invoked its authority to refer similar implementation issues to Judge Levie. In issuing Order #34-Remand (Dkt. No. 5991; issued Nov. 27, 2012), the Court identified the implementation details that needed to be addressed and explained that "[b]ecause of the complexity of these issues, the Court has concluded that the most efficient way to address them is to have the parties meet and confer with the Special Master to see if agreement can be reached." Mem. Op. at 55 (Dkt. No. 5992; issued Nov. 27, 2012). Similarly, in 2015, two days after the D.C. Circuit issued its opinion regarding issues with the revised language of the corrective statements, without consulting the parties, the Court referred further implementation issues to Judge Levie for mediation. Order #59-Remand at 1-2 (Dkt. No. 6164; issued Aug. 20, 2015). Plaintiffs attempt to distinguish these referrals since they "were not objected to by any of

the parties." Resp. at 8. But the Court issued these orders *sua sponte*, without inviting the parties' views or considering that the Court might lack authority to act unilaterally.

*Second*, the Court clearly possesses inherent authority to refer the parties to mediation. "Federal courts possess certain inherent powers, not conferred by rule or statute, to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017) (internal quotation marks omitted). Although the D.C. Circuit has not addressed this question, many other courts have recognized their inherent authority to order mediation, even over the objection of one of the parties. *In re Atl. Pipe Corp.*, 304 F.3d 135, 145 (1st Cir. 2002) ("[I]t is within a district court's inherent power to order non-consensual mediation in those cases in which that step seems reasonably likely to serve the interests of justice."); *E.E.O.C. v. Evans Fruit Co.*, 872 F. Supp. 2d 1107, 1116 (E.D. Wash. 2012) (same); *Pucci v. 19th Dist. Court*, No. 07-10631, 2009 WL 596196, at *4 (E.D. Mich. Mar. 6, 2009) (same); *Cunningham Charter Corp. v. Learjet Inc.*, No. 07-233-DRH, 2012 WL 2884987, at *1 (S.D. Ill. July 13, 2012) ("[T]he Court must reign [sic] in this litigation and will do so by exercising its inherent powers to enter this order directing the parties to undertake mandatory mediation.").

The D.C. Circuit's decision in *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003), does not limit this Court's authority to refer the parties to mediation, as Plaintiffs argue. There, the Court held that "[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." *Id.* at 1141. The Court concluded that the district court did not have inherent authority to appoint a post-judgment monitor with "extensive duties" to

monitor the internal workings of an executive agency. *Id.* The Court made clear that its "holding is a narrow one, tethered to the peculiar facts" of that case. *Id.* The referral order that Defendants and the Remedies Parties request here fits comfortably within the *Cobell* standard.[2] An exercise of inherent authority to refer parties to mediation is consistent with "historical practice," both in this case and numerous decisions from other circuits.[3] Sending the parties back to mediation here is a far cry from appointing a monitor with sweeping powers, as contemplated in *Cobell*.

*Finally*, Order #25-Remand did not, as Plaintiffs assert, previously reject Defendants' request for "mandatory mediation" on the basis that mediation leads to "time-consuming enforcement efforts." Resp. at 9, 14. There, Defendants had asked the Court to amend the injunctive measures in Order #1015 (Dkt. No. 5733; issued Aug. 17, 2006) to add a provision that would require the parties to meet and confer under LCvR 7(m) prior to seeking enforcement through the Court. Mem. Op. at 13-14 (Dkt. No. 5947; issued June 22, 2011) (***United States v. Philip Morris USA, et al.***, 793 F. Supp. 2d 164, 172 (D.D.C. 2011)). Given that Defendants were seeking to amend a final order, the Court considered whether, under Rule 60(b), "extraordinary circumstances" existed to justify such relief or if applying the order prospectively would "no

[2] The Government previously recognized that *Cobell* was limited to its facts, and argued that this Court's historical practice supported "using appointed agents and officers to implement and enforce remedial decrees." (Dkt. No. 5674 at 81; filed Sept. 19, 2005 (citing *Cobell*, 334 F.3d at 1141).)

[3] Plaintiffs' discussion of this Court's local rules is misplaced. Resp. at 11. Those Rules apply only to mediations formally conducted through the Court's mediation program, and expressly recognize that mediations also may occur outside that formal program. *See* LCvR 84(b). Plaintiffs' discussion also ignores the Intervenors' prior proposal to the Court that it to refer implementation issues to Judge Levie, without suggesting that other parties' consent was necessary. (*See* Dkt. No. 5883 at 18; filed Mar. 3, 2011 (citing *Cobell*, 334 F.3d at 1141).)

longer [be] equitable." *Id.* at 8 (793 F. Supp. 2d at 170). The Court determined that Defendants had not met this high standard to amend Order #1015.

Here, by contrast, Defendants do not seek to add language to a final judgment. Their request here does not relate to LCvR 7(m) at all. Defendants seek a referral to mediation to finalize necessary updates to the parties' Consent Order — as the parties have done successfully in the past — to *avoid* the needless and "time-consuming enforcement efforts" that the Court cautioned against in Order #25-Remand. Order #25-Remand is plainly inapposite.

**B. Mediation Is the Most Efficient Path Forward**

Plaintiffs make several arguments as to why mediation would not be efficient. *First*, Plaintiffs assert that mediation is an inherently lengthy process. Resp. at 14. But any concerns about further delay can be addressed easily with an order requiring the parties to conduct and conclude the mediation on an accelerated schedule, subject to Judge Levie's availability.

*Second*, Plaintiffs claim that negotiations over website mockups have already taken too much time, and they complain that discussions over the remaining issues to date have "proceeded slowly." Resp. at 6. That accusation ignores the substantial work Defendants alone have had to undertake to prepare each mockup to this point — coordinating the efforts of business representatives, graphic designers, and others to consider Plaintiffs' comments, assess options for changes, and execute and evaluate the changes. At least some of these issues may explain why Plaintiffs themselves took weeks to respond to many of Defendants' proposals.[4]

[4] For example, Plaintiffs took four weeks to respond to a proposal on website mockups that Defendants made on September 28, 2017, and three weeks to respond to a proposal that Defendants made on November 9, 2017. *See* Email from D. Crane-Hirsch (Oct. 23, 2017) (Exhibit 1); email from D. Crane-Hirsch (Nov. 30, 2017) (Exhibit 2).

*Third*, Plaintiffs say that, since the D.C. Circuit's most recent decision simply "deletes eight more words from the text" in the 2014 mockups, it can be implemented easily. Resp. at 21. However, as Defendants and the Remedies Parties previously explained, and as illustrated with the proposed mockups (*see infra* Part III), significant implementation changes arose from the language removed by the D.C. Circuit.[5]

*Finally*, Plaintiffs underscore that 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)." Resp. at 6 (Plaintiffs' emphasis). In other words, with respect to the websites for these brands, Plaintiffs seek to use the threat of adversarial proceedings as leverage: to press Defendants to implement the corrective statements with additional prominence or else face new rounds of motion practice. By taking this approach, Plaintiffs invite unnecessary and protracted contested proceedings, which will require the Court to hear and interpret the proper interpretation and enforceability of the prior Consent Order and the adequacy of Defendants' implementation efforts. Plaintiffs' approach will waste time and expense, given that mediation is available and will result in the shortest path to implementation.

## II. Order #64-Remand Cannot Be Enforced Against Defendants and the Remedies Parties

Plaintiffs assert a right to enforce Order #64-Remand and deride any contrary view as "a radical proposition." Resp. at 15. But as Defendants and the Remedies Parties previously

[5] These issues, combined with changes to the underlying technological architecture of the websites in question, render Plaintiffs' insistence that Defendants can ensure compliance by reverting their website designs to those enshrined in the 2014 mockups — which are now more than four years old — impractical.

explained, Plaintiffs' position ignores Order #64-Remand's plain text, this case's procedural history, and fundamental legal principles regarding consent orders and injunctions. All of those factors support the conclusion — that, until recently, Plaintiffs also held to — that the parties and the Court need to find agreement on an updated Consent Order. That is the correct outcome here, legally and practically, Plaintiffs' rhetoric notwithstanding.

### A. The Terms of Order #64-Remand Establish the Need for an Updated Consent Order

At the time Order #64-Remand was entered, Defendants and the Remedies Parties had already begun an appeal of the corrective statements' text. For that reason, the Order expressly addressed what would happen following the appeal. Section VI, Paragraph 5 provides that "[s]hould 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." (Dkt. 6195 at 32.) Paragraph 10 of the same Section states that "[t]he terms of this Order cannot be modified or amended without written consent by all parties." (*Id.* at 33.) That is because the Order is an *agreed* order, and the binding effect of all of its terms depends on the parties' agreement to all of those terms. *See* Mot. at 10-11.

These provisions are clear. The Order anticipates that, were the D.C. Circuit to change the corrective statements' text, the details of the parties' agreed implementation requirements in Order #64-Remand would lapse and all parties would need to provide "written consent" to replacement terms. That is exactly where the parties find themselves now. The D.C. Circuit struck down portions of the corrective statements' text and, under the provisions of Order #64-Remand, the parties must revisit their agreement on implementation terms.

Plaintiffs' efforts to downplay the significance of these provisions are unavailing. *First*, Plaintiffs agreed to the language in Order #64-Remand that establishes the need for revised implementation terms in the event of a change to the corrective statements' text. Defendants and the Remedies Parties steadfastly maintained that the text was unlawful and urged both Plaintiffs and Judge Kessler to modify the text accordingly. Defendants and the Remedies Parties negotiated for provisions anticipating their success on appeal. Plaintiffs accepted those provisions and cannot now write them out of the Order.

*Second*, the textual changes the D.C. Circuit ordered have effects far broader than Plaintiffs acknowledge. The D.C. Circuit struck the phrase "Here is the truth" as an unlawful exercise of the Court's remedial authority. *United States. Philip Morris USA Inc.*, 855 F.3d 321, 325-26 (D.C. Cir. 2017). This not only shortened the preamble of each statement, but also — for example — required changes to the "Phase 1 website preamble" and the "Phase 2 website preamble," both of which, under the terms of Order #64-Remand, include the unlawful phrase. (Dkt. 6195 at 14-15, 20.) One cannot merely delete that phrase in these instances without triggering the need for further changes, as the Phase 1 website preamble relied upon "Here is the truth" as a hyperlink to the full text of the statements. (*Id.* at 15.) Applying the D.C. Circuit decision renders some of the implementation terms in Order #64-Remand completely obsolete, without clear or obvious alternatives.

*Third*, Plaintiffs lean heavily on the D.C. Circuit's statement that, "[w]ith the minor revisions mandated in this opinion, the district court can simply issue an order requiring the corrected statements remedy to go forward." 855 F.3d at 329. But the most recent D.C. Circuit appeal challenged only the text, not the implementation details, of Order #64-Remand, so the

panel had neither occasion nor the necessary context to consider the complexities of implementation or the ripple effects of its decision.

### B. The Procedural History Underscores that Order #64-Remand Cannot be Enforced

It is not only the history of Order #64-Remand and the most recent appeal to the D.C. Circuit that show the need for an updated implementation consent order. Events prior to Order #64-Remand and the course of negotiations on remand both bolster that conclusion, as well.

After the D.C. Circuit issued its first order altering the corrective statements' text, all parties — including the United States and the Intervenors — advised Judge Kessler that the appellate decision required revisions to the agreed implementation terms. *See* June 30, 2015 Status Hr'g Tr. (Dkt. No. 6174) at 9-10 (Mr. Crane-Hirsch for the United States), 12-13 (Mr. Francisco on behalf of Defendants and the Remedies Parties), 14-16 (Mr. Crystal on behalf of the Intervenors). Judge Kessler agreed, referring the parties to Judge Levie for discussion of necessary changes to the implementation terms and ultimately adopting Order #64-Remand to supersede Order #51-Remand.

It was unsurprising that, after the D.C. Circuit mandated further text changes, the parties' joint status update to the trial court took as a given the necessity of updating Order #64-Remand. (*See* Dkt. 6211 at 11-12.) In fact, in exchanging drafts of the joint status update, Plaintiffs agreed that Order #64-Remand no longer has legal force. Plaintiffs commented that the status report mistakenly cited Order #67-Remand, rather than Order #64-Remand, and further stated: "If [Order #64-Remand] were cited, the subsequent history would be need to show it no longer has legal force[.] . . . But precisely because it no longer has legal force, we expect the tobacco

companies don't actually benefit from citing it." (*See* Exhibit 3 at 1 (attachment to July 11, 2017 email from D. Crane-Hirsch).)

Judge Kessler ultimately accepted the parties' view that Order #64-Remand required further changes, instructing the parties in Order #68-Remand to work cooperatively on negotiating a (Proposed) Second Superseding Consent Order. (Dkt. 6212 at 1.) Since Order #68-Remand, the parties have worked steadily toward reaching that new agreement. The parties have submitted numerous reports to update the Court on this progress in this regard.[6] All parties' conduct underscores the shared understanding that a new agreement is needed.

Plaintiffs incorrectly assert that Order #72-Remand (Dkt. No. 6227; issued Oct. 5, 2017) — the superseding consent order for implementation in newspapers and on television — somehow renders Order #64-Remand still operative. To the contrary, the existence of Order #72-Remand shows that the implementation requirements in Order #64-Remand are not themselves effective without a subsequent order that modifies those terms in light of the D.C. Circuit's decision. Were it otherwise, there would have been no need for Order #72-Remand. That Order's (accurate) observation that requirements for implementation on websites and package onserts "have been addressed in Order #64-Remand" in no way means that Order #64-Remand retains force and effect. It merely identifies the existence of the parties' prior agreement as a predicate for an updated agreement on websites and onserts. Plaintiffs' efforts to spin gold out of that straw are unavailing.

[6] *See* Dkt. No. 6214 (filed Aug. 11, 2017); Dkt. No. 6220 (filed Sept. 11, 2017); Dkt. No. 6224 (filed Oct. 2, 2017); Dkt No. 6228 (filed Oct. 23, 2017); Dkt. No. 6232 (filed Nov. 17, 2017); Dkt. No. 6235 (filed Dec. 15, 2017); Dkt. No. 6244 (filed Jan. 19, 2018).

### C. Enforcing Order #64-Remand in the Way Plaintiffs Suggest Would Be Inconsistent with the Nature of a Consent Order, with Rule 65(d), and with Due Process

As noted in Defendants and the Remedies Parties' motion, Plaintiffs' approach runs afoul of fundamental legal principles, including the nature of a consent order, the requirements of Federal Rule of Civil Procedure 65(d), and the constitutional guarantee of due process. *See* Mot. at 10-12 (Dkt. No. 6245; filed Jan. 24, 2018). Plaintiffs' response makes no effort to address any of these legal arguments. This Court therefore should treat them as conceded. *See, e.g.*, *Asare v. LM-DC Hotel, LLC*, 62 F. Supp. 3d 30, 34 (D.D.C. 2014) ( "A litigant has the obligation to spell out its arguments squarely and distinctly, or else forever hold its peace, so where a party fails to address certain positions, the Court will treat those claims as conceded." (internal quotation marks and citations omitted)); *see also, e.g.*, *Wannall v. Honeywell, Inc.*, 775 F.3d 425, 428 (D.C. Cir. 2014) ("[I]f a party files an opposition to a motion and therein addresses only some of the movant's arguments, the court may treat the unaddressed arguments as conceded. … [W]e have yet to find that a district court's enforcement of this rule constituted an abuse [of discretion]." (internal quotation marks and citations omitted)).

## III. Plaintiffs Should Not Be Permitted to Later Challenge the Proposed Mockups If They Forego The Opportunity to Resolve the Remaining Issues Now

Plaintiffs make much of the fact that "the tobacco companies . . . 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 mockups designs that are incorporated by reference in Order #64-Remand." Resp. at 15-16; *see also id.* at 17. Plaintiffs in

fact accuse Defendants of relying on "*ipse dixit*" regarding the adequacy of the executions. *Id.* at 18 n.8.

In their Motion, Defendants noted that they would submit all disputed mockups upon the Court's request. Mot. at 9. But in light of Plaintiffs' arguments, Defendants submit them now. (*see* Exhibit 4 (Marlboro website); Exhibit 5 (Parliament website); Exhibit 6 (Camel website); Exhibit 7 (Pall Mall website); and Exhibit 8 (R.J. Reynolds onserts)).[7]

The Court need not wade into the fact-intensive minutiae of *why* these website and onsert executions satisfy various aspects of the parties' prior agreement in Order #64-Remand. Defendants and the Remedies Parties are willing to submit further briefing on that issue should the Court wish to hear it. All of these issues can be addressed far more efficiently by Judge Levie in an expedited mediation that will likely to lead to a resolution and an updated consent order in short order. As a matter of fairness, Plaintiffs should not be permitted to refuse that opportunity to resolve these issues now through an expedited mediation and then later subject Defendants and the Remedies Parties to the risk of contempt should Plaintiffs deem implementation insufficient.

**CONCLUSION**

For the foregoing reasons, Defendants (joined by the Remedies Parties) request that the Court refer the remaining implementation issues to Judge Levie for mediation or, in the

[7] The parties have proceeded with new website mockups only for Phase 1 executions. *See, e.g.*, Joint Status Report Regarding Corrective Statements at 1-2 (Dkt. No. 6244; filed Jan. 19, 2018). The corresponding previously approved mockups are available at: Dkt. No. 6081-7 at 14-18 (Marlboro desktop website), 19-23 (Parliament desktop website), 29-32 (Camel desktop website), 33-34 (Pall Mall desktop website); Dkt. No. 6081-6 at 2-6 (Marlboro mobile website), 10-14 (Parliament mobile website); Dkt. No. 6081-8 at 2-3 (Camel mobile website), 4-7 (Pall Mall mobile website); Dkt. No. 6081-11 at 12 (R.J. Reynolds onserts); Dkt. No. 6193-9 at 7 (R.J. Reynolds onserts).

alternative, authorize Defendants and the Remedies Parties to proceed with implementation of their current website mockups without the threat of further disputes.

Dated: February 13, 2018

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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

Dated: February 13, 2018

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