UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

UNITED STATES' RESPONSE SUPPLEMENTAL BRIEF CONCERNING CORRECTIVE STATEMENTS

I. The *United States v. Philip Morris USA* Affirmance Opinion identifies the relevant First Amendment standard: The corrective statements are to be "purely factual and noncontroversial," and geared towards thwarting defendants' prospective frauds from deceiving consumers

On appeal, the D.C. Circuit rejected defendants' insistence that the First Amendment would prohibit any corrective-statement remedy in this case, holding that "Defendants' arguments misunderstand the commercial speech doctrine and misstate the commercial speech standard." *United States v. Philip Morris USA, Inc.* ("Affirmance Opinion"), 566 F.3d 1095, 1143 (D.C. Cir. 2009) (*per curiam*), *cert. denied*, 561 U.S. ___, 130 S. Ct. 3501 (2010). Despite some variations in the precise degree of scrutiny, "the Supreme Court's bottom line is clear: the government must affirmatively demonstrate its means are 'narrowly tailored' to achieve a substantial government goal." *Id.* at 1143.

This Court's principal duty concerning this remedy is to "ensure the corrective disclosures are carefully phrased so they do not impermissibly chill protected speech." *Id.* at 1144. (Defendants have made no claim that the United States' recommended statements would chill any speech, much less protected speech.) To avoid impermissibly chilling protected speech,

the Affirmance Opinion continued, this Court "must confine the statements to 'purely factual and uncontroversial information,' geared towards thwarting prospective efforts by Defendants to either directly mislead consumers or capitalize on their prior deceptions by continuing to advertise in a manner that builds on consumers' existing misperceptions." *Id.* at 1144-45.

The Court should therefore resist defendants' suggestion that the Affirmance Opinion was effectively modified by the recent *RJR v. FDA* decision, which expressly distinguished this case. *R.J. Reynolds Tobacco Co. v. FDA* ("*RJR v. FDA*"), ___ F.3d ___, Nos. 11-5352 & 12-5063, 2012 WL 3632003, at *7 & n.10 (D.C. Cir. Aug. 24, 2012). It is the Affirmance Opinion, not *RJR v. FDA*, that is the law of the case, and that binds this Court on the remand.

II. The recommended statements amply satisfy the Affirmance Opinion standard

A. The recommended statements are "purely factual"

1. Defendants make no claim that allowing them more discovery will uncover any material factual disputes; and in any event, they waived their opportunity to seek discovery 18 months ago

According to defendants, "this Court cannot rule in the Government's favor without first permitting limited discovery and an evidentiary hearing." Defs.' Suppl. Br. at 10 (R. 5985; filed 9/24/2012). But the Court authorized defendants to seek discovery (and if need be, move for discovery) eighteen months ago. Order #14-Remand at 1 n.1 (R. 5878; issued 2/25/2011). Following that order, the United States provided defendants with yet further voluntary discovery. *See* 2/25/2011 *and* 3/1/2011 emails, Crane-Hirsch to Wilkinson, et al. (Exs. 4 & 5 to U.S. Suppl. Br. (R. 5987-4 & 5987-5; filed 9/24/2012)). Despite receiving express permission, defendants did not seek any formal discovery, and did not move for discovery. Defendants' current brief ignores this history; gives no reason for seeking no discovery when the Court authorized them to; identifies no changed circumstances; and makes no claim that there is good cause for a further grant of discovery authority now.

2. Defendants identify no factual disputes, much less any that would require an evidentiary hearing to resolve

Similar infirmities afflict Defendants' current bid for an evidentiary hearing. During February 2011, the Court twice directed defendants' March 3, 2011 response brief to specify "the topics, if any, on which they believe the Court should hold an evidentiary hearing to resolve factual disputes concerning the corrective-statement remedy, *and an explanation of why an evidentiary hearing will be needed on those topics*." Order #11-Remand at 3 (R. 5873; issued 2/23/2011) (emphasis added); Order #14-Remand at 1 n.1 (R. 5878; issued 2/25/2011) (same). In response, defendants said only that, if the Court considered the Blake Report and related materials, "the Court should hold an evidentiary hearing on the validity and reliability of that report," Defs.' Resp. at 29; they made no attempt to explain "*why* an evidentiary hearing will be needed." Order #11-Remand at 3 (emphasis added); Order #14-Remand at 1 n.1 (same). Shortly after the United States filed its Surreply, defendants moved for oral argument on multiple topics, including the corrective-statement remedy—but made no claim that this remedy involved factual disputes that required an evidentiary hearing. Defs.' Mot. for Oral Argument on Pending Matters at 1 (R. 5932; filed 5/12/2011).

Defendants' current brief omits this history. Although it insists that the Court should convene "an evidentiary hearing regarding the [Blake Report]'s validity and reliability," Defs.' Suppl. Br. at 10, it again identifies no "factual disputes, if any" that would require "an evidentiary hearing to resolve." Order #11-Remand at 3; Order #14-Remand at 1 n.1 (same).

B. The recommended statements are not "controversial" in any legal sense

Defendants assert at length that the recommended statements are controversial, but support the claim by asserting, again and again, only that the statements are "inflammatory" and

were chosen to shame and embarrass them.[1] The United States' actual methodology, discussed in the next section, dispels any such claim. Defendants' stated worry is essentially that their past frauds have been so egregious that some people will be upset when they learn about them. This is not a reason to prohibit the corrective statements from referring to those past frauds. Indeed, it would create a perverse incentive: the worse a defendant's misconduct, the less likely a later corrective statement could refer to it.

Defendants continue to object to the recommended statements on grounds that they include "disputed factual findings with which numerous other courts disagree." Defs.' Resp. to Order of Nov. 17, 2011, at 3 (R. 5954; filed 12/20/2011); Defs.' Suppl. Br. at 6 n.2 (referring to "allegations of past wrongdoing that they vigorously contested and that have been rejected by many other courts"). As the Court has recognized, defendants are expert at creating controversy where none exists.[2] The Court found that defendants' misconduct continued even after they signed the MSA, and "Defendants offer[ed] no rebuttal to these findings" on appeal. Affirmance Opinion, 566 F.3d at 1134. The United States previously demonstrated that the past court verdicts defendants rely upon do not say what defendants claim; defendants again offer no rebuttal.[3] The facts of defendants' past (and continuing) misconduct are not impermissibly "controversial" merely because they were disputed at trial, or because defendants continue to make demonstrably wrong assertions about verdicts in other cases.

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[1] Defendants may have other unstated concerns. The "central shared objective" of their "overarching scheme to defraud existing and potential smokers" "has been to maximize [their] profits." 449 F. Supp. 2d at 869. The corrective statements are intended to thwart the success of similar prospective schemes to defraud. Affirmance Opinion, 566 F.3d at 1144.

[2] For example, defendants established the ETS Consultancy (also known as "Project Whitecoat") to " 'keep the controversy alive' by attacking the scientific consensus that ETS was a health hazard." *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 752, ¶ 3602 (D.D.C. 2006), *aff'd in relevant part*, 566 F.3d 1095 (D.C. Cir. 2009) (*per curiam*).

[3] Exs. 1 & 9 through 21 to U.S. Surreply (R. 5930; filed 5/10/2011); U.S. 1st Suppl. re. U.S. Surreply (R. 5935; filed 5/27/2011)

C. A robust methodology confirms that the recommended statements are likely to thwart defendants' prospective frauds from deceiving consumers

To determine which potential statements to recommend to the Court, the United States evaluated 30 potential corrective statements, including every statement proposed by the defendants themselves in 2006.[4] Applying "a well-established formative research process that is broadly used within the field of health communication science," the research was conducted by a Harvard-trained doctoral-level health-communications scientist who analyzed data obtained from a qualitative phase of eight focus groups and a quantitative phase of 3,617 survey responses from a nationally representative sample. Expert Report of Kelly Blake, Sc.D., at 11, ¶ 14; *id.* at 22, ¶¶ 44-45; *id.* at 98, ¶ 247 ("Blake Rep.") (R. 5875-1; filed 2/23/2011). The report explained that accurate knowledge, attention, and perceived public impact are "important markers of comprehension and should be used in considering the statements' potential to inoculate against future misinformation," and that the key factors in its recommendations were these measures, as well as the overall statement rankings and measures of negative unintended consequences. *Id.* at 18, ¶ 37.

Defendants' current brief raises no challenges to the validity and reliability of the United States' research methodology, and disputes no part of Dr. Blake's research conclusions vouching for the effectiveness and appropriateness of the recommended statements. *Id.* at 98, ¶ 247. Instead, defendants repeat their theme about the recommended statements' purpose, most recently that the statements are intended "to generate popular disapproval of, and anger toward,

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[4] Defendants withdrew those proposals in 2010, and now ask the Court instead to "use the text of the nine warnings mandated by Congress under the [Tobacco Control Act]." Certain Defs.' Status Rep. at 13 (R. 5841; filed 11/24/2010). Notably, none of that statute's health warnings advise consumers that tobacco companies manipulate the design of cigarettes to enhance nicotine delivery, in order to create and sustain addiction—Topic D in this litigation. 449 F. Supp. 2d at 928. Defendants thus ask, *sub silentio*, for the Court to vacate its corrective-statement order on this topic.

the tobacco industry based on past conduct," and were chosen "*precisely because* they elicited feelings of condemnation, revulsion, and anger." Defs.' Suppl. Br. at 4 (emphasis added). Defendants' sole evidence for their "precisely because" claim is one comment made by one focus-group member. *Id.* Such "evidence" is no evidence at all; it is barely an anecdote.

The United States' evaluation of negative unintended consequences, and use of those evaluations, rebuts defendants' claims. Dr. Blake evaluated all tested statements for negative unintended consequences, and found, that compared to control, Philip Morris's 2006 addiction proposal (Topic B) reduced the number of current smokers who reported thinking about quitting. Blake Rep. at 77-78, ¶¶ 193 & 196. Likewise, Dr. Blake found that the NCI and modified intervenors' statements for secondhand smoke (Topic E) both triggered smoking urges, for both current and former smokers, *id.* at 85-86, ¶¶ 211 & 216—and recommended *against* them for that reason, even though they performed *better* on the overall global rankings than the other secondhand-smoke statements, *id.* at 94, ¶ 231. (The intervenors have objected that this recommendation is overly conservative.) The United States' attention to negative unintended consequences demonstrates both that the Court can be confident that such consequences will not arise from adopting the recommended statements, *id.* at 21, ¶ 43, and that condemnation, revulsion, and anger were not the bases for determining which statements to recommend.

III. There is no prohibition against corrective statements that disclose a defendant's past misconduct

Defendants' briefs make plain that, under their view of the law, corrective statements could make them tell consumers something about their products, but nothing about their past frauds. Such a requirement is found nowhere in the law; defendants' only citation for the proposition is the exclusion of a "Contrary to prior advertising" preamble, based on the D.C. Circuit's finding that the record compiled in that case "could support a finding of good faith."

Warner-Lambert Co. v. FTC, 562 F.2d 749, 763 (D.C. Cir. 1977). In the same paragraph, the Court of Appeals commented that a corrective-statement preamble *designed* "to humiliate the advertiser. . . might be called for in an egregious case of deliberate deception." *Id.* If ever there was "an egregious case of deliberate deception," it is this one.

Contrary to defendants' claims, the D.C. Circuit has expressly upheld corrective statements requiring defendants to suffer the "ignominy" of corrective statements that require wrongdoers to disclose past misconduct. The United States has previously shown that the D.C. Circuit has routinely upheld National Labor Relations Board orders that require employers to post a notice captioned, "NOTICE TO EMPLOYEES. POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD," and beginning, "The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice." *See* U.S. Reply Br. at 8 (R. 5891; filed 3/16/2011), and cases cited therein. But the D.C. Circuit has gone further than that. In this case, the corrective statements will be disseminated by the same media channels defendants have used to market and sell their products. 449 F. Supp. 2d at 927-28. By contrast, where a particularized need is shown, an employer's high-ranking corporate executives will be ordered personally to read a "we violated Federal labor law" notice to employees, out loud and in public—notwithstanding the acknowledged "ignominy of a forced public reading by an employer and its potential for oppression." *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 930 (D.C. Cir. 2005) (internal quotation marks omitted). *Accord United Food & Commercial Workers Int'l Union, AFL-CIO v. NLRB*, 852 F.2d 1344, 1348-49 (D.C. Cir. 1988); *Conair Corp. v. NLRB*, 721 F. 2d 1355, 1385-87 (D.C. Cir. 1983); *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 401-04 (D.C. Cir. 1981); *NLRB v. Homer D. Bronson Co.*, 273 Fed. App'x 32, 39-40 (2d Cir. 2008) (unpublished).

Indeed, the D.C. Circuit last year upheld an order requiring a corrective statement to disclose the defendant's fraudulent misconduct. After finding that a company's cancer-curing claims for its product were unsupported, the FTC ordered it to send its customers a corrective statement on company letterhead, saying in part, "We are writing to tell you that the Federal Trade Commission ('FTC') has found our advertising claims for these products to be deceptive because they were not substantiated by competent and reliable scientific evidence, and the FTC has issued an Order prohibiting us from making these claims in the future." *Daniel Chapter One*, No. 9329, 2010 WL 387917, at *4, 2010 FTC Lexis 11, at *10-*11 (FTC Jan. 25, 2010). On review, the D.C. Circuit rejected a First Amendment challenge similar to the one that defendants here assert: "Deceptive commercial speech is entitled to no protection under the First Amendment and, even if it were, that would not preclude the Commission's order, which is carefully tailored to protect DCO's clientele from deception." *Daniel Chapter One v. FTC*, 405 Fed. App'x 505, 506 (D.C. Cir. 2010) (unpublished), *reh'g en banc denied*, No. 10-1064 (D.C. Cir. Feb. 16, 2011), *cert. denied*, 131 S. Ct. 2917 (2011).

IV. Even if the Affirmance Opinion standard were not the law of the case, the recommended statements would still easily survive scrutiny

As discussed above, the Affirmance Opinion, not *RJR v. FDA*, will govern this Court's corrective-statement decision. Nonetheless, defendants argue that *RJR v. FDA* requires any corrective statements to "directly advance" the goal of thwarting defendants' prospective frauds from deceiving consumers. Defs.' Suppl. Br. at 6-9. The recommended statements meet that standard as well. Defendants nowhere dispute Dr. Blake's conclusion that the recommended statements "are likely to . . . reduce the likelihood that consumers will believe potential future misrepresentations about the topics the Court identified." Blake Rep. at 98, ¶ 247.

Even so, defendants assert that the Blake Report "demonstrates that the government has failed to establish that its proposed statements would be more effective" than other tested statements. Defs.' Suppl. Br. at 7. This is impossible to square with the Blake Report's major finding:

> Across nearly all topic areas and key outcome variables, the statements proposed by the Intervenors and the National Cancer Institute generally performed better than those proposed by the tobacco industry, both when compared to the control condition, and when ranked against all proposed statements under study. This pattern was particularly evident on outcome variables seen as highly relevant to this evaluation—accurate knowledge, attention, and potential for public impact.

Blake Rep. at 72, ¶ 178; *see also id.* at 18, ¶ 37 (explaining study's primary considerations).

Instead of challenging Dr. Blake's research or methodology, defendants ask the Court to hold that the *preambles* to the recommended statements do not "materially advance" the Court's goals. Defs.' Suppl. Br. at 8. Dr. Blake evaluated five preambles head-to-head. Blake Rep. at 69, ¶ 169. The two that performed best refer to telling the truth, with Preamble 2 the preamble to the United States' recommended Statement A. *Id.* at 87-88, ¶¶ 217 & 218, figs. V22 & V23. Defendants disparage these head-to-head findings, claiming that they show that the Statement A preamble—and, confusingly, the Statement B, C, and D preambles, which were not assessed in this evaluation—are only slightly better than others. Defs.' Suppl. Br. at 8. Even if this were true, defendants do not explain what it has to do with whether the United States' recommended full statements will "materially advance" the goal of thwarting future fraud.

Defendants instead ask the Court to remove the preambles to the recommended statements (which were of course part of the full statements as tested), and substitute different preambles that do not refer to defendants' past misconduct. To justify this, defendants mis-apply results from a measure, cautioned to be less than fully reliable, that was tested on full statements (not on a head-to-head comparison of preambles). As defendants observe, the two "future

beliefs" questions found very few distinctions among the full statements. Blake Rep. at 73, ¶ 182 (cited in Defs.' Suppl. Br. at 7-8). But the expert report immediately went on to explain why these measures should be "interpreted with appropriate caution," and why the appendices reported only weighted percentages for them (and not the more detailed information reported for other questions). *Id.* Even if these questions were reliable, the study design did not seek to evaluate *preambles* through any of the questions posed about *full statements*.

It is a fundamental error to consider any measure out of its appropriate context, and a further error in a multivariate study to interpret a single measure in isolation from all others. Even more so, it would be a mistake to rewrite the recommended statements without adequate testing to ensure that new statements did not have negative unintended consequences, as does Philip Morris's addiction statement (Topic B), as well as the best-performing NCI and modified intervenors' secondhand-smoke statements (Topic E).

Conclusion

The Affirmance Opinion specifies that corrective statements must be "narrowly tailored," and holds that, "contrary to Defendants' argument, the publication of corrective statements addressing Defendants' false assertions [will be] adequately tailored to preventing Defendants from deceiving consumers." Affirmance Opinion, 566 F.3d at 1143, 1144; *accord Daniel Chapter* One, 405 Fed. App'x at 506 (finding that corrective statement notifying cancer patients that past claims were fraudulent was "carefully tailored to protect DCO's clientele from deception"). The Affirmance Opinion directed this Court to ensure that its corrective statements are "purely factual and uncontroversial" and are geared towards thwarting Defendants' prospective frauds from deceiving consumers. *Id.* at 1144. The Court should find that the United States' recommended statements satisfy these standards, and adopt them.

Respectfully submitted,

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