

# **TOBACCO CONTROL RESOURCE CENTER**

**Trial Update:**

***USA v. Philip Morris USA et al.***

**United States District Court for the District of Columbia**

**No: 99-CV-02496-GK**

**Kessler, J.**

**Issued: February 4, 2005**

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## TABLE OF CONTENTS

<b>I. BACKGROUND</b>	<b>1</b>
<b>II. REMEDIES DOJ SEEKS</b>	<b>3</b>
<b>III. DOJ'S PRESENTATION OF WITNESSES AND DOCUMENTS PROVES ITS CLAIMS AGAINST DEFENDANTS</b>	<b>5</b>
1. DEFENDANTS PURPOSELY MISLED THE PUBLIC REGARDING SMOKING'S DANGERS	<b>6</b>
2. DEFENDANTS MISLED, AND CONTINUE TO MISLEAD, THE PUBLIC ON THE DANGERS OF SECONDHAND SMOKE	<b>11</b>
3. DEFENDANTS MISREPRESENTED NICOTINE'S ADDICTIVENESS AND MANIPULATED NICOTINE DELIVERY IN CIGARETTES	<b>14</b>
4. DEFENDANTS DECEPTIVELY MARKETED "LIGHT" AND "LOW TAR" CIGARETTES TO EXPLOIT SMOKERS' DESIRE FOR LESS HAZARDOUS PRODUCTS	<b>19</b>
5. DEFENDANTS TARGETED THE YOUTH MARKET	<b>22</b>
6. DEFENDANTS CONSPIRED NOT TO RESEARCH OR PRODUCE SAFER CIGARETTES	<b>26</b>
<b>STATEMENT OF FORMER ATTORNEY GENERAL JOHN ASHCROFT</b>	<b>Appendix A</b>
<b>THE TRIAL'S PROCEDURAL PROCESS</b>	<b>Appendix B</b>

## I. BACKGROUND

On September 22, 1999, the United States Department of Justice (“DOJ” or “Government”) filed a lawsuit against the major American cigarette manufacturers (collectively, the “industry” or “Defendants”) in the United States District Court for the District of Columbia.<sup>1</sup> Federal Judge Gladys Kessler began the trial in this case on September 21, 2004, nearly five years after it was filed.<sup>2</sup> DOJ’s case in chief is ongoing and is expected to last into February or March, with the trial likely concluding in late spring.<sup>3</sup> For a summary of the procedures Judge Kessler is employing for the trial, see Appendix B.

DOJ alleges that Defendants have violated the Racketeer Influenced and Corrupt Organizations Act (“RICO”)<sup>4</sup> by engaging in a massive conspiracy to defraud the public by knowingly producing dangerous and addictive products and misleading the public about the risks associated with these products. The RICO statute authorizes DOJ to pursue criminal and civil sanctions against individuals and organizations that are engaged

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<sup>1</sup> See *U.S. v. Philip Morris, et al.*, No. 99-CV-02496GK (U.S. Dist. Ct., D.C.) (Complaint for Damages and Injunctive and Declaratory Relief) (September 22, 1999) (“Complaint”), available at <http://www.usdoj.gov/civil/cases/tobacco2/complain.pdf>

The Defendants are: Altria Group, Inc.; Philip Morris USA, Inc.; R J Reynolds Tobacco Company; Brown & Williamson Tobacco Corporation (now merged with RJR); British American Tobacco (Investments), Ltd (as the former parent company of Brown & Williamson); Lorillard Tobacco Company; The Liggett Group, Inc.; The Council for Tobacco Research-U.S.A., Inc.; and The Tobacco Institute. See Complaint at 1-2.

<sup>2</sup> See Michael Janofsky, *Tobacco Firms Face U.S. in High-Stakes Trial*, New York Times (Sept. 20, 2004) at A16.

<sup>3</sup> See Brian Blackstone, *Tobacco Trial Restarts With Whistleblower Testimony*, Dow Jones Newswires (Jan. 6, 2005), available at <http://www.tobacco.org/news/186167.html>

<sup>4</sup> 18 U.S.C §§ 1961 *et seq.*

in a conspiracy involving certain federal felonies (including mail and wire fraud).<sup>5</sup> DOJ is pursuing civil RICO sanctions in this lawsuit.<sup>6</sup>

A successful outcome for DOJ at trial will have a significant positive effect on the public health. Each year in the United States, cigarette smoking causes approximately 440,000 deaths and costs \$155 billion in medical and lost productivity costs annually.<sup>7</sup> Despite this, neither the United States Food and Drug Administration (“FDA”) nor the United States Consumer Product Safety Commission has the authority to regulate cigarettes, and the United States Federal Trade Commission has played a very passive role over the past two decades.<sup>8</sup> The result is a largely unregulated cigarette industry.

Where legislative and regulatory approaches have failed, litigation against the industry has served as a powerful and effective public health strategy.<sup>9</sup> Successful products liability lawsuits have the potential to shift billions of dollars of health and productivity costs from families and third-party payers back to cigarette manufacturers, forcing increases in cigarette prices.<sup>10</sup> Such increases reduce smoking rates, especially among children and teenagers.<sup>11</sup> Indeed, the settlement of state lawsuits against the

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<sup>5</sup> 18 U.S.C §§ 1961 *et seq.*

<sup>6</sup> See Complaint.

<sup>7</sup> See Centers for Disease Control and Prevention, *Annual Smoking – Attributable Mortality, Years of Potential Life Lost, and Economic Costs – United States, 1995 – 1999*, 51 Morbidity & Mortality Weekly Reporter 297, 300 (2002).

<sup>8</sup> See *FDA v. Brown and Williamson Corp., et al.*, 153 F.3d 155 (2000); Graham Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 Stanford Law & Policy Review 63-98 (1997).

<sup>9</sup> See Richard Daynard, *Why Tobacco Litigation*, 12 Tobacco Control 1-2 (2003).

<sup>10</sup> See Richard Daynard, *Why Tobacco Litigation*, 12 Tobacco Control 1-2 (2003).

<sup>11</sup> See Surgeon General David Satcher, *Reducing Tobacco Use: A Report of the Surgeon General*, U.S. Department of Health and Human Studies 322-37 (2000).

cigarette manufacturers in 1997 and 1998 has had exactly that effect. Additionally, lawsuits highlight smoking's dangerous nature and reveal to the public that the industry has been highly deceptive in its quest to acquire new smokers.<sup>12</sup>

This Trial Summary provides an overview of the DOJ lawsuit to date. Section II reviews the remedies DOJ seeks, which include requiring Defendants to change the way they market cigarettes. Section III reviews the basic allegations against the Defendants and highlights key witness testimony and documentary evidence that DOJ has presented at trial in support of these allegations. The appendices contain additional useful references and resources.

## **II. REMEDIES DOJ SEEKS**

Although the United States Court of Appeals for the District of Columbia Circuit has ruled against allowing DOJ to pursue disgorgement as a remedy,<sup>13</sup> there are many additional remedies available to help correct the effects of Defendants' conspiracy to defraud the public by lying about smoking's dangers.

These remedies – which DOJ indicated in a 2002 court filing it would seek – include significant changes in the manufacturing, marketing, labeling and sale of tobacco products. Specifically, DOJ may ask Judge Kessler to:

- Restrict all cigarette advertising to black-and-white, print-only formats, known as “tombstone ads,” with half the space in any ad reserved for “graphic health warnings.”<sup>14</sup> These warnings would be similar in style to those used in Canada, which are widely believed to give consumers a more accurate understanding of cigarettes’

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<sup>12</sup> See Richard Daynard, *Tobacco Liability Litigation as a Cancer Control Strategy*, 80 *Journal of the National Cancer Institute* 9-13 (1988).

<sup>13</sup> See *U.S. v. Philip Morris, et al.*, No. 99-CV-02496GK, slip op. (U.S. Dist. Ct., D.C. Feb. 4, 2005), available at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200502/04-5252a.pdf>

<sup>14</sup> John R. Wilke, *Demand Marks Departure for Bush Administration; Outlook is Uncertain*, *Wall Street Journal* (March 11, 2002) at A3.

health effects than do the warnings currently required in the U.S.<sup>15</sup> Such restrictions “would effectively bar the colorful ‘lifestyle’ advertising now favored by the industry.”<sup>16</sup>

- Eliminate trade promotions, give-aways, and vending machine sales. In 1999, “tobacco product trade promotions rose to \$3.54 billion – 43% of the industry’s promotional budget – as the industry sought new ways to drive sales while complying with marketing restrictions imposed by [the Master Settlement Agreement].”<sup>17</sup>
- Forbid cigarette companies from labeling cigarettes as “light,” “low tar,” or “mild.”<sup>18</sup>
- Order comprehensive restrictions on retail cigarette sales, including elimination of the “slotting fees” paid retailers for favorable placement of tobacco products in stores. “These fees and promotions an important revenue source for retailers – as much as \$20,000 a year for a busy convenience store, federal investigators found.”<sup>19</sup>
- Order marked changes in cigarette packaging, with “graphic health warnings” covering half the surface of a cigarette pack and health-information messages created and supervised by the U.S. Surgeon General on leaflet inserts.<sup>20</sup>

Additionally, Judge Kessler has wide discretion to fashion further remedies that fit Defendants’ RICO violations. These remedies could include: requiring Defendants to share their research over the years with the public; requiring Defendants to fund independent public service messages to undo public perceptions regarding cigarettes caused by their past fraudulent statements; requiring Defendants to fund an independent

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<sup>15</sup> See D Hammond, G T Fong, P W McDonald, R Cameron, K S Brown, *Impact of the Graphic Canadian Warning Labels on Adult Smoking Behavior*, 12 Tobacco Control 391-25 (2003).

<sup>16</sup> John R. Wilke, *Demand Marks Departure for Bush Administration; Outlook is Uncertain*, Wall Street Journal (March 11, 2002) at A3.

<sup>17</sup> John R. Wilke, *Demand Marks Departure for Bush Administration; Outlook is Uncertain*, Wall Street Journal (March 11, 2002) at A3.

<sup>18</sup> John R. Wilke, *Demand Marks Departure for Bush Administration; Outlook is Uncertain*, Wall Street Journal (March 11, 2002) at A3.

<sup>19</sup> John R. Wilke, *Demand Marks Departure for Bush Administration; Outlook is Uncertain*, Wall Street Journal (March 11, 2002) at A3.

<sup>20</sup> John R. Wilke, *Demand Marks Departure for Bush Administration; Outlook is Uncertain*, Wall Street Journal (March 11, 2002) at A3.

program to assist smokers with smoking cessation (such as nicotine patches, gum, counseling)<sup>21</sup>; requiring Defendants to list all ingredients, additives and toxic chemicals in their cigarettes; and requiring Defendants to disclose their manufacturing methods and marketing research.

### **III. DOJ'S PRESENTATION OF WITNESSES AND DOCUMENTS PROVES ITS CLAIMS AGAINST DEFENDANTS**

The Court of Appeals' ruling regarding disgorgement *does not affect* the underlying liability issues. Thus far, DOJ has produced dozens of witnesses and reams of documents in support of its claims that Defendants' wrongful acts violate the RICO statute. Stated broadly, these claims allege that Defendants: (1) purposely misled the public regarding smoking's dangers; (2) misled, and continue to mislead, the public on the dangers of secondhand smoke; (3) misrepresented nicotine's addictiveness and manipulated nicotine delivery in cigarettes; (4) deceptively marketed "light" and "low tar" cigarettes to exploit smokers' desire for less hazardous products; (5) targeted the youth market; and (6) conspired not to research or produce safer cigarettes.<sup>22</sup> The following section summarizes each of these claims and highlights certain witness testimony and documentary evidence from the trial supporting them.

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<sup>21</sup> In 2004, the price tag that a Louisiana jury put on such a program for that state alone was \$590 million. See "Louisiana Jury Requires Tobacco Companies to Pay \$590 Million to Help Louisiana Smokers to Kick the Habit," available at [http://www.tobacco.neu.edu/litigation/cases/Backgrounders/scott\\_phase2\\_verdict.htm](http://www.tobacco.neu.edu/litigation/cases/Backgrounders/scott_phase2_verdict.htm).

<sup>22</sup> DOJ Final Proposed Findings of Facts Executive Summary ("DOJ Executive Summary"), available at <http://www.usdoj.gov/civil/cases/tobacco2/U.S.%20Final%20PFOF%20Exec%20Summary.pdf>

**1. DEFENDANTS PURPOSELY MISLED THE PUBLIC REGARDING SMOKING’S DANGERS**

Summary of DOJ’s Claim<sup>23</sup>

“[S]ubstantial evidence exists that Defendants have engaged in and executed – and continue to engage in and execute – a massive 50-year scheme to defraud the public, including consumers of cigarettes, in violation of RICO.”<sup>24</sup>

In 1954, the tobacco companies issued the “Frank Statement to Cigarette Smokers,” a full page document published in 448 newspapers across the United States.<sup>25</sup> The Frank Statement included “two representations that would lie at the heart of Defendants’ fraudulent scheme.”<sup>26</sup> First, that “there was insufficient scientific and medical evidence that smoking was a cause of any disease,” and second, that “the industry would jointly sponsor and disclose the results of ‘independent’ research designed to uncover the health effects of smoking.”<sup>27</sup> Both claims were untrue. By late 1953, there had been “at least five published epidemiologic investigations, as well as others identifying and examining carcinogenic components in tobacco smoke and their effects.”<sup>28</sup> The result was a “categorical understanding of the link between smoking and lung cancer.”<sup>29</sup>

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<sup>23</sup> For DOJ’s complete summary of this claim, see DOJ Executive Summary at 1-7.

<sup>24</sup> DOJ Executive Summary at 1.

<sup>25</sup> DOJ Executive Summary at 4.

<sup>26</sup> DOJ Executive Summary at 4.

<sup>27</sup> DOJ Executive Summary at 4.

<sup>28</sup> DOJ Executive Summary at 2.

<sup>29</sup> DOJ Executive Summary at 2.

To support its fraud, the industry founded the Tobacco Industry Research Committee (“TIRC”), later renamed the Council for Tobacco Research (“CTR”), as a “sophisticated public relations apparatus . . . to deny the harms of smoking and to reassure the public.”<sup>30</sup> This involved “the essential strategy of generating ‘controversy’ surrounding the scientific findings linking smoking to disease” – an approach “Defendants stuck to . . . without wavering, for the next half-century.”<sup>31</sup>

#### Witness Testimony Supporting Claim

#### **Jeffrey Wigand, Ph.D.<sup>32</sup>**

Jeffrey Wigand, Ph.D., worked for Brown & Williamson (“B&W” from 1989 to 1993, first as its Vice President of Research and Development, then as Vice President of Research and Development/Environmental. He was “responsible for all aspects of Brown & Williamson’s research including basic research, applied research, the manufacturing development center, the duPont center (which was a testing center), technical issues in manufacturing, and interacting with the other BAT research and development centers.” Dr. Wigand testified as follows:

- As part of his orientation in 1989, Wigand was coached on the “company line” that “causation had not been proven and that nicotine had not been shown to be addictive.” This coaching was run by attorneys at Shook, Hardy & Bacon in Kansas City.
- “[T]he BAT Group of companies needed to maintain a public and legal position that causation had not been proven.”
- “Lawyers were instructing me, a scientist, how to interpret epidemiological studies. In every instance, I was instructed that the evidence in the public health domain had not

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<sup>30</sup> DOJ Executive Summary at 4.

<sup>31</sup> DOJ Executive Summary at 4.

<sup>32</sup> Written Examination of Jeffrey Wigand, Ph.D. (“Wigand Testimony”), available at [http://www.usdoj.gov/civil/cases/tobacco2/Wigand\\_Written%20Direct%20Testimony.pdf](http://www.usdoj.gov/civil/cases/tobacco2/Wigand_Written%20Direct%20Testimony.pdf)

satisfactorily proven causation. I was told that studies that demonstrated a link between smoking and cancer were fraught with errors. Moreover, I was told that epidemiology could not be relied upon because it was just statisticians doing guess work.”

- “[D]espite the overwhelming epidemiological evidence that smoking causes disease, the sessions focused on Brown & Williamson’s position that the mechanism by which smoking causes disease had not been established.”
- “[T]here was a great fear that many of the smoke components would demonstrate a high level of biological activity if tested. Increased biological activity would indicate increased risk of disease to human smokers. The company was afraid that if such tests were conducted and demonstrated high levels of biological activity, and were then discovered in litigation, the company’s argument regarding causation would be gutted.” Brown & Williamson’s response to this concern: “Don’t do the tests.”
- Company lawyers “vetted” scientific documents “to prevent or remove” “contentious” and “sensitive” information – that is, “anything that could be discovered during any kind of liability action and then used against the company in that litigation. Broadly speaking these words were referring to causation and addiction.”

**William Farone, Ph.D.**<sup>33</sup>

William Farone, Ph.D., was Philip Morris’ Director of Applied Research between 1976 and 1984. Dr. Farone testified as follows:

- “The tobacco industry recognized, even during the time that the companies were publicly denying that the smoke from cigarettes caused disease, that the evidence linking smoking and disease was sufficient to conclude scientifically that inhaling cigarette smoke was a cause of disease.”
- “There was widespread acceptance [at Philip Morris] that smoking caused disease. I never talked with a scientist at Philip Morris who said that smoking doesn’t cause disease.”

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<sup>33</sup> United States’ Written Direct Testimony of William A. Farone, Ph.D. (“Farone Testimony”), available at <http://www.usdoj.gov/civil/cases/tobacco2/20040929%20Written%20Direct%20Testimony%20for%20William%20Farone%20PhD.pdf>

**Allan Brandt, Ph.D.**<sup>34</sup>

Harvard University Professor Allan Brandt, Ph.D., is an expert in the history of medicine and particularly the history of medical research regarding tobacco use. He testified:

- “During the course of the 1950s the evidence implicating cigarette smoking as a cause of lung cancer became overwhelming. As a result, there was substantial scientific and medical consensus concerning this finding.”
- “[A]t about this time [1958], the tobacco industry sought to amplify its public relations presence on smoking and health issues through the formation of the Tobacco Institute, not only failing to aid research into questions of smoking and disease, but also increasing the effort to simultaneously deny or distort legitimate science.”

**Jeffrey Harris, M.D., Ph.D.**<sup>35</sup>

Jeffrey Harris, M.D., Ph.D., is an economist and a physician who performed an economic analysis of the industry’s conduct with respect to smoking and health since the early 1950s. Dr. Harris testified:

- “Defendants have engaged during the past five decades in a sustained cooperative arrangement in which they have jointly denied that smoking causes disease, jointly refrained from making comparative health claims about each others’ products, and jointly withheld potential risk-reducing alternatives from the marketplace.”
- “[T]he evidence in the present case, as shown by Defendants’ own documents, repeatedly shows that Defendants have colluded via direct communication and explicit agreement among themselves.”

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<sup>34</sup> United States’ Written Direct Testimony of Allan M. Brandt, Ph.D., available at: <http://www.usdoj.gov/civil/cases/tobacco2/20040920%20Allan%20M.%20Brandt,%20Ph.D.,%20Written%20Direct.pdf>

<sup>35</sup> Written Direct Testimony of Jeffrey E. Harris, M.D., Ph.D. (“Harris Testimony”), available at: <http://www.usdoj.gov/civil/cases/tobacco2/Writtend%20Direct%20of%20Dr.%20Jeffrey%20E.%20Harris.pdf>

**Victor DeNoble, Ph.D.**<sup>36</sup>

Victor DeNoble, Ph.D., was an associate senior scientist at Philip Morris between 1980 and 1984. He testified as follows about Philip Morris's prevention of the publication of his studies demonstrating nicotine's effects on the brain:

- DeNoble discussed the “prostration syndrome” in rats, describing it as a “particular behavioral response” that occurs “if you placed nicotine directly into a rat’s brain.” Although another scientist (Dr. Leo Abood, a Philip Morris consultant) discovered the syndrome, DeNoble and his colleagues “located the area in the brain that is primarily responsible for some of nicotine’s major effects in the prostration syndrome.” This brain area – the vestibular nucleus – “affects balance and coordination.” DeNoble and his colleagues published one paper “describing generally the prostration syndrome in rats injected with nicotine,” then “prepared a second paper on our discovery about the particular brain sites responsible for the prostration syndrome in rats.” However, “Philip Morris did not allow this [second paper] to be submitted for publication.”

Documents Supporting Claim

Dr. Farone discussed the following document during his testimony:

**United States Exhibit 20,088**<sup>37</sup>

1961 presentation made by Helmut Wakeham to the Philip Morris Board of Directors

Relevant text:

- Wakeham has a list titled “Partial List of Compounds in Cigarette Smoke Also Identified As Carcinogens.” (According to Dr. Farone, “this shows that by 1961, Philip Morris had identified most of the same basic classes of chemical compounds that were considered to be the most harmful substances in cigarette smoke when I arrived at Philip Morris in 1976.”)

Dr. Harris discussed the following documents during his testimony:

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<sup>36</sup> Written Direct Testimony of Victor J. DeNoble, II, Ph.D., available at [http://www.usdoj.gov/civil/cases/tobacco2/DeNoble\\_USwritten%20direct.pdf](http://www.usdoj.gov/civil/cases/tobacco2/DeNoble_USwritten%20direct.pdf)

<sup>37</sup> This document is available at <http://legacy.library.ucsf.edu/cgi/getdoc?tid=oty05e00&fmt=pdf&ref=results>

**United States Exhibit 22,986**

**Title: “Smoking and Health: Significance of the Report of the Surgeon General’s Committee to Philip Morris Incorporated”<sup>38</sup>**

Written by Dr. Helmut Wakeham, a scientist and Vice President for Research and Development for Philip Morris, dated February 18, 1964.

Relevant text:

- Dr. Wakeham stated that there was “little basis for disputing the findings” of the 1964 Surgeon General’s Report that concluded smoking causes cancer. [However, this was not Philip Morris’ public opinion. The major cigarette manufacturers had issued joint statements disputing the 1964 Surgeon General’s Report.]

**United States Exhibit 21,408,**

**Title: “Forwarding Memorandum: To Members of the Planning Committee”<sup>39</sup>**

(Apparently written in 1953; exact date unknown)

Relevant text:

- “There is only one problem – confidence, and how to establish it; public assurance, and how to create it – in a perhaps long interim when scientific doubts must remain. And, most important, how to free millions of Americans from the guilty fear that is going to arise deep in their biological depths – regardless of any pooh-poohing logic – every time they light a cigarette. No resort to mere logic ever cured panic yet, whether on Madison Avenue, Main Street, or in a psychologist’s office. And no mere recitation of arguments pro, or ignoring of arguments con, or careful balancing of the two together, is going to deal with such fear now. That, gentlemen, is the nature of the unexampled challenge to this office.”

**2. DEFENDANTS MISLED, AND CONTINUE TO MISLEAD, THE PUBLIC ON THE DANGERS OF SECONDHAND SMOKE**

Summary of DOJ’s Claim<sup>40</sup>

Since the 1970s, evidence has grown regarding the dangers of secondhand smoke, also known as environmental tobacco smoke (“ETS”).<sup>41</sup> There now is significant evidence linking ETS to adverse health outcomes, including lung cancer and heart

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<sup>38</sup> This document is available at <http://tobaccodocuments.org/pm/2025010489-0498.html>

<sup>39</sup> This document is available at <http://tobaccodocuments.org/ness/3793.html>

<sup>40</sup> For DOJ’s complete summary of this claim, see DOJ Executive Summary at 11-14.

<sup>41</sup> DOJ Executive Summary at 11.

disease in adults and respiratory ailments in infants and children.<sup>42</sup> Despite this evidence, Defendants have misled the public about ETS's health effects in an effort to quell restrictions on where and when people can smoke.<sup>43</sup>

Defendants have viewed concerns about ETS's health effects "as a threat to the 'number of smokers & number of cigarettes they smoke.'"<sup>44</sup> Although they promised publicly to "seek answers" through research, these promises were intended only to hoodwink the public into believing that ETS's link to disease was still an open controversy.<sup>45</sup> To that end, "Defendants designed a sophisticated public relations and research strategy to attempt to 'alter public perception that ETS is damaging'" – despite their own knowledge that there was a "[l]ack of objective science" to support this campaign.<sup>46</sup>

Part of Defendant's strategy involved the creation in 1988 of the Center for Indoor Air Research ("CIAR").<sup>47</sup> CIAR acted "as a coordinating organization for Defendants' efforts to fraudulently mislead the American public about the health effects of ETS exposure."<sup>48</sup> Additionally, to extend their domestic initiative to "counter ever-mounting evidence implicating secondhand smoke as a cause of disease and other health

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<sup>42</sup> DOJ Executive Summary at 12.

<sup>43</sup> DOJ Executive Summary at 11.

<sup>44</sup> DOJ Executive Summary at 12.

<sup>45</sup> DOJ Executive Summary at 12.

<sup>46</sup> DOJ Executive Summary at 12-13.

<sup>47</sup> DOJ Executive Summary at 13.

<sup>48</sup> DOJ Executive Summary at 13.

problems,” Defendants formed the international ETS Consultancy Program.<sup>49</sup> Overall, Defendants’ “goal was to ‘keep the controversy alive’ and forestall legislation and any restrictions on public or workplace smoking.”<sup>50</sup>

### Witness Testimony Supporting Claim

#### **Gregory Wulchin**<sup>51</sup>

Gregory Wulchin was a field technician from 1988 to 1993 for Healthy Buildings International (“HBI”), an organization that performed numerous indoor air quality tests for CIAR. Mr. Wulchin’s primary job responsibility at HBI was to inspect buildings for indoor air quality problems. He testified regarding evidence of the industry and its allies allegedly altering ETS test data, as follows:

- Wulchin discussed an ETS test form that he submitted to HBI: “I tested for particulate levels in both the smoking section and the nonsmoking section of the cafeteria at the same time . . . . I recorded high levels of particulates in both sections of the room . . . . These results indicated that in this case, the simple physical separation of smokers and nonsmokers in the same room was not an effective strategy for control of environmental tobacco smoke. In the HBI report to CIAR, however, the two tests I conducted in the same room are listed and tabulated as if they were inspections conducted in separate rooms.”
- “It is a mischaracterization to treat the nonsmoking section of a room with heavy smoking as a room in which no smoking is occurring . . . . The result of HBI’s mischaracterization was to skew the results of its analysis. Treating a section of a smoking room as a nonsmoking room raises the average particulate level of the nonsmoking room, obscuring the differences between smoking and nonsmoking areas.”
- Wulchin confirmed that there were “instances where HBI recorded a smaller local area and not the size of the entire room” that it was testing. As a result, the smoker density

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<sup>49</sup> DOJ Executive Summary at 14.

<sup>50</sup> DOJ Executive Summary at 14.

<sup>51</sup> Testimony of Gregory A. Wulchin, available at: [http://www.usdoj.gov/civil/cases/tobacco2/01\\_Wulchin%20Direct%20Testimony.pdf](http://www.usdoj.gov/civil/cases/tobacco2/01_Wulchin%20Direct%20Testimony.pdf)

level is raised while “nicotine levels may be reduced by the larger volume of air that freely circulates in the larger room.”

- “My experience with HBI data, as well as my review of HBI reports, leads me to conclude that HBI’s data contain unexplained entries that raise serious questions about the integrity of its studies.”

### **3. DEFENDANTS MISREPRESENTED NICOTINE’S ADDICTIVENESS AND MANIPULATED NICOTINE DELIVERY IN CIGARETTES**

#### Summary of DOJ’s Claim<sup>52</sup>

“Cigarette smoking is an addictive behavior, a dependency characterized by drug craving, compulsive use, tolerance, withdrawal symptoms, and relapse after withdrawal. Underlying the smoking behavior and its remarkable intractability to cessation is the drug nicotine. Nicotine is the primary component of cigarettes that creates and sustains addiction to cigarettes.”<sup>53</sup>

Since the 1950s, Defendants have studied nicotine and have characterized its effects as “addictive,” “dependence” producing or “habituating.”<sup>54</sup> These documents “demonstrate unequivocally that defendants understood the central role nicotine plays in keeping smokers smoking, and thus its critical importance to the success of their industry.”<sup>55</sup> Additionally, industry documents reveal that “Defendants purposefully designed and sold products that delivered a pharmacologically effective dose of nicotine in order to create and sustain nicotine addiction in smokers.”<sup>56</sup>

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<sup>52</sup> For DOJ’s complete summary of this claim, see DOJ Executive Summary at 14-18.

<sup>53</sup> DOJ Executive Summary at 15.

<sup>54</sup> DOJ Executive Summary at 15.

<sup>55</sup> DOJ Executive Summary at 15.

<sup>56</sup> DOJ Executive Summary at 15. Several examples of these can be found at DOJ Executive Summary at 15-16.

However, similar to their denial regarding smoking’s link to disease, Defendants “consistently and publicly denied that smoking is addictive . . . intentionally maintain[ing] and coordinate[ing] their fraudulent position on addiction and nicotine as an important part of their overall efforts to influence public opinion and persuade people that smoking was not dangerous” and that “smoking is a free choice.”<sup>57</sup> Defendants also have “publicly and fraudulently denied that they manipulate nicotine.”<sup>58</sup> “Through these and other false statements, Defendants have furthered their common efforts to deceive the public regarding their use and manipulation of nicotine.”<sup>59</sup>

#### Witness Testimony Supporting Claim

#### **Jeffrey Wigand, Ph.D**<sup>60</sup>

Jeffrey Wigand (B&W’s former Vice President of Research and Development) testified as follows regarding addiction:

- “I was told by Kendrick Wells and Ernest Pepples, and the Shook, Hardy & Bacon lawyers that this position was important because part of their legal defense was that smoking was a free choice. If it were ever demonstrated that Brown & Williamson was aware that nicotine was addictive, then Brown & Williamson’s defense in litigation – that choosing to smoke was the result of an individual exercising their own free will – would be destroyed.”
- “I had regular conversations with officers of the company [about addiction] . . . . They often stated at strategic planning meetings and product development review meetings that ‘we [Brown & Williamson] are in the nicotine delivery business and tar is the negative baggage.’ This statement was commonly used during my tenure with Brown & Williamson.”

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<sup>57</sup> DOJ Executive Summary at 16.

<sup>58</sup> DOJ Executive Summary at 17.

<sup>59</sup> DOJ Executive Summary at 18.

<sup>60</sup> Wigand Testimony, available at [http://www.usdoj.gov/civil/cases/tobacco2/Wigand\\_Written%20Direct%20Testimony.pdf](http://www.usdoj.gov/civil/cases/tobacco2/Wigand_Written%20Direct%20Testimony.pdf)

- Wigand’s “personal conversations” with company scientists “demonstrated that they understood and accepted that nicotine was physiologically active and addictive.”
- “Brown & Williamson was concerned that people would simply not have enough opportunities to smoke or chew tobacco as a means of maintaining their addiction. Thus, the company decided to pursue alternative nicotine delivery devices to keep addicts hooked. It was thought that if smokers could get their nicotine fix when smoking was not permitted, they would maintain their addiction and continue to smoke when the opportunity to smoke was available.”

Dr. Wigand testified regarding nicotine manipulation as follows:

- “Brown & Williamson manipulated nicotine levels to produce a cigarette that would consistently deliver the amount of nicotine necessary to keep smokers addicted.”
- “There are three main ways that Brown & Williamson manipulated the nicotine levels delivered by its cigarettes including: tobacco blending, cigarette design, and the use of additives.”
- “We understood at Brown & Williamson that every cigarette we made was manipulated to make sure that it delivered enough nicotine to keep smokers addicted.”
- “Brown & Williamson used cigarette design to guarantee an addictive level of nicotine.”
- “Ventilation holes were generally placed in the filter of the cigarette and allowed more air to be mixed with the smoke that is measured by a smoking machine. This resulted in a lower level of nicotine as measured by the machine, but not necessarily as delivered to the smoker. . . . At Brown & Williamson we were aware that the ventilation holes were routinely blocked by smokers and that, as a result, the nicotine exposure of the smoker was much higher than was registered by the FTC testing method.”
- “Ammonia based additives were used in Brown & Williamson’s products to develop flavor compounds, but predominantly, and more importantly, ammonia based additives were used to manipulate the amount of free nicotine.”

**Neal Benowitz, M.D.**<sup>61</sup>

University of California Professor Neal Benowitz, M.D., testified as an expert witness regarding nicotine addiction. Dr. Benowitz testified on this issue as follows:

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<sup>61</sup> United States’ Written Direct Examination of Neal Benowitz, M.D., available at <http://www.usdoj.gov/civil/cases/tobacco2/Written%20Direct%20of%20Dr.%20Neal%20Benowitz.pdf>

- “A regular smoker exposes his or her brain to nicotine 24 hours per day. As occurs with the use of all psychoactive drugs, the brain attempts to adapt to the persistent presence of nicotine. This adaptation, called neuroadaptation, or tolerance, includes changes in brain structure, such as an increase in the number of nicotinic receptors. Over time, the brain becomes tolerant to the effects of nicotine and needs greater amounts of nicotine to produce the same effects on hormones as it once did before the development of tolerance.”
- “[R]esearch demonstrates that, while there are some differences in the way in which these drugs affect the body, the addictiveness of nicotine is very similar to that of other drugs, such as heroin, cocaine, and alcohol. Nicotine is just as addictive, or more addictive, than these other drugs.”

**Victor DeNoble, Ph.D.**<sup>62</sup>

Victor DeNoble, Ph.D. (Philip Morris associate senior scientist Philip Morris between 1980 and 1984) testified as follows regarding his rat experiments at Philip Morris alongside colleague Dr. Paul Mele<sup>63</sup>:

- “Philip Morris knew about nicotine’s brain effects well before 1980.”
- DeNoble discussed his research showing that “nicotine functioned as an [sic] weak reinforcer in rats when delivered intravenously. When a nicotine solution was delivered to rats, the pressing of the lever would increase and be maintained until the nicotine was no longer available.” DeNoble’s research also demonstrated that “the brain effects of nicotine . . . were responsible for the rats’ self administration.”
- In the fall of 1982, DeNoble sought Philip Morris’s permission to publish his findings on nicotine self-administration in rats. His manuscript was reviewed by his immediate management, Dr. Charles or Dr. Dunn, then sent to the director of research, Dr. Osdene. DeNoble thinks it also went to other directors, to the Vice President of R&D, and then to the legal department in New York. In January 1983, DeNoble was granted approval to submit the paper to the journal *Psychopharmacology*, where it was accepted and scheduled for publication in September 1983. However, in July 1983 he was told by Philip Morris management (Jim Charles and Tom Osdene) that he would have to withdraw it.

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<sup>62</sup> Written Direct Testimony of Victor J. DeNoble, II, Ph.D., available at [http://www.usdoj.gov/civil/cases/tobacco2/DeNoble\\_USwritten%20direct.pdf](http://www.usdoj.gov/civil/cases/tobacco2/DeNoble_USwritten%20direct.pdf)

<sup>63</sup> See Direct Testimony of Paul C. Mele, Ph.D., available at [http://www.usdoj.gov/civil/cases/tobacco2/01\\_Mele%20Written%20Direct.pdf](http://www.usdoj.gov/civil/cases/tobacco2/01_Mele%20Written%20Direct.pdf)

- “In early 1983 several lawyers showed up and started reviewing and copying all of our documents. . . . We were told that the tobacco industry was under threat of litigation and they were reviewing the research.”
- DeNoble and Mele “concluded that we demonstrated in the experiments that rats would develop tolerance after repeated injections of nicotine, and this tolerance was in part behavioral, and in part physiological.” DeNoble and Mele “requested permission [to publish the results], but were told we could not do that.”
- DeNoble and Mele performed “a few” experiments in which they observed that rats who had received nicotine regularly did not change their behavior once the nicotine was taken away. This was “the only study they encouraged me to publish while I was at Philip Morris.”
- DeNoble discussed leaving Philip Morris in April 1984: “They shut down the lab. On April 5, 1984, at three in the afternoon, Dr. Charles called me to his office . . . he said that Philip Morris was discontinuing animal research beginning now. He told me to shut the equipment off; terminate the experiments, even if they were ongoing – which they were; and to kill all the animals. Our passes were deactivated so we couldn’t get back into the lab the next day. . . . The response that we got was that the work we were doing was inconsistent with the industry’s position in litigation.” “The next week . . . [t]he lab was gone, everything was gone except for some tables. The equipment was gone, the cages were gone, the animals were gone, all the data was gone. There were sliced wires sticking out of the ceiling where they had been cut.”
- After leaving Philip Morris, DeNoble and Mele sought to publish their research results that the company had prohibited them from publishing. This was met with letters from Philip Morris’s Assistant General Counsel reminding them of their lifetime confidentiality agreement and threatening to take action against them. DeNoble stated that as a result, he felt “[f]ear, and lots of it.” Consequently, DeNoble sought to withdraw two papers from publication. One paper had already gone to press, but another – on nicotine self-administration – had not. DeNoble testified that to date, this paper has not been published in a scientific or medical journal.
- “I saw the company choose not to continue research or go further to support research that was making progress toward something they could implement or use to make the product safer.”

#### 4. **DEFENDANTS DECEPTIVELY MARKETED “LIGHT” AND “LOW TAR” CIGARETTES TO EXPLOIT SMOKERS’ DESIRE FOR LESS HAZARDOUS PRODUCTS**

##### Summary of DOJ’s Claim<sup>64</sup>

Another central component of Defendants’ scheme to defraud is “the design and marketing of so-called ‘low tar/low nicotine’ cigarettes.”<sup>65</sup> As public awareness and concern about smoking’s dangers started to grow in the early 1950s, Defendants “began developing cigarettes they referred to internally as ‘health reassurance’ brands in an effort to keep smokers in the market.”<sup>66</sup> Defendants initially made explicit claims that these brands were safer as the result of an added filter; later, Defendants switched to making implied health claims in an effort to avoid suggesting to consumers that any cigarettes were harmful.<sup>67</sup>

For years, the tobacco companies have marketed and promoted their so-called “low tar/nicotine” cigarettes with brand names such as “Light,” “Ultralight,” “Mild” and “Medium” – suggesting to consumers that these products are safer than regular cigarettes – and have continued to “make health benefit claims regarding filtered and low tar cigarettes.”<sup>68</sup> Defendants, however, have been aware since the late 1960s/early 1970s that such cigarettes are unlikely to be any healthier than regular cigarettes.<sup>69</sup> Moreover, Defendants have has known for decades that “light/low tar” cigarettes do not actually

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<sup>64</sup> For DOJ’s complete summary of this claim, see DOJ Executive Summary at 18-21.

<sup>65</sup> DOJ Executive Summary at 18.

<sup>66</sup> DOJ Executive Summary at 18.

<sup>67</sup> DOJ Executive Summary at 18.

<sup>68</sup> DOJ Executive Summary at 18-19.

<sup>69</sup> DOJ Executive Summary at 19.

deliver lower levels of tar and nicotine.<sup>70</sup> This is because smokers of these cigarettes tend to modify their smoking behavior to obtain the amount of nicotine sufficient to satisfy their addiction.<sup>71</sup> The Defendants have gone so far as to design “light/low tar” cigarettes that facilitate a smoker’s ability to gain adequate nicotine delivery to create and sustain addiction.<sup>72</sup> Despite their knowledge of this information, however, Defendants have withheld and suppressed it from public dissemination.<sup>73</sup>

Defendants’ “campaign of deception” has impacted Americans’ decisions to smoke by leading many smokers to perceive “light/low” tar cigarettes as “an acceptable alternative to quitting smoking.”<sup>74</sup> In fact, smokers of these cigarettes are less likely to quit smoking than are smokers of regular cigarettes.<sup>75</sup> Additionally, many of these smokers actually consume more cigarettes than do smokers of regular cigarettes.<sup>76</sup> “In short, Defendants’ concerted campaign of deception regarding low tar cigarettes has been a calculated – and extremely successful – scheme to increase their profits at the expense of the health of the American public.”<sup>77</sup>

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<sup>70</sup> DOJ Executive Summary at 19.

<sup>71</sup> DOJ Executive Summary at 19. Smokers may accomplish this by inhaling smoke more deeply, holding the smoke in their lungs longer, covering the cigarette ventilation holes with their fingers or lips, or smoking more cigarettes.

<sup>72</sup> DOJ Executive Summary at 20.

<sup>73</sup> DOJ Executive Summary at 20.

<sup>74</sup> DOJ Executive Summary at 20.

<sup>75</sup> DOJ Executive Summary at 20.

<sup>76</sup> DOJ Executive Summary at 20-21.

<sup>77</sup> DOJ Executive Summary at 21.

## Witness Testimony Supporting Claim

### **Jeffrey Wigand, Ph.D.<sup>78</sup>**

Jeffrey Wigand (B&W's former Vice President of Research and Development) testified as follows:

- “Certainly everyone in my research and development department was well aware of compensation [the phenomenon of smokers manipulating their smoking behavior to achieve their optimum nicotine reward]. Indeed, it was a design consideration that played a central role in all of the cigarettes manufactured at Brown & Williamson as well as the other BAT Cigarette Affiliated Companies.” “Brown & Williamson was aware that smokers would typically modify their smoking behavior in order to obtain their desired level of nicotine.”
- “First, everyone at Brown & Williamson, indeed throughout all of BAT, understood that the machine method for measuring nicotine and tar yield grossly understated the tar and nicotine actually ingested by the smoker. Second, again through out the BAT organization, we knew that smokers compensated to obtain more nicotine than was reported on the label and that compensation increased as a smoker moved from a full flavor to a light cigarette.” B&W did not disclose this information publicly while Wigand was employed there.

### **William Farone, Ph.D.<sup>79</sup>**

Dr. Farone (Philip Morris's Director of Applied Research between 1976 and 1984)

testified on this issue as follows:

- “[T]he major brands of cigarettes sold by Defendants as ‘light’ or ‘low tar’ do not significantly change the chemistry or composition of cigarette smoke compared to their ‘full flavor’ counterparts. Therefore, from a chemist’s perspective, I would not expect such cigarettes to present any meaningful reduction in harm. In fact, at least some designs features as used in ‘light’ cigarettes make the smoke more toxic than the smoke from their ‘full flavor’ versions.”
- “[H]olding all other design parameters constant, dilution levels . . . used on many best selling “lights” brands . . . results in tar that is likely more mutagenic on a per milligram of tar basis.” Farone testified that Marlboro Lights actually have more

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<sup>78</sup> Wigand Testimony, available at [http://www.usdoj.gov/civil/cases/tobacco2/Wigand\\_Written%20Direct%20Testimony.pdf](http://www.usdoj.gov/civil/cases/tobacco2/Wigand_Written%20Direct%20Testimony.pdf)

<sup>79</sup> Farone Testimony, available at <http://www.usdoj.gov/civil/cases/tobacco2/20040929%20Written%20Direct%20Testimony%20for%20William%20Farone%20PhD.pdf>

mutagenic smoke on a per milligram of tar basis than do regular Marlboros (“Marlboro Reds”).

- Farone was personally involved in conducting research into how people smoke cigarettes of varying nicotine levels. “We were aware that if we adjusted the design to reduce the nicotine delivery, or if people were given a cigarette of lower nicotine delivery than their usual brand, smokers would ‘compensate’ – change how they smoked – to get the amount of nicotine they need.”
- “[W]here a ‘light’ version of a brand varies in limited ways from its full flavor counterpart, compensation will cause the smoker to take in basically the same amount of toxins.”

## 5. DEFENDANTS TARGETED THE YOUTH MARKET

### Summary of DOJ’s Claim<sup>80</sup>

Simply put, Defendants have “intentionally marketed cigarettes to youth under the legal smoking age while falsely denying that they have done and continue to do so.”<sup>81</sup>

This is especially egregious because “cigarette smoking, particularly that begun by young people, continues to be the leading cause of preventable disease and premature mortality in the United States. Of children and adolescents who are regular smokers, one out of three will die of smoking-related disease.”<sup>82</sup>

Defendants’ own documents demonstrate that their continued financial viability depends upon new smokers taking up the habit to replace current smokers who die from smoking-related diseases or quit.<sup>83</sup> Industry documents also demonstrate that Defendants have known that “an overwhelming majority of regular smokers begin smoking before

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<sup>80</sup> For DOJ’s complete summary of this claim, see DOJ Executive Summary at 21-27.

<sup>81</sup> DOJ Executive Summary at 21.

<sup>82</sup> DOJ Executive Summary at 21.

<sup>83</sup> DOJ Executive Summary at 21.

age eighteen,” and that youth develop brand loyalty, are highly susceptible to advertising, and are very likely to remain lifetime smokers.<sup>84</sup>

Although Defendants pledged voluntarily in 1966 to refrain from marketing to youth, they did so only in the face of threatened federal advertising restrictions.<sup>85</sup> And, despite this pledge, Defendants “continued unabated their efforts to capture as much of the youth market as possible . . . designing advertising themes, marketing campaigns, and promotional activities known to resonate with adolescents.”<sup>86</sup> Specifically, Defendants’ marketing campaigns have used themes such as “independence, liberation, attractiveness, adventurousness, sophistication, glamour, athleticism, social inclusion, sexual attractiveness, thinness, popularity, rebelliousness and being ‘cool’” to exploit adolescents’ vulnerability.<sup>87</sup> Moreover, Defendants continue to:

advertise in youth-oriented publications; employ imagery and messages that they know are appealing to teenagers; increasingly concentrate their marketing in places where they know youths will frequent such as convenience stores; engage in strategic pricing to attract youths; increase their marketing at point-of-sale locations with promotions, self-service displays, and other materials; sponsor sporting and entertainment events, many of which are televised or otherwise broadcast and draw large youth audiences; and engage in a host of other activities which are designed to attract youths to begin and continue smoking.<sup>88</sup>

Defendants, however, still deny that they intentionally appeal to youth.<sup>89</sup>

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<sup>84</sup> DOJ Executive Summary at 21, 22. Numerous examples of these documents can be found at DOJ Executive Summary, 22-23.

<sup>85</sup> DOJ Executive Summary at 21.

<sup>86</sup> DOJ Executive Summary at 22. Several examples of documents discussing the Defendants’ marketing efforts can be found at DOJ Executive Summary, 23.

<sup>87</sup> DOJ Executive Summary at 24.

<sup>88</sup> DOJ Executive Summary at 24.

<sup>89</sup> DOJ Executive Summary at 24.

## Witness Testimony Supporting Claim

### **Jeffrey Wigand, Ph.D**<sup>90</sup>

Jeffrey Wigand (B&W's former Vice President of Research and Development) testified as follows:

- “Project Rainbow was a Brown & Williamson project focused on developing a moist snuff that would serve as a ‘gateway’ product for youth.” “A ‘gateway’ product, which is also known as a ‘starter’ product, was less harsh than cigarettes, but would lead to nicotine addiction and, ultimately, to cigarette smoking.” “Cigarette smoking is difficult for the initiator because of the harsh effects of smoking, such as headaches and nausea, during the initiation period. Brown & Williamson felt that a less harsh introductory product would help mitigate the undesirable effects of tobacco smoking during the initiation period, while still allowing the user to become addicted to nicotine without smoking. With Project Rainbow, Brown & Williamson hoped to make a moist snuff that was highly flavored, less harsh and more palatable to young users. It would provide for absorption of nicotine through the mouth, and that would lead to addiction. Ultimately the young snuff user would graduate from the gateway product to cigarettes to satisfy their newly acquired addiction to nicotine.”
- “Mr. Sandefur was obsessed with Project Rainbow. . . . As he said several times, ‘we need to hook ‘em young and hook ‘em for life.’”

### **Dr. David A. Kessler**<sup>91</sup>

Former FDA Commissioner Dr. David A. Kessler supervised the FDA's investigation of the tobacco industry. He testified as follows regarding youth smoking:

- “It became clear to me from reading the industry documents that these documents indicated that addiction to nicotine set in over a period of years – that that child who begins to experiment at 12 or 13 could become addicted within the next several years.”
- “[F]rom reading industry documents, I became convinced that some in the industry understood that youth smokers were one of the major critical determinants of success for the cigarette industry.”

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<sup>90</sup> Wigand Testimony, available at [http://www.usdoj.gov/civil/cases/tobacco2/Wigand\\_Written%20Direct%20Testimony.pdf](http://www.usdoj.gov/civil/cases/tobacco2/Wigand_Written%20Direct%20Testimony.pdf)

<sup>91</sup> United States' Written Direct Testimony of Dr. David A. Kessler, available at: [http://www.usdoj.gov/civil/cases/tobacco2/01\\_20040913%20Written%20Direct%20Testimony%20David%20Kessler.pdf](http://www.usdoj.gov/civil/cases/tobacco2/01_20040913%20Written%20Direct%20Testimony%20David%20Kessler.pdf)

## Documents Supporting Claim

Dr. Kessler discussed the following documents during his testimony:

### **U.S. Exhibit 21,605**

**Title: “Planning Assumptions and Forecast for the Period 1977-1986 for R.J. Reynolds Tobacco Company”<sup>92</sup>**

R.J. Reynolds Research Department, March 15, 1976

Relevant text:

- “Young people will continue to become smokers at or above the present rates during the projection period. The brands which these beginning smokers accept and use will become dominant brands in future years. Evidence is now available to indicate that the 14 to 18 year old group is an increasing segment of the smoking population. RJR-T must soon establish a successful new brand in this market if our position in the industry is to be maintained over the long term.”

### **U.S. Exhibit 20,708**

**Title: “Research Planning Memorandum on Some Thoughts About New Brands of Cigarettes for the Youth Market”<sup>93</sup>**

Written by Claude E. Teague, Jr. of R.J. Reynolds, dated February 2, 1973

Relevant text:

- “Realistically, if our Company is to survive and prosper over the long term, we must get our share of the youth market. In my opinion this will require new brands tailored to the youth market. I believe it unrealistic to expect that existing brands identified with an over-thirty ‘establishment’ market can ever become the ‘in’ products with the youth group. Thus we need new brands designed to be particularly attractive to the young smoker, while ideally at the same time being appealing to all smokers.”
- Dr. Teague discussed what goes into making new “youth brands”: “For the pre-smoker and ‘learner’ the physical effects of smoking are largely unknown, unneeded, and actually quite unpleasant or awkward. . . . once the ‘learning’ period is over, the physical effects become of overriding importance in the desirability to the confirmed smoker . . . .”

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<sup>92</sup> This document is available at <http://tobaccodocuments.org/rjr/501630269-0288.html>

<sup>93</sup> This document is available at <http://tobaccodocuments.org/youth/AmYoRJR19730202.Rm.html>

**U.S. Exhibit 20,659**

**Title: “Research Planning Memorandum on the Nature of the Tobacco Business and the Crucial Role of Nicotine Therein”<sup>94</sup>**

Written by Claude E. Teague, Jr. of R.J. Reynolds, dated April 14, 1972

Relevant text:

- “[I]f we are to attract the non-smoker or pre-smoker, there is nothing in this type of product that he would currently understand or desire. . . . Instead, we somehow must convince him with wholly irrational reasons that he should try smoking, in the hope that he will for himself then discover the real ‘satisfactions’ attainable.”<sup>95</sup>

**6. DEFENDANTS CONSPIRED NOT TO RESEARCH OR PRODUCE SAFER CIGARETTES**

Summary of DOJ’s Claim<sup>96</sup>

Although Defendants “recognized that there was a substantial market for a cigarette that could be marketed as potentially less hazardous,” they jointly agreed not to develop such products.<sup>97</sup> The Defendants entered this agreement, known as the “Gentlemen’s Agreement,” because producing a safer cigarette would “jeopardize the public relations position at the core of the scheme to defraud: the denial that any commercially sold cigarettes were a proven cause of disease.”<sup>98</sup> Thus, if a company designed a safer cigarette, it purposely “limited the types of information that it provided to consumers in marketing such products . . . because such information carried the obvious implication that cigarettes were harmful.”<sup>99</sup> Despite privately entering into the

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<sup>94</sup> This document is available at <http://tobaccodocuments.org/landman/501877121-7129.html>

<sup>95</sup> See <http://tobaccodocuments.org/landman/501877121-7129.html>

<sup>96</sup> For DOJ’s complete summary of this claim, see DOJ Executive Summary at 8-11.

<sup>97</sup> DOJ Executive Summary at 8.

<sup>98</sup> DOJ Executive Summary at 8.

<sup>99</sup> DOJ Executive Summary at 10.

Gentlemen’s Agreement, Defendants publicly “proclaim[ed] their commitment – and ability – to develop potentially less hazardous cigarettes, but indicated that such actions were unnecessary unless and until cigarettes were proven to cause disease.”<sup>100</sup>

Evidence suggests that Defendants also jointly agreed to limit their own biological research “because they did not want to generate internal evidence to suggest that the companies believed there was any need to examine whether a causative link existed between smoking and disease, let alone create scientific information that demonstrated such a link.”<sup>101</sup> Additionally, substantial evidence suggests that research the companies did conduct yielded certain design features and processes that were likely to reduce smoking’s hazards, were technically feasible, and were acceptable to smokers – yet the companies chose not to incorporate them into their products.<sup>102</sup> “In short, Defendants’ conduct in this area is powerful evidence of Defendants’ well documented agreement not to compete on smoking and health issues.”<sup>103</sup>

#### Witness Testimony Supporting Claim

**William Farone, Ph.D.**<sup>104</sup>

Dr. William Farone (Philip Morris’s Director of Applied Research between 1976 and 1984) testified on this issue as follows:

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<sup>100</sup> DOJ Executive Summary at 8. For a number of examples of tobacco industry executives’ public statements to this effect, see DOJ Executive Summary at 8-9.

<sup>101</sup> DOJ Executive Summary at 10.

<sup>102</sup> DOJ Executive Summary at 11.

<sup>103</sup> DOJ Executive Summary at 11.

<sup>104</sup> Farone Testimony, available at <http://www.usdoj.gov/civil/cases/tobacco2/20040929%20Written%20Direct%20Testimony%20for%20William%20Farone%20PhD.pdf>

- While at Philip Morris, Farone learned of an “agreement not to compete against each other in the marketing of cigarettes by claiming that their products were potentially any safer than other cigarettes. Related to that agreement was an agreement not to perform certain biological research on commercially marketed cigarettes in their domestic facilities.” This agreement “was referred to internally as the Gentleman’s Agreement.”
- Farone was told the agreement “was to protect the industry from lawsuits.” He said the agreement supported Defendants’ “basic position that no cigarettes were scientifically proven to cause any disease. If they had competed on health issues, and told the public that this brand is safer or potentially delivers less carcinogens than other brands, it would have implicitly acknowledged that the other brands – the ones with higher delivery of carcinogens or more potent carcinogens – were less safe.”
- As a result of the agreement, “Defendants in fact knew of and have developed technologies that reduced or eliminated harmful agents from smoke that were technically and commercially feasible, but did not meaningfully test them, did not incorporate them into marketed products in meaningful fashion, and did not assess how cigarettes with these features performed on standard toxicological tests as compared to commercially sold brands.”
- “Defendants continue to obfuscate the science and technology of cigarettes and cigarette smoke, as it relates to their research on the chemicals in smoke and tobacco, the harm caused by the chemicals, and thus the products. In my view, the ‘reduced risk’ products that Defendants have recently begun to market, or say they intend to market, represent technologies available to them for decades.”
- “It is my opinion that the absence of potentially less hazardous products from the market is the result of choices by Defendants, not technological limitations.”

#### Documents Supporting Claim

Dr. Farone discussed the following documents in his testimony:

**U.S. Ex. 21,737**

**Title: “Biological/Consumer Preference Research Conducted by Philip Morris”<sup>105</sup>**  
 March 1983, prepared by R.J. Reynolds’ Alan Rodgman and Frank Colby

Relevant text:

- “Throughout the domestic industry, two ‘gentlemen’s’ agreements were operative in the early days:

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<sup>105</sup> This document is available at <http://tobaccodocuments.org/rjr/501543470-3517.html>

- Any company discovering an innovation permitting the fabrication of an essentially ‘safe’ cigarette would share the discovery with others in the industry.
- No domestic company would use intact animals in-house in biomedical research.”

**U.S. Ex. 21,617**

**Title: “Need for Biological Research by Philip Morris”<sup>106</sup>**

Dr. Farone identified this as a November 15, 1968 draft of a memorandum by Helmut Wakeham to senior management.

Relevant text:

- “We have reason to believe that in spite of gentlemen [sic] agreement from the tobacco industry in previous years that at least some of the major companies have been increasing biological studies within their own facilities.”

**U.S. Ex. 58,608**

**“Telephone Conversation this Morning with Mr. Robert K. Heimann”<sup>107</sup>**

March 15, 1972 American Tobacco Company memorandum prepared by John H. Hager

Relevant text:

- Hager reports that in congressional testimony, Dr. Ernst Wynder had implied he had been told personally by “Researcher Directors” of major U.S. tobacco companies that: “were it not for their supervising executives, significant changes could be made in smoking products to make them ‘safer’ . . . .”

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<sup>106</sup> This document is available at <http://tobaccodocuments.org/pm/1001607055-7061.html>

<sup>107</sup> This document is available at <http://tobaccodocuments.org/ness/24978.html>

## Appendix A

### **STATEMENT OF FORMER ATTORNEY GENERAL ASHCROFT**

The Bush Administration has stated its unequivocal belief in the strength of DOJ's case. To the effect, then-Attorney General John Ashcroft made the following statement at the trial's start:

The government's case against the tobacco industry is an important effort to prevent fraudulent activity and uphold corporate integrity. We look forward to presenting the evidence supporting our case in court, and to achieving relief, including the recapture of wrongfully obtained proceeds from the sale of cigarettes and preventing cigarette manufacturers from marketing to young people in this country.<sup>108</sup>

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<sup>108</sup> Statement of Attorney General John Ashcroft Upon the Start of the Tobacco Trial, FDCH Federal Department and Agency Documents Regulatory Intelligence Data, September 21, 2004.

## **Appendix B**

### **THE TRIAL'S PROCEDURAL PROCESS**

Judge Kessler has issued rulings to manage this complex, lengthy case. These rulings include time management rules and an unusual, but not unprecedented, requirement to submit witness testimony in writing one week before the witness appears. In Orders #471<sup>109</sup> and #471A,<sup>110</sup> Judge Kessler laid out the procedures “which will govern the trial of this case.” Relevant parts of these orders include:

#### **Time Allocation**

- The Government is allocated 50% of the trial time and Defendants, as a group, are allocated 50%.
- Each party has a limited number of hours within which it may conduct all live witness examinations, including direct, cross and redirect.

#### **Witnesses**

- Counsel must provide the court and the other parties with written notice of the witnesses and exhibits that they intend to present during the following week of trial.

#### **Direct Examination (of non-adverse witnesses)**

- The direct testimony of all witnesses must be presented to the court in writing.
- By 5:00 p.m. on the Monday preceding a week of trial the written direct examination testimony of those witnesses who are planned for presentation during the following week must be served upon the court and opposing counsel. Counsel are to present the written direct examination testimony in “question and answer” format just as if the witness was testifying in open court.

#### **Adoption of Written Direct Examination**

- When a witness is called for direct testimony, he or she must adopt all or part of his or her written testimony under oath in open court.

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<sup>109</sup> Order #471 is available at [http://www.usdoj.gov/civil/cases/tobacco2/Order\\_471.pdf](http://www.usdoj.gov/civil/cases/tobacco2/Order_471.pdf)

<sup>110</sup> Order #471A is available at [http://www.usdoj.gov/civil/cases/tobacco2/Order\\_471A.pdf](http://www.usdoj.gov/civil/cases/tobacco2/Order_471A.pdf)

### **Adverse Witnesses (and any other witnesses for whom a written direct examination cannot be obtained)**

- A party offering an adverse witness is expected to provide a “proposed” written direct examination of that witness where possible, created through “prior trial or deposition testimony (written or videotaped).”
- Proposed direct testimony must be served on the opposing party and the adverse witness by 5:00 p.m. on the Monday preceding the week in which such witness is scheduled to testify.
- By noon on the Friday following that Monday, the adverse witness must file and serve his or her “corrected” written direct testimony. In the corrected testimony, “any proposed testimony that was subsequently corrected” (i.e., deleted) must be **shaded**, and any “corrections” (i.e., additions) must be *italicized*.

### **Cross-Examination**

- All parties have the right to cross-examination, which is to be held live.

### **Redirect Examination**

- Redirect examination is to be held live. For redirect examination of a defense witness, only the party presenting the direct examination of that witness may conduct redirect.

### **Government’s Rebuttal Case**

- The Government will have the opportunity to present rebuttal evidence after the close of Defendants’ case. There will be a two week hiatus between the close of Defendants’ case and the rebuttal case.
- Once the court determines the number of total hours to be allowed for rebuttal, the Government will be allocated 50% of those hours and Defendants, as a group, will be allocated 50% of those hours.