

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

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	Civil Action No. 99-CV-2496 (GK)
	:	
and	:	
	:	
TOBACCO-FREE KIDS	:	
ACTION FUND, <i>et al.</i> ,	:	
	:	
Plaintiff-Intervenors,	:	
	:	
v.	:	
	:	
PHILIP MORRIS USA INC., <i>et al.</i> ,	:	
	:	
	:	
Defendants.	:	
	:	
	:	

**NATIONAL NEWSPAPER PUBLISHERS ASSOCIATION AND NATIONAL  
ASSOCIATION OF BLACK OWNED BROADCASTERS’  
REPLY BRIEF**

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**INTRODUCTION**

The National Newspaper Publishers Association (“NNPA”) and the National Association of Black Owned Broadcasters (“NABOB”) hereby file this Reply Brief to Defendants’ January 27, 2014 Response to Motions to File Amicus Curiae Briefs to address Defendants’ argument that NNPA and NABOB concerns that the list of 34 newspapers (“List of 34 Newspapers”)<sup>1</sup> and

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<sup>1</sup> Order #1015 listed the following thirty-three newspapers for which Defendants will be required to publish corrective statements: Atlanta Journal-Constitution, Boston Globe, Boston Herald, Charlotte Observer, Chicago Sun Times, Chicago Tribune, Dallas Morning News, Florida Times Union, Fresno Bee, Ft. Worth Star-Telegram, Houston Chronicle, Los Angeles Times, Miami Herald, New York Daily News, New York Post, New York Sun<sup>1</sup>, New York Times, Orlando Sentinel, Palm Beach Post, Philadelphia Inquirer, Richmond Times-Dispatch, Sacramento Bee, San Diego Union-Tribune, San Francisco Chronicle, St. Petersburg Times, Tallahassee Democrat, USA Today, Wall Street Journal, Washington Post, LA Eastern Group Publications, San Francisco La Oferta Review/El Vistaz-Combo, NAHP, Chicago Lawndale Group News, NAHP, and Houston – Que Onda! *United States v. Phillip Morris USA, Inc.*, 449 F. Supp. 2d 1, 939-40 (D.D.C. 2006) (hereinafter referred to as “Order

three television networks identified by the Court in its August 17, 2006 Order for the Corrective Statements to be published is an inadequate remedy. The 34 newspapers identified in the Court's Order are located in only ten states and the District of Columbia. Additionally, none of the 34 newspapers are located in the southern region of the United States, where approximately 56.5 percent of African Americans reside.

Defendants' position that they are willing to "accommodate the concerns of the amici within the framework of the existing agreement" should not be a condition of NNPA and NABOB's participation in this case.<sup>2</sup> Based on the record, the List of 34 Newspapers and three networks did not derive from an agreement among the parties, but was instead selected by the Court. It is therefore within the Court's authority to modify the Remedial Order to include NNPA and its member newspapers, and NABOB and its member broadcast stations and networks, as media sources to disseminate the Corrective Statements.

### **PRELIMINARY STATEMENT**

In Order #1015, the Court ordered Defendants to make corrective statements on each of the five topics on which they had historically made false and deceptive statements: (1) the existence of any adverse health effects from smoking; (2) the addictive nature of smoking and nicotine; (3) the lack of any significant health benefit from smoking 'low tar,' 'light,' 'ultra light,' 'mild,' and 'natural,' cigarettes; (4) the manipulation of cigarette design and composition to ensure optimum nicotine delivery; and (5) the adverse health effects of exposure to secondhand smoke.<sup>3</sup> The Court ordered that the statements are to be published in thirty-four (34) newspapers and disseminated "through television, advertisements, onsets, in retail displays,

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#1015" or the "Remedial Order"). Order #1015 also listed NAHP twice. NNPA and NABOB are proceeding on the assumption that NAHP is an acronym for the National Association of Hispanic Publications.

<sup>2</sup> Def.s' Resp. to Mot. To File Am. Br. 1, ECF No. 15.

<sup>3</sup> Remedial Order, 449 F. Supp. 2d at, 938-39.

and on [Defendants'] corporate websites.”<sup>4</sup> The methods of dissemination were chosen in order to “structure a remedy which uses the same vehicles which Defendants have themselves historically used to promulgate false smoking and health messages,”<sup>5</sup> and to “ensure maximum exposure to consumers, potential consumers, and the general public.”<sup>6</sup> NNPA and NABOB respectfully submit that the List of 34 Newspapers and three networks exclude the Black media, one of the primary vehicles Defendants used to directly target African Americans with false smoking and health messages.”<sup>7</sup>

## **ARGUMENT**

### **I. The Court has Legal Authority to Modify the Remedial Order.**

The Court’s authority to modify the existing remedial order is rooted in the well-established principle that courts may modify injunctions resulting from final orders at any time, pursuant to their more general power to modify or vacate any final decree.<sup>8</sup> The Court’s authority to order the relief requested by NNPA and NNBOB is rooted in 18 U.S.C. § 1964(a), which provides in part that a district court’s remedial authority in a civil Racketeering Influence Corrupt Practices Act (“RICO”) case includes, but is not limited to, “making due provision for the rights of innocent persons.”

The evidence of record amply demonstrates that Defendants utilized sophisticated advertising campaigns and programming to target and lure African-Americans into smoking.<sup>9</sup> In order to reach African-Americans, Defendants forged relationships with the Black press and

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<sup>4</sup> Remedial Order, 449 F. Supp. 2d at 928; *see also id.* at 938-41.

<sup>5</sup> *Id.* at 928.

<sup>6</sup> *Id.* at 939.

<sup>7</sup> *See* Tr. of Status Hr’g in *United States v. Phillip Morris USA, Inc.*, Jan. 22, 2014, at 8-9.

<sup>8</sup> *See Board of Educ. of Oklahoma city Public Schools v. Dowell*, 498 U.S. 237 (1991) (allowing modification of desegregation decree where decree had achieved its purpose); *System Fed’n No. 91, Railway Employees Department v. Wright*, 364 U.S. 642 (1961); *see also* Charles Wright & Arthur Miller, 11 Federal Practice and Procedure, § 2960, at 581 (West, 1973 and 1992 Supp).

<sup>9</sup> Remedial Order, 449 F. Supp. 2d at 582-584, 595-602, 626-633.

placed targeted, fraudulent advertisements in Black newspapers for many decades.<sup>10</sup> Based on the Court's findings, Defendants' fraudulent advertisements in NNPA's member newspapers are part and parcel of Defendants' overall scheme to defraud. Thus, consistent with the purposes of the Remedial Order, Defendants should be required to apprise the African-American community of its fraudulent conduct through the most practicable methods, which as demonstrated herein, is by ordering Defendants to publish Corrective Statements in African-American media outlets.

## **II. The List of 34 Newspapers in the Remedial Order Will Not Effectively Reach the Public, including African Americans.**

As the map below demonstrates, the list of 34 Newspapers is not in the following forty states: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Idaho; Indiana; Iowa; Kansas; Kentucky; Louisiana; Maine; Maryland; Michigan; Minnesota; Mississippi; Missouri; Montana; Nebraska; Nevada; New Hampshire; New Jersey; New Mexico; North Dakota; Ohio; Oklahoma; Oregon; Rhode Island; South Carolina; South Dakota; Tennessee; Utah; Vermont; Washington; West Virginia; Wisconsin; and Wyoming. Conversely, NNPA newspapers are located in thirty states and the District of Columbia<sup>11</sup>.

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<sup>10</sup> See Phyra M. McCandless, Valerie Yerger, & Ruth E. Malone, *Quid Quo Pro: Tobacco Companies and the Black Press*, 102 Am. J. Pub. Health 739 (2012).

<sup>11</sup> As a courtesy to the Court, NNPA and NABOB have included an 11 x 17 inch blowup of this same map in the Court's hand delivered copy of this Reply.

Further, as shown on the above map, none of the 34 newspapers are present in the southern region of the United States—the geographic region in which approximately 56.5 percent the total African-American population resides.<sup>12</sup> The listing omits entirely newspapers from the following eleven southern states: Maryland, Louisiana, South Carolina, Alabama, Mississippi, Tennessee, Arkansas, Delaware, Kentucky, Oklahoma, and West Virginia. The aggregate African-American population of these states is approximately 9,170,386 or 23.56% of the total African-American population in the United States.<sup>13</sup> Conversely, NNPA’s member newspapers are heavily concentrated in the southeastern United States. NNPA has twenty-three newspapers in eight of the southern states excluded from the Remedial Order.

Figure 1 below is a list of the NNPA member newspapers in the southern states excluded from the Remedial Order.<sup>14</sup>

<b>Figure 1 – Southern States with No Newspapers from the Remedial Order</b>		
<b>States (8)</b>	<b>African American Alone Population (8,465,101)</b>	<b>NNPA Member Newspapers (23)</b>
Maryland	1,700,298	1. Afro-American – Baltimore 2. The Baltimore Times
Louisiana	1,451,944	1. Alexandria News Weekly 2. Data News Weekly 3. Louisiana Weekly 4. New Orleans Tribune 5. Shreveport Sun
South Carolina	1,290,684	1. The Charleston Chronicle 2. Community Times 3. South Carolina Black News
Alabama	1,251,311	1. Birmingham Times 2. Greene County Democrat 3. Mobile Beacon-Citizen 4. Speakin’ Out News
Mississippi	1,098,385	1. Jackson Advocate 2. Mississippi Link
Tennessee	1,057,315	1. Memphis Silver Star News 2. Nashville Pride

<sup>12</sup> See 2010 Census Briefs, *The Black Population: 2010*, United States Census Bureau (September 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>.

<sup>13</sup> *Id.*

<sup>14</sup> Arkansas, Delaware, and West Virginia were excluded from these tables because neither the newspapers listed in the Remedial Order nor NNPA’s member newspapers had locations in these states.



- Remedial Order Newspapers
- NNPA Newspapers

		3. The Tennessee Tribune 4. Tri-State Defender
Kentucky	337,520	1. Louisville Defender
Oklahoma	277,644	1. The Black Chronicle 2. The Tulsa Oklahoma Eagle

To adequately reach the African American population, and thereby to achieve “maximum exposure to consumers, potential consumers, and the general public,” NNPA and its member newspapers should be incorporated into the Remedial Order. Similarly, NABOB has member national networks that reach all of these states, as well as local broadcast stations in most of these states.

**III. Inclusion of NNPA and its Member Newspapers and NABOB and its Member Broadcast Networks into the Remedial Order Will Not Delay the Parties from Resolving the Case.**

Incorporating NNPA and its member newspapers and NABOB and its member broadcast networks into the Remedial Order will not delay the parties’ ability to resolve the case. First, NNPA’s request will not cause the parties to re-negotiate any issues previously settled through mediation. It is NNPA and NABOB’s understanding that the purpose of the mediation was to address the implementation of the Corrective Statements remedy. The mediation did not negotiations about the newspaper publications in which the Corrective Statements are to be published. Thus, the modification proposed by NNPA and NABOB can be incorporated into the Proposed Consent Order without disturbing any agreement that the parties have attained.

Second, NNPA will serve as the single point of contact for all of Defendants’ Corrective Statement publishing requirements as they pertain to NNPA. NNPA is able to provide Defendants with a single quote to publish the Corrective Statements in every NNPA member newspaper. Likewise, Defendants will receive a single invoice from NNPA for advertisements purchased rather than separate invoices from every NNPA member newspaper. Similarly,



NABOB is able to serve as the single point of contact for all of Defendants' corrective statement broadcasting requirements as they pertain to NABOB. NABOB can provide Defendants a single quote to broadcast the corrective statements in every NABOB member broadcast station and network. Likewise, Defendants will receive a single invoice from NABOB for advertisements purchased rather than separate bills from every NABOB member.

Third, as discussed at the Status Conference held on January 22, 2014, Defendants have represented that they intend to appeal the Court's decision pertaining to the content of the Corrective Statements. Based on the United States Court of Appeals' anticipated schedule, there should be ample time for the parties to consider NNPA and NABOB's position and modify the Proposed Consent Order.

Fourth, the Court has discretion to permit a non-party to participate as *amicus curiae*<sup>15</sup> without accepting Defendants' conditions for such participation. The Court should exercise its discretion to grant NNPA and NABOB's Motion because both organizations are able to provide "unique . . . perspective[s] that can help the [C]ourt beyond the help that the lawyers for the parties are able to provide."<sup>16</sup>

### **CONCLUSION**

For the reasons set forth above, NNPA and NABOB's Motion for Leave to Participate as Amicus should be granted and the Remedial Order should be modified to include NNPA and its member newspapers.

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<sup>15</sup> See September 1, 2005 Op. (citing *Ellsworth Associates, Inc. v. United States*, 917 F. Supp. 841, 846 (D.D.C. 1996)).

<sup>16</sup> See *id.* (citing *Cobell v. Norton*, 246 F. Supp.2d 59, 62 (D.D.C. 2003)).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 30th day of January 2014, a copy of the foregoing National Newspaper Publishers Association (“NNPA”) and the National Association of Black Owned Broadcasters (“NABOB”) Reply Brief was served on all parties of record via the Court’s CM/ECF system.

/s/Natalie O. Ludaway