

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

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 99-2496 (GK)
	:	
PHILIP MORRIS USA INC. , et al.,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION AND ORDER #50-Remand

I. BACKGROUND

In August 2006, the Court issued a Final Judgment and Remedial Order #1015, mandating that Defendants publish corrective statements on five topics on which the Court found they had made false and deceptive statements about cigarettes [Dkt. No. 5733]. United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 937-45 (D.D.C. 2006) (“Original Opinion”). On May 22, 2009, the Court of Appeals affirmed this Court’s judgment of liability and affirmed the major provisions of its Remedial Order. United States v. Philip Morris USA, Inc., 566 F.3d 1095, 1150 (D.C. Cir. 2009) (“Affirmance Opinion”).

After two other appeals by Defendants were denied, 686 F.3d 832 (D.C. Cir. 2012) and 686 F.3d 839 (D.C. Cir. 2012), on November 27, 2012, the Court issued a Memorandum Opinion and Order #34-Remand [Dkt. Nos. 5991 and 5992] setting forth the text of the corrective statements. The Court also directed the Parties to mediate various technical and complex issues surrounding implementation of the corrective statements with the Special Master, Judge Richard Levie (Ret.).

After an extended period of time during which the Parties and the Special Master struggled to reach a Consent Order implementing the corrective statements remedy under Order #1015 and

Order #34-Remand, on January 10, 2014, the Parties succeeded in reaching agreement on a myriad of issues and filed a Joint Motion for Consent Order Implementing the Corrective Statements Remedy Under Order #1015 and Order #34-Remand (“Proposed Consent Order”) [Dkt. No. 6021]. Subsequent to that filing, several entities were granted leave to file *amicus curiae* briefs objecting to portions of the Proposed Consent Order.¹ On January 22, 2014, the Court held a Status Conference in order to discuss various provisions of the Proposed Consent Order, including issues which had been raised by several *amici*. The Court also ordered the Parties to file praecipes addressing the issues raised by the various *amici* [Dkt. No. 6030].

After the Status Conference, several additional entities submitted *amicus curiae* briefs. In all, ten organizations filed briefs objecting to the Proposed Consent Order. [Dkt. No. 6044 (Fox Broadcasting Company), 6045 (National Association of Black Owned Broadcasters and National Newspapers Publishers Association), 6046 (National Association for the Advancement of Colored People), 6066 (Viacom Inc.) (“Viacom”), 6068 (A&E Television Networks, LLC), 6073 (Univision Communications, Inc.) (“Univision”), 6074 (CW Network, LLC), 6075 (Radio One, Inc., TV One, LLC, and Interactive One, LLC) (“Radio One”), 6077 (Little Rock Sun), and 6079 (Turner Broadcasting System, Inc.) (“Turner”).]

On April 22, 2014, after again working with the Special Master, the Parties filed a Joint Praecipe Regarding Issues Raised at the January 22, 2014 Status Conference (“Joint Praecipe”) [Dkt.

¹ It should be noted that the Court’s substantive Remedial Order #1015 covering remedies was issued in August of 2006 in Order #1015. More than six years passed before any objection was ever made to any of its specific provisions which laid out in detail what remedial actions Defendants were required to take, including the specific newspapers and television stations to be used. The Court cannot help but wonder why no party or *amici* ever raised the issue of whether Order #1015’s provisions adequately ensured that the corrective statements would reach the African-American community.

No. 6081], as well as a Revised Proposed Consent Order (“Revised Consent Order”) [Dkt. No. 6081-12].

On May 2, 2014, the Court ordered the *amici* to file any opposition to the Revised Consent Order by May 15, 2014 [Dkt. No. 6085]. Six *amici* filed oppositions [Dkt. Nos. 6082, 6083, 6087, 6090, 6091, 6093]. The matter is now ripe for review.

II. ANALYSIS

It has long been established that District Court judges may act “well within [their] broad equitable powers in ordering specific relief” to remedy the “legal transgressions” of defendants. Cobell v. Norton, 240 F.3d 1081, 1108 (D.C. Cir. 2001) (citations omitted). As the Supreme Court said in Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15 (1971), “[o]nce a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.”

In response to the Court’s Order of January 22, 2014, the Parties worked diligently with the aid of the Special Master to address the remedial issues which the Court discussed at the Status Conference on January 22, 2014. The Revised Consent Order, submitted on April 22, 2014, does respond to those concerns of the Court and *amici*, and is a significant improvement over the earlier Proposed Consent Order submitted on January 10, 2014. The Parties have explained in detail in their Joint Praecipe how they considered, and what criteria they used, to assess how the list of newspapers and television networks originally set forth in Order #1015 could be revised to address the Court’s concern as to whether the African-American community--to which many of Defendants’ false and deceptive advertisements were directed--would be effectively and adequately reached.

The Parties have been able, as suggested by the Court, to make substantial changes in the Revised Consent Order. For example, the revised list now includes major-circulation newspapers in the 10 cities with the highest African-American populations in the United States. See Joint Praecept at 6. The Parties' revised list also includes major-circulation newspapers in the 10 states with the highest number of African-American residents, id., as well as the major-circulation newspapers in the 10 states with the highest percentage of African-Americans. Id. at 7. The Parties' revised list also includes major-circulation newspapers in, or in close geographic proximity to, the 10 cities with the highest percentage of African-Americans in the United States. Id. The revised list also includes for the first time 14 African-American owned newspapers in states that are not served by any major-circulation newspapers. Id. at 7-8. Finally, the Parties also agreed to eliminate 11 of the newspapers that were originally listed in Order #1015.

As a result of these changes, the Revised Consent Order now provides for publication of the corrective statements in at least 12 more newspapers than those listed in Order #1015. In addition, the corrective statements will now be published in 33 states and the District of Columbia, as compared to Order #1015's publication in only 10 states and the District of Columbia. Joint Praecept at 8-9.

The Parties also made a significant change to the television networks listed in Order #1015. *Amici* complained that the three television stations designated to run the corrective statements should be replaced or supplemented by other networks which have a higher percentage of African-American viewers. In responding to that complaint and coming to agreement on the following changes, the Parties examined and analyzed in great detail many different sets of statistics for viewing by African-Americans. Joint Praecept at 9-12. The Parties concluded that airing the corrective statements on

the three major broadcast networks during primetime would reach a greater number of viewers generally and African-American viewers specifically. Even though there are other stations where the percentage of African-American viewers is higher, the overall number of African-Americans who will see the corrective statements is higher if the traditional broadcast stations are used.

What is more, the Parties have provided Defendants additional flexibility in the airing of the corrective statements in Order #1015 by giving each Defendant the option of placing up to one-third of its television advertisements on channels or networks with an overall audience at least as large as the “benchmark timeslot,”² so long as Defendants ensure that each such airing has a greater number of African-Americans viewers than the benchmark timeslot. Id. at 11-12.³

Thus, by providing Defendants with the option to run the corrective statements on any channel during the prescribed days of the week and hours of the day, up to one-third of the total television spots may run on a channel that is not ABC, CBS, or NBC. In addition to ensuring any channel not mandated in the Revised Consent Order has an overall audience at least as large as the least viewed slot on ABC, NBC, and CBS during the prescribed days of the week and hours of the day, the television station chosen by Defendants must also reach a substantial portion of the African-American community as defined by the benchmark timeslot. Revised Consent Order at 8. Finally,

² The “benchmark timeslot,” an important marker of viewership data, is defined as “the timeslot that received the fewest average impressions (18-99+) among CBS, ABC, and NBC, Monday through Thursday, between 7:00 p.m. and 9:59 p.m., during the most recent three month period that ended a full month before the month in question.” Revised Consent Order at 2.

³ Network *amici* also argued that more television time could be purchased for less money if Defendants were ordered to buy multiple cheaper advertisement slots on their respective networks. This argument is clearly directed at obtaining a slice of the advertisement pie (which will be substantial), rather than directly contradicting any of the figures and/or rationales provided by the Parties.

the Parties have pointed out in their Joint Praecept that “all of the television channels proposed by the *amici* are in the running for the corrective statements if placing television slots on their programs will maintain the benchmark numbers of overall viewers and increase the number of African-American viewers.” Joint Praecept at 12.⁴

Univision also objects to the fact that the Revised Consent Order does not target Hispanic Americans and young people. Univision’s Opposition to Motion at 2-3 [Dkt. No. 6082]. As a remedy, Univision requests the Court to order Defendants to purchase advertisements on its network in addition to the major networks already selected. *Id.*; *see also* Amicus Brief of Univision at 5 [Dkt. No. 6073].

Univision ignores the fact that Order #1015 already provides for the corrective statements to be translated into Spanish and published in a number of Spanish language newspapers. 449 F. Supp. 2d at 940 (ordering Defendants to publish corrective statements in Spanish in LA Easter Group Publications, San Francisco La Oferta Review/El Vistaz-Combo, Chicago Lawndale Group News, and Houston-Que Onda!). Thus, there is already a mechanism in place to ensure that the corrective statements will reach Hispanic Americans.

In addition, Univision’s argument regarding the effectiveness of airing the corrective statements on its network relies on percentages, not total viewers. Again, it appears that airing the corrective statements on the major broadcast networks during primetime will reach the largest number of viewers, including Hispanic Americans. Thus, the failure to include Univision is not a reason to reject the Revised Consent Order.

⁴ Defendants are required to consult with Plaintiff prior to their choice of an alternate network. Revised Consent Order at 8-9.

Turner, Radio One, and Viacom argue that the Revised Consent Order does not effectively target the corrective statements to young people. It is certainly true that this Court made numerous findings that Defendants intentionally marketed their products to young people in order to recruit “replacement smokers.” Original Opinion, 449 F. Supp. 2d at 561-667; *id.* at 691 (“The evidence is clear and convincing--and beyond any reasonable doubt--that Defendants have marketed to young people twenty-one and under while consistently, publicly, and falsely, denying they do so.”). However, the cable networks have failed to demonstrate that airing corrective statements on their networks would reach a higher number of young viewers than those reached by the traditional broadcast networks, even though the percentage of young viewers may be higher.

III. CONCLUSION

This case was decided in 2006 and affirmed by our Court of Appeals in 2009. The public has still not received the benefit of any of the remedies ordered by this Court in Order #1015. Publicizing the corrective statements is a major step forward in the effort to remedy many years of false and deceptive advertising by Defendants. The Parties have now agreed and presented a Revised Consent Order which the Court concludes, after careful evaluation, and for all the reasons discussed above, will allow effective, comprehensive, and reasonable implementation of Order #1015.⁵

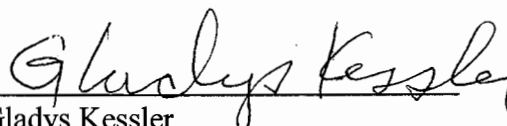
⁵ The Court appreciates the submissions of the *amici*, which were helpful in producing a more satisfactory Proposed Consent Order.

For all the reasons discussed, the Court finds that the Revised Consent Order adequately and effectively implements Order #1015.

WHEREFORE, it is this 2nd day of June, 2014, hereby

ORDERED, that the Joint Motion for Consent Order Implementing the Corrective Statements Remedy Under Order #1015 and Order #34-Remand [Dkt. No. 6021], as revised by the Parties' Joint Praecipe [Dkt. No. 6081], shall be **granted**; and it is further

ORDERED, that the Revised Consent Order [Dkt. No. 6081-12] shall be **entered**.


Gladys Kessler
United States District Judge

Copies via ECF to all counsel of record