

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA,	:	
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<i>Plaintiff,</i>	:	
	:	Civil Action No. 99-2496 (GMK)
and	:	
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TOBACCO-FREE KIDS ACTION FUND, <i>et al.</i> ,	:	
	:	
<i>Plaintiff-Intervenors,</i>	:	
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PHILIP MORRIS USA, INC.	:	
(f/k/a Philip Morris, Inc.), <i>et al.</i> ,	:	
	:	
<i>Defendants.</i>	:	
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AMICUS BRIEF OF VIACOM INC.

Viacom Inc. (“Viacom”), on behalf of its television networks MTV®, MTV2®, VH1®, Comedy Central® and BET®, files this amicus brief urging the Court to deny the motion to approve the proposed Consent Order Implementing the Corrective Statements Remedy under Order #1015 and Order #34-Remand, or, in the alternative, modify the proposed Consent Order, as set forth below.

INTRODUCTION

After seven years of litigation and over sixteen-hundred pages of factual findings, this Court ordered Defendants to remedy their decades of false statements – which the Court found had been targeted, in large part, at the young adult and Black demographics – by correcting those false statements. In its Original Order, this Court held that the dissemination of the Corrective Statements through television and other means was intended to “ensure maximum exposure to consumers, potential consumers, and the general public.” Although the Corrective Statements envisioned by the Court are intended to remedy the Defendants’ past deception, the Proposed Consent Order as currently drafted may pervert – rather than serve – that purpose.

The Proposed Consent Order provides that Defendants shall cause Corrective Statements to be broadcast through 260 spots on CBS, ABC, or NBC between Monday and Thursday, from 7 p.m. to 10 p.m., over one year. This ignores the reality that much of the programming on those networks during those hours is not geared to reach youth and African American demographics. For example, the median age of viewers of CBS, ABC, and NBC is between 50 and 60 years old, and only 1%-2% of those networks’ primetime viewers are Black adults ages 18 to 34. Moreover, pursuant to the Proposed Consent Order, Defendants could purchase the lowest-cost airtime on the least-viewed shows on CBS, ABC, and NBC and further minimize the impact of the Corrective Statements on young adult and Black viewers.

The Court should not countenance this approach. Defendants should be required to target the young adult and Black markets with their Corrective Statements, just as they targeted young people and young African Americans with their deceptive advertising and marketing campaigns. Viacom's networks MTV, MTV2, VH1, Comedy Central, and BET are specifically targeted to, and in fact reach, young adults including young Black viewers. Moreover, Viacom's networks take a leadership role in promoting the health and wellness of their audiences, efforts which have produced a demonstrable impact including, among many other initiatives, successfully educating young adults concerning pregnancy, breast cancer, and sexually transmitted diseases. Broadcasting the Corrective Statements on these Viacom networks, which have long-served as a successful conduit for similar such messages, is a natural fit to achieve the salutary purpose of the Court's remedy.

Further, for each view of an advertising message, the average cost on Viacom's networks during prime time is a third the cost of the major networks during prime time. The differential becomes significantly larger when focusing on a younger audience because such a high percentage of Viacom's networks' viewers are young adults, including young African Americans, compared to the major networks. Thus, on average, the cost of obtaining one thousand views of a message by people ages 18 to 34 on MTV, MTV2, VH1, Comedy Central, and BET is just one-seventh the cost of the major networks.

For these reasons, Viacom respectfully requests that the Court (1) deny the motion for approval of the Proposed Consent Order; (2) find that Viacom's networks are appropriate vehicles for the Corrective Statements; and (3) direct the parties with the assistance of the Special Master and input from *amici curiae* to conduct a comprehensive inquiry into the most effective distribution of the Corrective Statements to the target audiences. Alternatively,

Viacom requests that the Court modify the Proposed Consent Order to require Defendants to utilize 20% of its advertising “spend” on MTV, MTV2, VH1, Comedy Central, and/or BET. This straightforward modification of the Proposed Consent Order would target young and Black consumers and potential consumers and therefore more effectively remediate Defendants’ wrongful conduct.

ARGUMENT

I.

MTV, MTV2, VH1, COMEDY CENTRAL AND BET ARE APPROPRIATE VEHICLES FOR DISTRIBUTION OF THE CORRECTIVE STATEMENTS TO HELP ACHIEVE THE COURT’S REMEDIAL PURPOSE

In Order #1015, the Court ordered that certain Corrective Statements would be run five times per week for one year on CBS, ABC, or NBC, as well as in major newspapers, on Defendants’ websites, and through other means. *United States v. Philip Morris*, 449 F. Supp. 2d 1, 939-41 (D.D.C. 2006) (the “Original Opinion”). These media 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.” *Id.* at 928. The purpose of the dissemination of the Corrective Statements is “to ensure maximum exposure to consumers, potential consumers, and the general public.” *Id.* at 939.

As the Court found in its Original Opinion, many of the “potential consumers” targeted by Defendants in their media and advertising campaigns were and continue to be youth: “[H]istorically, as well as currently, Defendants do market to young people, including those under twenty-one, as well as those under eighteen. Defendants’ marketing activities are intended to bring new, young, and hopefully long-lived smokers into the market in order to replace those who die (largely from tobacco-caused illnesses) or quit.” *Id.* at 691. Defendants used their knowledge of young people to create highly sophisticated and appealing marketing campaigns

targeted to lure them into starting smoking and later becoming nicotine addicts. *Id.* Defendants also targeted young African Americans. The record is replete with evidence that the tobacco companies specifically targeted young African Americans with targeted brands and programs to lure them into starting smoking. *See, e.g., id.* at 582-584, 595-602, 626-633. Thus, to the extent that today's young people are, like young people before them, "potential consumers" of tobacco products, they are an important part of the intended audience for the Corrective Statements.

In addition, young people and African Americans use tobacco products in significant numbers. A recent report by the CDC states that 18.9% of people between 18 and 24, and 22.1% of people between 25 and 44, are current smokers.¹ The same report states that 19.4% of Blacks are smokers. *Id.* Accordingly, as consumers and potential consumers, young people and African Americans are an important audience for the Corrective Statements.

A. Viacom's Young Adult and African-American Oriented Television Networks MTV, MTV2, VH1, Comedy Central and BET Are Appropriate Vehicles for Distribution of the Corrective Statements.

Although the Court intended the Corrective Statements to be disseminated through the "same vehicles" Defendants historically used to promulgate false smoking and health messages, the Court should not now limit the broadcast of the Corrective Statements to the exact same television networks Defendants used as long as forty years ago. Indeed, in 2012, this Court recognized that the types of media used by Defendants had "changed dramatically" in the six years after it issued its original opinion. *United States v. Philip Morris*, 907 F. Supp. 2d 1, 27 (D.D.C. 2012). Television media has likewise changed dramatically in the 43 years that have elapsed since January 2, 1971, when Defendants last advertised their products on television,

¹ Center for Disease Control, Current Cigarette Smoking Among Adults — United States, 2011, Morbidity and Mortality Weekly Report, November 9, 2012, available at http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6144a2.htm?s_cid=%20mm6144a2.htm_w#fig1.

including through the introduction of Viacom's networks focused on youth and African American demographics.

As such, Viacom's youth-targeted, including African American youth-targeted, television networks MTV, MTV2, VH1, Comedy Central, and BET are quintessentially appropriate for the distribution of the Corrective Statements. For example, MTV specifically targets the "millennial" generation. *See* Decl. of Berj Kazanjian, ¶ 4. MTV2 targets male "millennials" aged 15 to 25. *Id.* ¶ 5. VH1 features music and pop culture-driven content targeting adults aged 18 to 49. *Id.* ¶ 6. Comedy Central features award-winning "fake news" programs, stand-up, and sketch comedy with a core male millennial audience and numerous top-ranked shows for males between 18 and 34. *Id.* ¶ 7. BET is the nation's leading television network providing entertainment, music, news and public affairs programming to African-American audiences, and the BET television channel focuses on young Black adults. *See* Decl. of Matthew Barnhill, ¶ 4.

The median age of the Viacom networks' viewers reflects those networks' focus on younger people. According to Nielsen Media Research, the median age of viewers of MTV is just 22.12; the median age of MTV2 viewers is 22.97; the median age of VH1's viewers is 23.87; the median age of Comedy Central's viewers is 29.92; and the median age of BET's viewers is 35.7. Kazanjian Decl. ¶ 8; Barnhill Decl. ¶ 5.

By contrast, the major television networks' viewers skew decades older. According to Nielsen, the median age of viewers of CBS is 57.85. Kazanjian Decl. ¶ 9. The median age of viewers of ABC is 54.38, while the median age of NBC's viewers is only slightly younger at 51.85. *Id.* Even FOX, which seeks to be included in the Proposed Consent Order as a "major network," has viewers with a median age of 48.4.

Moreover, according to Nielsen, of television networks with more than 50 million subscribers in 2013, Viacom networks comprise four of the five with the highest percentage of viewers between ages 18 and 34. *Id.* ¶ 10. Among such networks, MTV has the highest percentage of viewers ages 18 to 34 (46.75% of MTV's viewers in 2013). Comedy Central has the second highest percentage of viewers ages 18 to 34 (44.25% of its viewers in 2013). Just slightly lower, and third and fifth respectively, 42.175% of viewers of MTV2 in 2013 were 18 to 34 years old, and 40.15% of viewers of VH1 were 18 to 34. *Id.*

CBS, ABC, and NBC have significantly lower percentages of young viewers. During "Prime Time" hours (8-11 p.m. Mondays through Saturdays, and 7-11 p.m. on Sundays), the percentage of CBS's viewers in 2013 who were 18 to 34 years old was just 9.875% – that is, more than 9 out of 10 viewers of CBS were outside the 18 to 34 age bracket. *Id.* ¶ 11. Only 14.6% of ABC's viewers in 2013 during Prime Time were 18 to 34, while NBC was slightly higher with 15.4% of its viewers in 2013 in the 18 to 34 age bracket. *Id.*

In addition, the audiences of CBS, ABC, and NBC are not young Black viewers. Of the people who watched CBS in 2013, only 1% were Black viewers between 18 and 34. ABC's and NBC's audiences were each comprised of only 2% of such viewers. Barnhill Decl. ¶ 8. By contrast, BET, which tailors its programming to reach the Black community, has an audience which is 80% Black. *Id.* ¶ 7. And, of BET's audience, 22% are Black viewers between 18 and 34. *Id.*

Thus, to the extent the Court's 2006 Order was intended to remediate Defendants' decades of youth- and Black-targeted marketing by communicating to today's youth, the Proposed Consent Order may well fail to meet that purpose. The Court should reconsider the vehicles for distribution of the Corrective Statements by including Viacom's networks MTV,

MTV2, VH1, Comedy Central and BET in order to increase the likelihood those messages are received by today's young, including young Black, viewers.

B. Viacom's Leadership in the Health and Wellness of Young People and African Americans Will Serve the Salutary Purpose of the Court's Remedial Order.

Viacom's networks take a strong leadership role in actively seeking to protect the health and wellness of today's youth. In short, the young people including young African American people of today look to Viacom's networks such as MTV and BET for health and wellness information – and Viacom's campaigns have produced remarkable results.

MTV's mission is to be the cultural home of the millennial generation, and one of the key ways the network pursues this goal is by regularly engaging and activating America's youth on the biggest challenges facing their generation. The MTV public affairs department leads these efforts – “using MTV's superpowers for good” – and oversees a number of multi-platform social change initiatives, many of which are focused on health. Viacom's campaigns include the Emmy-winning “It's Your (Sex) Life” and “GYT: Get Yourself Tested” – in partnership with the Kaiser Family Foundation and CDC – which have reached over 200 million young people on sexual health issues. *See* Viacomcommunity, Annual Report 2012, at 30, available at http://media.viacom.com/viacommunityreport/Viacom_CSR_Annual_2012.pdf. These campaigns have been credited with helping to significantly reduce teen pregnancy and increase STD testing, nationally.² *Id.* MTV's Peabody-winning initiative “Half of Us” has reached millions of college students on mental health issues and helped tens of thousands connect to life-saving help. *Id.* at 44. Likewise, BET's “RAP IT UP” campaign educates the African American

² *See also* Melissa S. Kearney & Phillip B. Levine, *Media Influences on Social Outcomes: The Impact of MTV's 16 and Pregnant on Teen Childbearing*, National Bureau of Economic Research (Working Paper 19795) (Abstract), January 2014, available at <http://www.nber.org/papers/w19795> (“We find that *16 and Pregnant* led to more searches and tweets regarding birth control and abortion, and ultimately led to a 5.7 percent reduction in teen births in the 18 months following its introduction. This accounts for around one-third of the overall decline in teen births in the United States during that period.”) (emphasis added); Annie Lowrey, *MTV's '16 and Pregnant,' Derided by Some, May Resonate as a Cautionary Tale*, N.Y. Times, Jan. 13, 2014 (discussing same).

community about HIV/AIDS and sexual health while BET's "Goes Pink" campaign educates the community about the specific risks breast cancer poses to Black women. *Id.* at 33, 45.

Viacom's networks are leaders in the field of social change focused on the health and wellness of young people including young African Americans. The Viacom networks are thus a natural fit for dissemination of the Corrective Statements to these populations.

C. The Current Structure of the Consent Order Creates a Perverse Incentive for Defendants to Purchase Advertisements During Broadcasts with Few Young and African American Viewers.

As it is currently structured, the Proposed Consent Order creates for the Defendants the perverse incentive to place the Corrective Statements on the major networks' lowest-cost and least-viewed television shows which are, in turn, viewed by only a negligible percentage of the young adults and young Black viewers. Thus, to the extent the Court's 2006 Order was intended to remediate Defendants' decades of youth- and Black-targeted marketing by communicating to today's youth and Black population the falsity of Defendants' statements, this "solution" would be wildly wasteful and very likely ineffectual.

CBS, ABC, and NBC each airs numerous television series between 7 p.m. and 10 p.m. on Mondays through Thursdays that – whether by design or otherwise – are viewed by a minimal portion of young adult and Black viewers in this country. Kazanjian Decl. ¶ 12. For example, NBC's program "Sean Saves the World," which aired at 9 p.m. on Thursday evenings during the fourth quarter of 2013, was seen by only 0.77% of 18 to 34 year olds. The median age of persons watching that show was 51.4 years old. *Id.* ¶ 12(a). Numerous nighttime weekly broadcast network series are seen by similar demographics and with minimal exposure to young people. *See, e.g., id.* ¶ 12(b) (viewers of NBC's "Welcome to the Family" had a median age of 48.2 and the program reached only 0.81% of 18 to 34 year olds); *id.* ¶ 12(c) (viewers of NBC's "The Michael J. Fox Show" had a median age of 51.8 and the series reached only 0.98% of 18 to

34 year olds); *id.* ¶ 12(d) (viewers of ABC’s “Once Upon a Time in Wonderland” had a median age of 48.2 and the series reached 1.03% of 18 to 34 year olds); *id.* ¶ 12(e) (viewers of ABC’s “Trophy Wife” had a median age of 50.1 and the series reached 1.11% of 18 to 34 year olds); *id.* ¶ 12(f) (viewers of CBS’s “Two and a Half Men” had a median age of 54.6 and the series reached 1.46% of 18 to 34 year olds). And, according to Nielsen, for prime time programs aired in 2013 on CBS, ABC, and NBC, only 1%-2% of viewers are Black young adults ages 18 to 34. *See* Barnhill Decl. ¶ 10 (CBS: 1%; ABC: 2%; NBC: 2%).

As the Proposed Consent Order is currently phrased, Defendants could purchase airtime for the Corrective Statements during these programs or similar programs and be in full compliance with the Order, yet fail to reach a critical mass of young or Black viewers. By contrast, if Defendants applied identical resources to Viacom networks, that shift in approach would substantially increase the probability that the messages in the Corrective Statements would reach the desired populations.

D. Applying Identical Resources to Viacom’s Networks Will Deliver Significantly More Exposure for the Corrective Statements to Younger and Black Viewers.

Because, as set forth above, the portion of 18 to 34 year old viewers watching major network television is very small, using only the major networks would be a highly inefficient means of delivering the Corrective Statements to young adult viewers. By contrast, Viacom’s networks’ high percentage of young adult viewers including young Black viewers means that the Corrective Statements can be delivered to these audiences much more efficiently and effectively.

As a general matter, delivering a message to the general public on the major networks costs three times as much as Viacom’s networks. According to Nielsen Monitor Plus, the average cost to obtain 1,000 views of a message by the general public on the major networks

(including FOX) in Prime Time hours is \$30.38, while the average cost of 1,000 views on Viacom's networks in Prime Time is just \$9.16. *See* Halley Decl. ¶¶ 5, 6.

Moreover, if the focus of delivery is young adults, the cost differential grows dramatically, as a result of the large percentage of Viacom's audience in the 18 to 34 age bracket in contrast to the major networks. The average cost to obtain 1,000 views of a message by persons ages 18 to 34 during Prime Time hours on the major networks (including FOX) is \$141.76 – while delivering 1,000 views of the same message by 18 to 34 year olds in Prime Time on Viacom's networks costs an average of just \$18.33 – which is less than one-seventh the cost on the major networks. *Id.*

In other words, if the Court intends the Corrective Statements to reach a younger including younger Black audience, it will be far more effective to use the same ad dollars needed to run the spots on the major broadcast networks to purchase spots on Viacom's networks, since the same advertising “spend” will deliver significantly more exposure of the Corrective Statements to that audience than the major networks.

II.
**THE COURT SHOULD DIRECT THE PARTIES TO RECONSIDER THE
APPROPRIATE CHANNELS FOR DISTRIBUTION OF THE CORRECTIVE
STATEMENTS OR, ALTERNATIVELY, MODIFY THE CONSENT ORDER**

For the reasons set forth above, Viacom respectfully requests that the Court (1) deny the motion for approval of the Proposed Consent order; (2) find that Viacom's networks are appropriate vehicles for the Corrective Statements, and (3) direct the parties, with the assistance of the Special Master and with input from *amici curiae* including Viacom, to conduct a comprehensive inquiry into, *inter alia*, the distribution of the Corrective Statements to the target audiences, the quantity of advertisements that can be purchased on each such network for

equivalent resources, and the days and times of the broadcast of the Corrective Statements to ensure the effective distribution of the corrective messages to the target audiences.

In the alternative, Viacom requests that the Proposed Consent Order be amended to require a portion of Defendants' advertising "spend" be used to purchase spots on Viacom's networks. As explained above, Viacom believes this simple modification of the order as it currently stands will increase the probability that the Corrective Statements are transmitted to young people including young African Americans.

Viacom's proposed new language for Sections III(1) & (2) of the Consent Order is set forth below, with the changed language highlighted in bold and underlined:

"III. Corrective Statements on Television

1. Each Defendant will place the Corrective Statements ("spots") on its choice of the three major television networks – CBS, ABC, or NBC. The TV spots will run at least **4** times per week, subject to the availability of network time and upon approval of the network(s) on which the spots will air. The TV spots to be run each week **on the three major networks** will be run by each Defendant at its choice between 7:00 p.m. and 10:00 p.m. in the time zone in which the spot airs, between Monday and Thursday, for one year.

2. Each week, Defendants will place on their choice of MTV, MTV2, VH1, Comedy Central and/or BET, the maximum number of spots available for the median cost of one 7:00 to 10:00 p.m. Monday-Thursday spot on the three major television networks, with such spots on MTV, MTV2, VH1, Comedy Central and/or BET to run at each Defendant's choice of times during the hours 7:00 pm to 12:00 a.m. in the time zone in which the spot airs, between Monday and Thursday, for one year.³

³ Viacom's proposal contains different hours for broadcast of the Correct Statements because many of the shows most popular with the target audiences are shown after 10:00 p.m. For example, Comedy Central's late night "fake news" shows "The Daily Show with John Stewart" and "The Colbert Report" are aired at 11:00 p.m. and 11:30 p.m. respectively, and Tosh.0 which has been ranked as #1 cable program with males 18-24, is aired at 10:00 p.m. See, e.g., Viacom, *Pulse* (Quarter Ended September 30, 2013), available at http://files.shareholder.com/downloads/VIA-B/2923066650x0x706656/B9122A57-6CC2-44BA-9491-D3AA32291D4D/2013_Q4_Pulse_Investor_Newsletter.pdf.

CONCLUSION

For the foregoing reasons, Viacom urges the Court to (1) deny the motion for approval of the Proposed Consent Order; (2) find that Viacom's networks are appropriate vehicles for the Corrective Statements; and (3) direct the parties, with the assistance of the Special Master and with input from *amici curiae* including Viacom, to conduct a comprehensive inquiry into, *inter alia*, the distribution of the Corrective Statements as set forth above, or, in the alternative, modify the Proposed Consent Order as proposed by Viacom and in order to better effectuate the remedial purposes of Order #1015 and Order #34-Remand.

Dated: January 27, 2014

Respectfully Submitted,

FRIEDMAN KAPLAN SEILER &
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/s/ Kent K. Anker

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 2014, a copy of the foregoing Amicus Brief of Viacom Inc. was filed electronically through the Court's CM/ECF system.

/s/ Kent K. Anker