



IN THE
Supreme Court of the State of Delaware
No. 579, 2005

LORILLARD TOBACCO COMPANY,
a Delaware corporation,

*Defendant-Below,
Appellant,*

—v.—

AMERICAN LEGACY FOUNDATION,
a Delaware nonprofit corporation,

*Plaintiff-Below,
Appellee.*

APPEAL FROM:
COURT OF CHANCERY
OF THE STATE OF
DELAWARE IN AND FOR
NEW CASTLE COUNTY
C.A. NO. 19406-NC

**BRIEF OF *AMICUS CURIAE*
CITIZENS' COMMISSION TO PROTECT THE TRUTH
IN SUPPORT OF APPELLEE
AMERICAN LEGACY FOUNDATION**

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Dated: February 10, 2006

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Exhibit

Letter dated March 18, 2005 from William H. Sorrell,
Attorney General of the State of Vermont, to
Joseph A. Califano, Jr..... 3, Exhibit 1

Amicus curiae Citizens' Commission to Protect the Truth respectfully submits this brief in support of Appellee American Legacy Foundation ("Legacy") in its request for declaratory and injunctive relief in *Lorillard Tobacco Company v. American Legacy Foundation*, No. 579,2005.

PRELIMINARY STATEMENT

Lorillard appeals the Chancery Court's decision finding that none of Legacy's **truth**® campaign advertisements violate the anti-vilification clause of the Master Settlement Agreement¹ ("MSA") for one simple and compelling reason: the **truth**® campaign works. Empirical peer reviewed studies support the conclusion that unlike conventional anti-tobacco campaigns, **truth**®'s innovative advertising techniques have effectively stemmed tobacco use among the nation's children and teens. As a result, **truth**® advertisements diminish Lorillard's (and other tobacco companies') revenues by reducing the number of youth smokers who will eventually become those companies' adult consumers. While publicly Lorillard routinely sang (and continues to sing) the praises of anti-tobacco and smoking cessation programs, its attitude changed drastically when the *successful* **truth**® campaign came along. Indeed, once it became clear that **truth**® was effective (and, therefore, a threat to Lorillard and the other major tobacco companies), Lorillard responded with a series of threats to institute lawsuits against Legacy, presumably in an effort to scare Legacy into "toning down" its marketing techniques and airing more traditional (and ineffective) advertisements, or worse, to eliminate the **truth**® campaign altogether.

It is not surprising that Lorillard disfavors advertisements that have a detrimental effect on its business, or that Lorillard would try to quell such advertisements. What is remarkable, however, is that Lorillard is attempting to use the MSA—the very instrument that mandated Legacy's creation—to carry out its apparent mission.

¹ *Am. Legacy Found. v. Lorillard Tobacco Co.*, 886 A.2d 1, 32 (Del. Ch. Aug. 22, 2005) ("ALF's ad campaign consists of a group of cohesive messages: tobacco companies target young consumers to begin smoking, tobacco companies manipulate the chemical composition of cigarettes to increase the addictiveness of the nicotine, and smoking kills. None of these messages violate the anti-vilification clause of the MSA.").

When Lorillard and four other major tobacco companies entered into the MSA, they agreed to its terms, including the creation of Legacy, in order to mitigate the massive liability they were facing as a result of lawsuits filed by individual states. One of the conditions of the settlement was that the tobacco companies fund a comprehensive anti-smoking, public education campaign: Legacy was the result of that requirement. Now that Legacy's **truth**® campaign has proven effective at preventing smoking among children and teens, Lorillard seeks to use the MSA as a shield against the financial repercussions it faces from losing too many future adult consumers. This cannot be the purpose of the MSA. Indeed, it would defy all logic if the terms of the MSA could be used to hamper and render ineffective the very anti-smoking campaign the MSA *required the tobacco companies to fund*.

By requesting reversal of the well-reasoned judgment of the Chancery Court, Lorillard seeks to effectuate a return to pre-MSA days when the public health took a back seat to Lorillard's (and other tobacco companies') profits, political needs and corporate image.² If Lorillard is permitted to twist the meaning of the anti-vilification clause of the MSA as a means to threaten and initiate lawsuits whenever Legacy develops an effective anti-tobacco advertising campaign, Lorillard and other tobacco companies will eviscerate the smoking prevention protections built directly into the MSA. This flagrant misuse of the MSA should not be countenanced, and Lorillard should be prohibited from using the settlement it agreed to as a weapon against Legacy's **truth**® campaign.

² See Anne Landman, et al., *Tobacco Industry Youth Smoking Prevention Programs: Protecting the Industry and Hurting Tobacco Control*, 92 AM. J. PUB. HEALTH 917, 919 (2002) ("The purpose of the [tobacco] industry's youth smoking prevention programs is not to reduce youth smoking but rather to serve the industry's political needs by preventing effective tobacco control legislation, marginalizing public health advocates, preserving the industry's access to youths, creating allies within policymaking and regulatory bodies, defusing opposition from parents and educators, bolstering industry credibility, and preserving the industry's influence with policymakers."). "[The] outcomes [of Lorillard's youth smoking prevention program] are evaluated not in terms of influencing teen smoking but rather in terms of the effects on adult response and Lorillard Tobacco's corporate image." *Id.* at 922.

STATEMENT OF INTERESTS AND FACTS

Amicus curiae Citizens' Commission to Protect the Truth (the "Commission") was created to end smoking among the nation's children and teens by supporting the life-saving **truth**® campaign engineered by Legacy. The Commission is not affiliated with Legacy. It is an independent organization created to serve the public health in connection with tobacco use and prevention. The Commission is principally funded through a \$1.5 million multi-year pass-through grant from Legacy, using funds provided to it for this purpose by the National Association of Attorneys General ("NAAG").³

The Commission has assembled, for the first time in the nation's history, all the living former United States Secretaries of Health, Education and Welfare, United States Secretaries of Health and Human Services, United States Surgeons General, and Directors of the Centers for Disease Control and Prevention, from every administration, Republican and Democrat, since President Lyndon Johnson, to support a single cause.⁴ These public health

³ See Letter dated March 18, 2005 from William H. Sorrell, Attorney General of the State of Vermont, to Joseph A. Califano, Jr. (attached hereto as Exhibit 1).

⁴ The members of the Commission include U.S. Secretaries of Health, Education and Welfare Joseph A. Califano, Jr. (Carter Administration, 1977-1979, Chairman of the Citizens' Commission to Protect the Truth) and David Mathews Ph.D. (Ford Administration, 1975-1977); U.S. Secretaries of Health and Human Services Tommy G. Thompson (GW Bush Administration, 2001-2005), Donna E. Shalala, Ph.D. (Clinton Administration, 1993-2001), Louis Sullivan, M.D. (GHW Bush Administration, 1989-1993), Otis R. Bowen, M.D. (Reagan Administration, 1985-1989), Margaret M. Heckler (Reagan Administration, 1983-1985), Richard S. Schweiker (Reagan Administration 1981-1983); U.S. Surgeons General David Satcher, M.D. (Clinton/GW Bush Administrations 1998-2002), M. Joycelyn Elders, M.D. (Clinton Administration, 1993-1994), Antonia C. Novello, M.D., M.P.H., DrPH (GHW Bush Administration, 1990-1993), C. Everett Koop, M.D. (Reagan Administration, 1982-1989), Julius B. Richmond, M.D. (Carter Administration, 1977-1981), Jesse Steinfeld, M.D. (Nixon Administration, 1969-1973), William H. Stewart, M.D. (Johnson Administration, 1965-1969); Directors of the Center for Disease Control James O. Mason, M.D., DrPH (Reagan Administration, 1983-1989), William H. Foege, M.D., M.P.H. (Carter/Reagan Administrations, 1977-1983), David J. Sencer, M.D. (Johnson/Nixon/Ford Administrations

officials have united for this cause because keeping children and teens tobacco-free is the best way to prevent death and disease in the United States. That the members of the Commission have significant influence in the area of smoking prevention is evident from the fact that since the Surgeon General issued the first "Report on Smoking" in 1964, every successive report until 2002 was written under the leadership of a Commission member.

Legacy was established pursuant to the MSA, an unprecedented settlement entered into by the nation's five major tobacco companies (including Appellant Lorillard) and forty-six states. The MSA provided for the creation of a public education foundation to, among other things, carry out a "nationwide sustained advertising and education program to (A) counter the use by Youth of Tobacco Products, and (B) educate consumers about the cause and prevention of diseases associated with the use of Tobacco Products."⁵

Legacy's mission is "to build a world where young people reject tobacco and anyone can quit,"⁶ a mission it seeks to effectuate through two primary goals: (i) arming all young people with the knowledge and tools necessary to reject tobacco use and (ii) eliminating disparities in access to tobacco prevention and cessation services.⁷ In its efforts to reach these goals, Legacy has been guided by the leadership of several national experts in the tobacco field, including Dr. Cheryl Heaton,⁸ the founding and cur-

1966-1977); and Directors of the Centers for Disease Control and Prevention Jeffrey P. Koplan, M.D., M.P.H. (Clinton/GW Bush Administration, 1998-2002); David Satcher, M.D., Ph.D. (Clinton Administration, 1993-1998) and William L. Roper, M.D., M.P.H. (GHW Bush Administration, 1990-1993).

⁵ See Master Settlement Agreement at § VI(d), (f).

⁶ See American Legacy Foundation, <http://www.americanlegacy.org> (stating mission).

⁷ *Id.* (stating goals).

⁸ Dr. Heaton's experience in tobacco control issues is expansive. She led grant-funded projects for the Centers for Disease Control and Prevention (CDC) to study the effects of marketing and counter-marketing on youth tobacco use, developed a series of prevention partnerships linking public health researchers with New York State tobacco-health policy makers, and evaluated intervention programs for New York's largest youth tobacco prevention programs.

rent President and Chief Executive Officer; Christine O. Gregoire, founding Board Chair serving from 1999-2003, Governor and former Attorney General of the State of Washington, and one of the chief negotiators of the MSA for the states; and Dr. Steven A. Schroeder, Board Chair from 2003-2005, former President of the Robert Wood Johnson Foundation and a Distinguished Professor of Health and Health Care in the Department of Medicine at the University of California at San Francisco, where he also heads the Smoking Cessation Leadership Center.

Legacy has built a reputation as a successful, independent public health foundation by developing programs that utilize youth activism, counter-marketing and grass roots marketing campaigns, public relations, and outreach to educate the public about the devastating health effects of tobacco use. Legacy has worked with numerous federal, state, and local organizations to implement the most effective anti-tobacco campaigns possible. Most notable is its groundbreaking **truth**® campaign.

The **truth**® campaign was launched in 2000. **truth**® is the only non-tobacco-industry sponsored national youth-focused anti-tobacco education campaign.⁹ Its innovative strategy is based on research indicating that children and teens who are likely to smoke are generally rebellious and value independence and freedom from authority.¹⁰ **truth**® informs children's and teens' smoking choices by presenting, through a thought-provoking, innovative anti-tobacco marketing campaign, the facts about the marketing practices of the tobacco industry, and the addictiveness, health effects and social costs related to the use of tobacco products.

The Commission has a strong interest in the continued proliferation of the **truth**® campaign. **truth**® is the first program of its kind to demonstrate a significant impact on children and teens in this nation. By supporting the **truth**® campaign, the Commission seeks to end smoking by children and

⁹ See American Legacy Foundation, <http://www.americanlegacy.org>.

¹⁰ Because traditional smoking prevention campaigns had proven ineffective with children and teens, Legacy commenced its **truth**® campaign by developing a composite of personality traits typically associated with teen smokers, and subsequently geared its advertising strategy specifically toward those salient traits. Legacy attempted, and succeeded, in crafting advertisements that resonate strongly in children and teens displaying the character and personality traits often found in young smokers.

teens. If Lorillard and other tobacco companies are permitted to defeat Legacy's advertising efforts by relying on a decision from this Court that reverses the Chancery Court and upholds Lorillard's incorrect interpretation of the anti-vilification clause of the MSA, much of the Commission's progress made to date in the battle to stop smoking among the nation's children and teens will be negatively impacted.

The Commission's purpose in submitting this brief is to serve the interests of the public health and to advance effective programs designed to reduce smoking among the nation's children and teens. In addition, the Commission seeks to inform the Court that Lorillard's attacks on the **truth**® campaign run counter to the advancement of the public health community's stated goals—as evidenced by, among other things, every report of the U.S. Surgeon General since 1964—and Lorillard's purported commitment to such goals as consented to in the MSA.

In furthering the advancement of such goals, the Commission submits that: (i) the **truth**® campaign is an effective and proven counter-marketing campaign that has had a profound effect on the attitude and behavior of this nation's youth toward smoking and (ii) the continued threat of litigation by Lorillard (in the event its interpretation of the anti-vilification clause is allowed to prevail by virtue of the reversal of the Chancery Court's opinion) against Legacy in multiple jurisdictions will thwart Legacy's ability to successfully disseminate its anti-tobacco message. The Commission submits this brief in support of the relief sought by Legacy's position on appeal, specifically that this Court affirm the Chancery Court's decision that Legacy's **truth**® campaign does not violate the anti-vilification clause of the MSA.

ARGUMENT

I. The Public Health Will Be Adversely Impacted If Legacy Must Operate Under The Specter Of Tobacco Company Lawsuits Brought To Intimidate Legacy Under The Guise Of Lorillard's Incorrect Interpretation Of The MSA's Anti-Vilification Clause

A. The truth® Campaign Has Proven To Be An Effective And Groundbreaking Advertising Campaign That Benefits The Public Health

Children and teens are inundated daily with tobacco company advertising in every form of media, including radio, print, television and the Internet. The Federal Trade Commission's most recent annual report on cigarette sales and advertising (dated August 9, 2005) showed that the tobacco companies spent \$15.15 *billion* on advertising and tobacco-related promotions in 2003 alone—an increase of \$2.68 billion from 2002 (21.5 percent) and the most ever reported to the FTC.¹¹ Through their barrage of advertisements, the tobacco companies send mixed messages about smoking to children and teens by, on the one hand, infusing their *promotional* material with imagery portraying the smoker's lifestyle as cool, rebellious and exciting, and on the other hand, using imagery in their *anti-smoking* advertisements that reminds youths that smoking is an "adult" activity.¹² The Surgeon General has recognized that the underlying purpose of the tobacco companies' enormous investment in advertising and marketing is to recruit "replacement smokers" for the customers they lose each year to death and quitting.¹³

¹¹ See *Federal Trade Commission Issues Cigarette Report for 2003* (Aug. 9, 2005), available at <http://www.ftc.gov/opa/2005/08/cigreport.htm>.

¹² See Pamela M. Ling and Stanton A. Glantz, *Why and How the Tobacco Industry Sells Cigarettes to Young Adults: Evidence From Industry Documents*, 92 AM. J. PUB. HEALTH 908, 910 (2002) (discussing development of leading tobacco company's marketing model); Matthew C. Farrelly, *Getting to the Truth: Evaluating National Tobacco Countermarketing Campaigns*, 92 AM. J. PUB. HEALTH 901, 906 (2002) (discussing anti-smoking advertising campaign of leading tobacco company).

¹³ See U.S. Dep't of Health and Human Servs., CDC, *Reducing Tobacco Use: A Report of the Surgeon General—2000* 162 (2000) ("Advocates for reducing tobacco use have pointed out that if the tobacco industry is to main-

The **truth**® campaign was established to reveal in national media outlets the truth about the deceptive and misleading marketing practices of the tobacco industry, and to draw attention to the addictive nature, health effects, and social costs of tobacco. The **truth**® campaign is unique in that it uses the tobacco companies' own statements and actions to expose their deceptive practices and to provoke questions about who drives tobacco consumption—the consumer or the tobacco companies themselves. The **truth**® campaign empowers children and teens to take charge of their own attitudes and behaviors toward tobacco by providing hard-hitting facts about the tobacco industry. It features a fast-paced, no-nonsense approach to tobacco, and educates children and teens about the number of deaths and types of diseases attributable to smoking, the ingredients contained in cigarettes, the addictiveness of cigarettes, and the health effects and social costs of smoking and tobacco-related diseases.

The **truth**® campaign draws on the guidelines for effective counter-marketing campaigns propounded by the Centers for Disease Control and Prevention (“CDC”), which recommend that anti-smoking advertisements should incorporate, among other things, “nonauthoritarian appeals that avoid direct exhortations not to smoke.”¹⁴ In line with these CDC principles, the **truth**® campaign, rather than scolding children and teens, portrays them as leading the fight against smoking and revealing the truth about the

tain current consumption or even slow the ongoing decline in smoking, the industry must aggressively seek replacement smokers for the estimated 3,500 Americans who quit smoking each day and for the additional 1,200 tobacco customers and former customers who die each day of smoking-related illnesses.”).

¹⁴ See Centers for Disease Control and Prevention, *Best Practices for Comprehensive Tobacco Control Programs* 22 (Aug. 1999), available at http://www.cdc.gov/tobacco/research_data/stat_nat_data/bestprac-dwnld.htm (stating that anti-smoking advertisements should: “(1) Combine messages on prevention, cessation and protection from secondhand smoke; target both young people and adults; and address both individual behaviors and public policies; (2) Include grassroots promotions, local media advocacy, event sponsorships, and other community tie-ins to support and reinforce the statewide campaign; (3) Maximize the number, variety, and novelty of messages and production styles rather than communicate a few messages repeatedly; [and] (4) Use nonauthoritarian appeals that avoid direct exhortations not to smoke and do not highlight a single theme, tagline, identifier, or sponsor”).

tobacco companies' destructive products and marketing tactics. The **truth**® campaign also incorporates the suggestions of leading counter-marketing scholars, who advise that anti-smoking campaigns should expose the tobacco companies' manipulative marketing techniques and should also provide children and teens with specific and convincing reasons why not smoking is a better choice than smoking.¹⁵

By contrast, the only other national youth anti-smoking advertising campaigns (which are promulgated by the tobacco companies) routinely flout the CDC's guidelines and patronize children and teens with paternalistic anti-smoking messages which remove from youths the power to make informed choices about smoking, and instead tend to place the burden on parents to educate their children about the dangers of smoking.¹⁶ Not surprisingly, the tobacco companies' anti-smoking advertisements have proven ineffective in combating smoking among children and teens and are no sub-

¹⁵ See Jeffrey McKenna, et al., *Strategies for an Effective Youth Counter-Marketing Program: Recommendations from Commercial Marketing Experts*, 6(3) J. PUB. HEALTH MGMT. 10 (2000) (“[E]xposing tobacco companies’ manipulative marketing tactics may be an effective strategy because it can provide youth with an ‘insider’s view’ and allow them to draw their own conclusions about whether they are being controlled by these exploitative methods.”); Lisa K. Goldman & Stanton A. Glantz, *Evaluation of Antismoking Advertising Campaigns*, 279 J. AM. MED. ASS’N 772, 774 (March 11, 1998) (“[T]he most effective positioning statement for young people is one that shows the industry as money-hungry companies that intentionally and willfully target very young and vulnerable kids with manipulative and deceptive tactics in order to get them addicted to cigarettes at an early age so they become customers for life (or until tobacco kills them).”) (internal quotations omitted).

¹⁶ See Landman, et al., 92 AM. J. PUB. HEALTH at 919 (stating that a 1991 Tobacco Institute “Discussion Paper” shows how anti-smoking programs developed by tobacco companies “helped place responsibility for youth smoking on parents’ inability to control peer pressure, a strategy that allowed the industry to shift the focus away from its advertising practices while portraying tobacco control advocates as ‘extremist’”). “Presenting smoking as an ‘adult choice,’ a ‘forbidden fruit,’ and an act of rebellion are common industry marketing themes.” *Id.*

stitute for **truth**®, which has consistently proven to be an effective and invaluable educational tool.¹⁷

In 2005, the American Journal of Public Health published the results of a rigorous, peer-reviewed study of the impact of **truth**® on national smoking rates among students in grades 8, 10, and 12. The 2005 study used data from the 1997-2002 *Monitoring the Future* annual spring surveys, which are designed to monitor alcohol, tobacco, and illegal drug use among children and teens in the United States. The study concluded that exposure to the **truth**® campaign accounted for 22% of the nationwide decline in youth smoking prevalence.¹⁸ Moreover, the study found that the **truth**® campaign contributed to an overall decline in the rate of smoking; by 2002, *as a result of the truth® campaign, there were 300,000 fewer youth smokers.*¹⁹ Because an estimated one-third of youth smokers will die from a smoking-related disease, 300,000 fewer youth smokers equates to 100,000 fewer premature deaths—progress directly attributable to the **truth**® campaign.²⁰ In addition, given that 90% of adult smokers started smoking as teenagers, children and teens who reject tobacco are virtually certain never to smoke.²¹

Putting aside these obvious benefits to the nation's health, **truth**® also stems the exorbitant health care costs associated with tobacco use. Adult smokers account for almost \$3,400 *each* in annual health care costs and lost

¹⁷ See Farrelly, 92 AM. J. PUB. HEALTH at 906 (finding that, whereas exposure to the **truth**® campaign was associated with strong anti-tobacco attitudes among youth, exposure to a major tobacco company's anti-smoking advertisements had a counterproductive effect on preventing smoking among children and teens, because it engendered a favorable sentiment toward the tobacco industry).

¹⁸ See Matthew C. Farrelly, et al., *Evidence of a Dose-Response Relationship Between "truth" Antismoking Ads and Youth Smoking Prevalence*, 95 AM. J. PUB. HEALTH 425 (March 2005).

¹⁹ *Id.* at 429.

²⁰ Centers for Disease Control and Prevention, *Tobacco Use Among Middle and High School Students—United States, 2002*, 52(45) MORBIDITY AND MORTALITY WEEKLY REPORT, 1096-1098 (Nov. 14, 2003).

²¹ U.S. Dep't of Health and Human Servs., *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* (1994).

productivity.²² By preventing 300,000 children and teens from becoming adult smokers, **truth**® will save an estimated one billion dollars per year in health care costs.²³

B. Any Retreat From The Chancery Court’s Decision That *None* Of The Challenged Advertisements Violate The MSA Would Render Legacy’s Influential And Health-Promoting **truth® Campaign Ineffective**

The Chancery Court found that *all* of the challenged advertisements promulgated by the **truth**® campaign are based on well known public facts and held that *none* of the challenged advertisements violate the anti-vilification clause of the MSA.²⁴ These advertisements centered around several themes: (i) that the tobacco companies target children and teens to begin smoking; (ii) that the tobacco companies manipulate the chemical composition of cigarettes to increase the addictiveness of the nicotine; and (iii) that smoking kills.²⁵ Importantly, in its wholesale rejection of Lorillard’s challenge to each of the advertisements, the Chancery Court deemed all of the messages conveyed by the advertisements to be compliant with the MSA. Accordingly, any reversal of the Chancery Court’s findings that the anti-vilification clause of the MSA was not violated would have far-reaching consequences. It would incentivize Lorillard, and possibly the other tobacco companies as well, to initiate litigation against Legacy any time these companies took offense at Legacy’s portrayal of, among other things, the tobacco companies’ historical misrepresentations about the deadly effects of tobacco products, the purpose of their advertising, or the ingre-

²² Centers for Disease Control and Prevention, *Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Economic Costs—United States 1995-1999*, 51(14) MORBIDITY AND MORTALITY WEEKLY REPORT, 300-303 (2002).

²³ *Id.*

²⁴ *See Am. Legacy Found.*, 886 A.2d. at 32, 33 (“There are no scurrilous and vitriolic attacks. There is no cruel slander. There is no social ostracism. There is no public ridicule, traduction, or calumny. . . . These ads clearly use preposterous situations as an attention-getting mechanism to contrast historical misrepresentations from the tobacco industry with current knowledge about the dangers of tobacco products.”).

²⁵ *Id.*

dients contained in their cigarettes. Faced with the possibility of constant and harassing litigation in every jurisdiction where **truth**® campaign advertising is distributed, Legacy would be forced to water down its anti-tobacco advertising to protect itself from an aggressive and meritless litigation strategy, to the point of rendering the **truth**® campaign as ineffectual as traditional anti-smoking efforts.

Specifically, allowing Lorillard to threaten or bring suit against Legacy based on its incorrect interpretation of the anti-vilification clause would severely burden Legacy, forcing the foundation to operate under the constant scrutiny of the tobacco companies. Such a decision by the Court would set precedent that could require Legacy to defend its campaign in a virtually endless number of potential venues. The cost of defending such lawsuits would be exorbitant, and would force Legacy to use the finite amount of funding available to it to litigate rather than to forge ahead with innovative advertising methods as contemplated by the MSA.

Lorillard and the other major tobacco companies are fully aware that Legacy would be forced, in the face of an impending threat of suit, to stop or to temper its advertisements so as to comply with an interpretation of the MSA that was never contemplated at the time of execution and goes against the MSA's plain meaning. Rather than developing targeted anti-tobacco advertising that will have the greatest impact on children and teens, Legacy would instead have to consider producing measured, tame messages out of fear that the tobacco companies will file suit to guard against even moderately forceful marketing efforts. Such "soft" advertisements are precisely the type of messages that have proven completely ineffective in stemming tobacco use among the nation's children and teens.²⁶ The Commission submits that by using the threat of litigation as a sword to force Legacy to alter its life-saving messages, Lorillard will have achieved its goal of suppressing effective anti-tobacco advertising.²⁷

²⁶ Michael Siegel, *Mass Media Antismoking Campaigns: A Powerful Tool for Health Promotion*, 129 ANNALS OF INTERNAL MED. 131 (July 15, 1998) ("The most aggressive media campaigns generate the most controversy, but they are also likely to be the most effective."). *Accord* Farrelly, 92 AM. J. PUB. HEALTH at 906.

²⁷ *See* Landman, 92 AM. J. PUB. HEALTH at 925 ("If the tobacco industry were sincere in its stated desire to contribute to reducing youth smoking, it would stop opposing policies and programs that have been demonstrated to

The only way for this Court to preserve the effectiveness of Legacy's **truth**® campaign, and thereby to allow the nation's most successful smoking prevention campaign to continue its efforts, is to uphold, *in toto*, the Chancery Court's decision that none of the **truth**® campaign's challenged advertisements violate the anti-vilification clause of the MSA. Anything less will stifle Legacy's work and negate the progress Legacy has made through the **truth**® campaign toward eliminating youth smoking.

be effective. Policymakers who believe that the industry would do anything that would negatively affect recruitment of new smokers are ignoring history and fooling themselves.”).

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that this Court grant Legacy's request for declaratory and injunctive relief.

Dated: February 10, 2006

Respectfully submitted,

/s/ Don A. Beskrone 

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