

## RESEARCH PAPER

# The role of tobacco advertising and promotion: themes employed in litigation by tobacco industry witnesses

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**Objectives:** To identify key themes related to tobacco advertising and promotion in testimony provided by tobacco industry-affiliated witnesses in tobacco litigation, and to present countervailing evidence and arguments.

**Methods:** Themes in industry testimony were identified by review of transcripts of testimony in the Tobacco Deposition and Trial Testimony Archive (<http://tobaccodocuments.org/datta>) from a sample of defence witnesses, including three academic expert witnesses, six senior executives of tobacco companies, and one industry advertising consultant. Counterarguments to the themes embodied in defence testimony were based on information from peer-reviewed literature, advertising trade publications, government reports, tobacco industry documents, and testimony provided by expert witnesses testifying for plaintiffs.

**Results:** Five major themes employed by defence witnesses were identified: (1) tobacco advertising has a relatively weak “share of voice” in the marketing environment and is a weak force in affecting smoking behaviour; (2) tobacco advertising and promotion do not create new smokers, expand markets, or increase total tobacco consumption; (3) the tobacco industry does not target, study, or track youth smoking; (4) tobacco advertising and promotion do not cause smoking initiation by youth; and (5) tobacco companies and the industry adhere closely to relevant laws, regulations, and industry voluntary codes. Substantial evidence exists in rebuttal to these arguments.

**Conclusions:** Tobacco industry-affiliated witnesses have marshalled many arguments to deny the adverse effects of tobacco marketing activities and to portray tobacco companies as responsible corporate citizens. Effective rebuttals to these arguments exist, and plaintiffs’ attorneys have, with varying degrees of success, presented them to judges and juries.

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In 2003 the major US tobacco manufacturers spent \$15.1 billion on cigarette advertising and promotion (about \$480 per second), according to data reported by the manufacturers to the Federal Trade Commission (FTC).<sup>1</sup> This was the cigarette industry’s largest annual expenditure ever reported, and exceeded expenditures for 2002 by 21.5%. The largest category of spending was for price discounts—\$10.8 billion (71.4%)—followed by promotional allowances for retailers (\$1.2 billion, 8.1%), promotional allowances for wholesalers (\$683 million, 4.5%), “retail-value-added” promotions involving bonus cigarettes (\$677 million, 4.5%), and coupons (\$651 million, 4.3%).<sup>1</sup> (Promotional allowances are payments to retailers or wholesalers to facilitate the sale or placement of cigarettes, through special stocking, shelving, and displays, as well as volume rebates and incentive payments. Bonus cigarettes are free cigarettes offered through promotions such as “buy two packs, get one free.”)

Both the extent and nature of spending on advertising and promotion by the tobacco industry have changed considerably since 1970 (the first year the FTC required reporting of data on cigarette marketing expenditures). In 1970 the industry spent \$1.7 billion on cigarette advertising and promotion, compared to \$15.5 billion in 2003 (in 2004 dollars) (appendix 1) (to view appendices 1–4 visit the *Tobacco Control* website—<http://www.tobaccocontrol.com/supplemental>).<sup>1</sup> Across the same time period, the balance between advertising and promotion shifted dramatically: from 82% allocated for advertising and just 18% for promotion in 1970 to just 1% for advertising and 99% for promotion in 2003 (appendix 2). This shift to promotion reflects, in part, the constraints placed upon the industry with regard to the use of certain advertising media. The Public Health Cigarette Smoking Act of 1969 banned

cigarette advertising on television and radio, beginning in 1971. The Master Settlement Agreement (MSA), signed by 46 state attorneys general and the major cigarette manufacturers in 1998, prohibited outdoor and transit advertising of cigarettes, including billboards.<sup>2</sup> Thus the focus of the industry shifted to in-store (largely convenience store) promotional strategies.

Substantial evidence exists that cigarette advertising and promotion increase smoking by youth as well as total cigarette consumption.<sup>3–6</sup> The US Surgeon General’s 1989 report on smoking and health<sup>7</sup> outlined four direct and three indirect mechanisms by which tobacco advertising and promotion may increase tobacco consumption. The direct mechanisms are: (1) encouraging children or young adults to experiment with tobacco products and initiate regular use; (2) increasing tobacco users’ daily consumption of tobacco products by serving as an external cue to smoke or by lowering the cost of smoking; (3) reducing current tobacco users’ motivation to quit; and (4) encouraging former smokers to resume smoking. The indirect mechanisms are: (1) media dependence on tobacco advertising revenue “may discourage full and open discussion of the hazards of tobacco use”; (2) tobacco industry funding provided to sporting, cultural, minority, and other organisations “may create political support for, or mute opposition to, the industry’s

**Abbreviations:** DATT, Tobacco Deposition and Trial Testimony Archive; FCTC, Framework Convention on Tobacco Control; FDA, US Food and Drug Administration; FTC, Federal Trade Commission; IOM, Institute of Medicine; MSA, Master Settlement Agreement; OECD, Organisation for Economic Co-operation and Development; RJR, RJ Reynolds; STMSA, Smokeless Tobacco Master Settlement Agreement; USST, United States Smokeless Tobacco Company

marketing and policy objectives"; and (3) "the ubiquity and familiarity of tobacco advertising and promotion may contribute to an environment in which tobacco use is perceived by users to be socially acceptable, or at least less socially objectionable and less hazardous than it is in fact."

Tobacco marketing has been a key issue in tobacco litigation. Plaintiffs and their attorneys have often asserted that tobacco companies have marketed their products using advertising and promotional techniques that have targeted youth (including the plaintiffs) with messages and images designed to increase the desirability of tobacco use while obscuring its dangers. This paper reviews the role of tobacco advertising and promotion as interpreted by industry-affiliated witnesses in the litigation process. We identify key themes in the testimony provided by these witnesses, and we present countervailing evidence and arguments in response to those themes.

## METHODS

Our study occurred as part of the Tobacco Deposition and Trial Testimony Archive (DATTA) project. The overall methods used in the DATTA project are described elsewhere in this journal supplement,<sup>8</sup> which is devoted to research utilising transcripts of tobacco litigation testimony in the DATTA collection.

In our investigation, we identified a sample of defence witnesses whose testimony we examined in detail. These witnesses were selected because they provided key testimony on the subject of tobacco advertising and promotion. They included three academic expert witnesses, six senior executives of tobacco companies, and one industry advertising consultant. All of this testimony was drawn from US lawsuits, except for the testimony (and expert report) presented by the industry consultant, which was for an industry lawsuit challenging federal tobacco control legislation in Canada. To place these defence witnesses' comments into a broader context, we also reviewed the testimony of four expert witnesses who gave testimony on tobacco advertising and promotion for plaintiffs, including one of the authors (MG). The testimonies we examined, and the corresponding cases, witnesses, and their roles, are listed in table 1.<sup>9-34</sup>

Themes in the defence witnesses' testimony were identified as follows. Each of the three co-authors independently reviewed each of the witnesses' testimony. The authors then conferred via email and conference calls to analyse the comments identified as potentially significant, and to develop a classification of the broad themes into which each might fall. In this way, a convergence of perspectives and a sense of the categorical themes to be coded emerged. Upon conclusion of the initial analysis of the testimonies, one of us (MG) developed the formal coding structure based on themes and subthemes, and excerpted relevant examples for each of the codes developed. These codes and examples were reviewed by the other two authors for their concurrence.

Counterarguments to the themes embodied in defence testimony are presented below. These rebuttals are based on information from peer-reviewed literature, advertising trade publications, government reports, tobacco industry documents, and testimony provided by expert witnesses testifying for plaintiffs.

## RESULTS

The procedure described above led to the identification of five major themes employed by defence witnesses:

1. Tobacco advertising has a relatively weak "share of voice" in the marketing environment and is a weak force in affecting smoking behaviour.

2. Tobacco advertising and promotion do not create new smokers, expand markets, or increase total tobacco consumption.
3. The tobacco industry does not target, study, or track youth smoking.
4. Tobacco advertising and promotion do not cause smoking initiation by youth.
5. Tobacco companies and the industry adhere closely to relevant laws, regulations, and industry voluntary codes.

These themes and their respective subthemes are described below, along with counterarguments to them.

### Theme 1: Tobacco advertising has a relatively weak "share of voice" in the marketing environment and is a weak force in affecting smoking behaviour

#### Subtheme 1A: Relative to other industries and the total funds spent on advertising by all industries, tobacco is a minor player

Expert witnesses for the defence expressed the view that advertising for tobacco is not a major factor in the advertising environment.

Q. "About how much is spent on advertising [across all industries] in this country every year?" A. "... approximately \$200 billion." Q. "And approximately how much of that amount is for advertising by cigarette companies?" A. "One half of one percent ... about a half a penny a dollar."<sup>11</sup> (p 4380)

"[T]here is only one cigarette brand that appears in the 200 megabrands and it's Marlboro. It comes ... in about 51st."<sup>11</sup> (p 4419)

Q. "And how does the cigarette industry's total expenditures on advertising compare to other industries in general terms?" A. "... [T]he cigarette industries come in at about ... the two-thirds level of the advertising-to-sales ratio. And there are other industries that come in higher and there are others, obviously, that come in lower."<sup>11</sup> (p 4418)

#### Counter-argument (subtheme 1A)

In effect, defence witnesses seek to make the case that relative to other industries, the tobacco industry does not spend very much on advertising; hence, it has limited influence. In fact, based on the data presented in the FTC's annual reports on cigarette sales and advertising, and on estimates for expenditures before 1970, the evidence indicates that the tobacco industry has been a *major* player for the advertising industry. As noted above, in 2003 (the last year for which figures are available) the industry spent \$15.1 billion on cigarette advertising and promotion in the United States (now mostly on promotion),<sup>1</sup> or about \$41.5 million per day.

Analysing trends in expenditures over time reveals the scope of cigarette advertising in the environment and within the marketing arena. (All FTC dollar figures presented below and in the appendices are adjusted to 2004 dollars, as are other figures when so noted.) From 1940 to 2004, the cigarette industry spent more than \$215 billion on advertising and promotion—averaging about \$9 million per day. These figures are based on data for total industry expenditures for 1970–2003 as presented in the FTC's annual cigarette reports, the latest of which was published in 2005. Figures for the years 1940–1970 and 2004 are estimates based on the 1970–2003 figures. Appendix 1 presents the industry's

**Table 1** Testimony reviewed

Witness	Case	Appearing for/role/affiliation*	Date(s) of testimony	Reference(s)
Harold H Kassarijan	Cipollone v. Liggett Group Inc	Defendant; Expert witness; Professor of Management, University of California, Los Angeles	15 April 1988; 18 April 1988	9, 10
Claude R Martin	Whiteley v. Raybestos-Manhattan Inc	Defendant; Expert witness; Professor and chairman, Marketing Department, University of Michigan School of Business	25 February 2000; 28 February 2000	11, 12
Timothy P Meyer	Ierardi v. Lorillard Tobacco Co	Defendant; Expert witness; Professor of Communications, University of Wisconsin	13 November 1991	13
Lynn Beasley	Local No. 17 Bridge & Iron Workers Insurance Fund v. Philip Morris	Defendant; Vice President of Marketing, RJ Reynolds Tobacco Company	5 March 1999	14
Ellen Merlo	Boeken v. Philip Morris	Defendant; Vice President of Marketing Services, Philip Morris	2 May 2001	15
James J Morgan	Engle v. RJ Reynolds Tobacco Co	Defendant; President & CEO, Philip Morris USA	18 May 1999	16
Martin L Orlowsky	Engle v. RJ Reynolds Tobacco Co	Defendant; President & CEO, Lorillard Tobacco Company	28 June 2000	17, 18
Andrew J Schindler	Minnesota v. Philip Morris	Defendant; President & CEO, RJ Reynolds Tobacco Company	5 March 1998; 6 March 1998	19, 20
Michael Szymanczyk	Engle v. RJ Reynolds Tobacco Co	Defendant; Chairman & CEO, Philip Morris USA	12 June 2000	21, 22
Michael J Waterson	JTI-MacDonald Corp [RJR-MacDonald Inc] v. Canada	Plaintiff; Industry consultant; Chairman of Information Sciences Ltd and research advisor to the UK Advertising Association	21 January 2002; 22 January 2002	23–25
Joel B Cohen	Miles v. Philip Morris	Plaintiff; Expert witness; Professor of Marketing and director, Center for Consumer Research, University of Florida	4 February 2003	26, 27
Marvin E Goldberg	Boeken v. Philip Morris	Plaintiff; Expert witness; Professor and chair of the Department of Marketing, Smeal College of Business, Penn State University	16–18 April 2001	28–31
John P Pierce	Local No. 17 Bridge & Iron Workers Insurance Fund v. Philip Morris	Plaintiff; Expert witness; Professor and associate director, Cancer Prevention & Control Program, University of California, San Diego	25 February 1999	32
Richard W Pollay	Whiteley v. Raybestos-Manhattan Inc	Plaintiff; Expert witness; Professor of Marketing, University of British Columbia	2–3 February 2000	33, 34

\*Title and affiliation at the time of the cited testimony.

total expenditures on cigarette advertising and promotion in five-year increments from 1970 until 1995, and annually from 1995 to 2003.

Up until about 1980, a majority of the tobacco industry's marketing expenditures were focused on advertising in measured media (where syndicated marketing research services estimate the audiences for magazines, television, radio, newspapers, and billboards). As mentioned above and discussed more fully below, beginning in the 1980s and extending into the 21st century, but especially in the 1990s, the industry transformed its marketing efforts to focus on promotion—largely in-store promotion (see appendix 2). Data from the trade magazine *Advertising Age* show that from the 1940s through the 1970s, tobacco companies were frequently ranked among the top 100 advertisers in the country, often in the top 25. Appendix 3 shows advertising expenditures by each cigarette company, and their rankings among the top 100 advertisers in the country, across five-year intervals. Thus, these data capture much of the period during which the tobacco industry emphasised advertising in measured media as opposed to other forms of promotion. In 1945 L&M/Liggett spent \$54 million on cigarette advertising and ranked as the 17th largest advertiser in the country. In 1980, Philip Morris spent \$725 million and was ranked as the third largest advertiser in the country. Also in 1980, RJ Reynolds (RJR) spent \$668 million and was ranked as the fifth largest advertiser. (By comparison, in 1980 McDonald's spent \$300 million and Kellogg's spent \$228 million.) These huge expenditures have no doubt been a major contributor to the brand equity established by Philip Morris for its dominant Marlboro brand, which held 40% of the cigarette market in 2005.<sup>35</sup> (Philip Morris brands overall controlled 50% of the cigarette market in 2005.<sup>35</sup>) *Business Week* has estimated the equity in the Marlboro brand to be more than \$22 billion, making it the ninth most valuable brand name in

the world.<sup>36, 37</sup> As the data make clear, and contrary to the claims of the defence witnesses, the tobacco industry has been a major advertiser in the United States and globally.

#### Subtheme 1B: Advertising is limited in its ability to persuade

Regardless of the *amount* spent on advertising, the argument advanced here is that advertising does not influence consumer behaviour, or at most, plays only a small role in the "marketing mix."

Q. "... [I]s advertising in the scheme of all the influences ... a strong force, a weak force or somewhere in between with respect to influencing consumer behavior?" A. "When we take all of the ... factors that are inputted into that decision [whether to smoke], it ends up being a relatively weak force."<sup>11</sup> (pp 4374–5)

"There are many things that go into the effect [of inducing smoking initiation].... One of these is communication and a small part of communications [is] advertising."<sup>9</sup> (p 8480)

Q. "Would you agree that advertising is a very powerful and persuasive medium?" A. "No."<sup>16</sup> (p 34811)

#### Counter-argument (subtheme 1B)

Total domestic advertising spending (for all industries) in 2004 was \$263.3 billion and was predicted to climb to \$280 billion in 2005.<sup>38</sup> Moreover, the levels of expenditures for individual firms, both domestically and globally, reach well into the billions of dollars for the top-spending firms such as Procter & Gamble and Unilever, whose global advertising budgets reached \$5.76 billion and \$3.54 billion in 2003,

respectively.<sup>39</sup> This would argue that advertising is regarded as considerably more persuasive and effective in influencing consumer behaviour than defence witnesses suggest.

### Subtheme 1C: The majority of current expenditures are competitive actions focusing on pricing or promotions, not advertising

Q. "So both 'promotional allowances' and the 'coupon & retail value added' [FTC categories for cigarette advertising and promotion] would be price items rather than advertising items?" A. "That is correct."<sup>11</sup> (p 4417)

Q. "... [O]f the total amount of dollars in cigarette advertising and promotion reported to the Federal Trade Commission, approximately what percent of the total spending relates to things that are purely price?" A. "... [I]t's mostly price-oriented, and it's over 50 percent of the total amount."<sup>12</sup> (pp 4522–3)

"This was not advertising. This was a T-shirt offer."<sup>14</sup> (p 2853)

#### Counter-argument (subtheme 1C)

These witnesses attempt to convey a sense that promotional efforts, dominant as they have become, are part of competitive pricing, not advertising, and hence, are more "legitimate". However, to the extent that a criterion of legitimacy concerns the power of marketing tactics to induce youth to smoke, promotional efforts may be viewed as *less* legitimate. Research has documented that teens who are susceptible to *advertising* are about *twice* as likely to become interested in smoking, relative to those who are not susceptible. But teens who are susceptible to *promotions* are about *three times* as likely to become interested in smoking, relative to those who are not susceptible.<sup>40</sup>

### Subtheme 1D: Taste, not advertising, is what wins over consumers

Q. "So as a marketer, you attribute the fact that Winston lost its number one position to the fact it could no longer advertise on television the jingle, 'Winston tastes good like a cigarette should,' ...?" A. "No. I think the primary reason was that Marlboro was a better product and tasted that way. Better tasting product."<sup>16</sup> (pp 34808–9)

"Newport has a unique taste, a unique flavor. It is preferred by more menthol smokers, and that is the primary and fundamental reason why Newport is as successful as it is today. It is not necessarily attributable to this advertising, which, frankly, hasn't changed in probably 20 years."<sup>18</sup> (p 56015)

#### Counter-argument (subtheme 1D)

Advertising "shapes" our experience with products—including what we taste. The Coca Cola company paid a price when it ignored that relationship two decades ago. In "blind" taste tests in which the brand name was not known, consumers preferred a sweeter version of Coca Cola to the one on the market. Based on this finding, Coke modified its formula with the introduction of "New Coke" in 1985. However, most Coke drinkers, loyal to the longstanding brand whose image had been shaped by massive advertising, claimed not to like what they tasted in the new version. Evidence from the blind taste test was set aside and Coke backtracked by re-introducing "Coca Cola Classic," the original formula.

Field experiments with foods have documented that what people experience as "taste" is, at least in part, a function of how the foods are advertised/labelled. In one such experiment, the same lunch meals were sold in a university faculty cafeteria but were labelled differently on different days. For example, on some days one such meal was identified as "*Succulent* Italian Seafood Filet" but on other days merely as "Seafood Filet". Those who bought and ate the foods when they were described in an embellished way reported that the foods were more appealing to the eye—they *tasted significantly better*; and after eating the meal they felt more "comfortably full and satisfied".<sup>41</sup> The enhanced labels had a powerful impact.

Similarly, as part of a recent study, half of the subjects were offered jelly beans labelled with more intriguing, novel, and ambiguous sounding names like "moody blue" and "Mississippi brown". For the other half of the subjects, the labels on the jelly beans involved more common descriptors such as "blueberry blue" and "chocolate brown". Under these straightforward circumstances, the subjects who saw the embellished descriptors took an average of 18 jelly beans, while those who saw the more common descriptors took an average of just eight.<sup>42</sup>

In a third experiment,<sup>43</sup> all subjects were told that JC Penney golf shirts had been considerably improved in quality. One-third of the subjects were then encouraged to examine a JC Penney shirt along with several similar shirts made by competitors. Another third of the subjects were shown a JC Penney ad for the shirts that made the same claim. The remaining third of the subjects were first shown the JC Penney ad and then allowed to examine the JC Penney shirt next to those from competitors. It was only this last group who were persuaded that the JC Penney shirt had actually been improved. Apparently, the ad shaped or "primed" these subjects to see positive aspects of the advertised shirt when they examined it. Both steps were required; the ad by itself was not enough to convince the subjects and neither was examination of the shirt alone. In the same way, tobacco advertising helps to shape the smoker's smoking experience or taste.

### Theme 2: Tobacco advertising and promotion do not create new smokers, expand markets, or increase total tobacco consumption

This theme is typically a dominant one in the testimony of witnesses for the defence. The claim is that tobacco advertising is primarily for brand-switchers only, intended to maintain a brand's current users and to convert those who are smoking other brands. These witnesses testify that except for an occasionally innovative new product, advertising does not create or expand market demand.

#### Subtheme 2A: Corporate focus is on maintaining/gaining market share

Q. "[W]hy do ... cigarette companies spend so much money on advertising?" A. "I think there are three fundamental reasons. One is to protect the brand. The thought is that 'If my name is not out there and I stop advertising, the people who regularly buy it will forget about me.' So it's reinforcement to people. The second is that there is the attempt to capture sales from a competing brand. And remember that ... [a] one percent market share shift is a lot of money.... There is a third one ... they advertise because they're afraid not to. They advertise because their competitors advertise."<sup>11</sup> (p 4382)

"R.J. Reynolds has about 25 percent of the market. There are about 44 million smokers. Roughly 33 million of them

do not smoke our brands. This is a huge opportunity for our company to grow, and our marketing dollars would be far better spent against convincing 33 million people who smoke to choose our brands than trying to convince people who don't smoke to smoke."<sup>14</sup> (p 2739)

"[W]hen you do marketing ... the first thing, the most important thing is that you don't cause the people [who] would choose your brand today to switch away to another brand, because they already like your brand and so you don't want to introduce something that they wouldn't like and cause them to switch away. But you do want to find something that you can get Marlboro smokers to switch to Camel for."<sup>14</sup> (p 2734)

"[A]dvertising is important for two basic, fundamental reasons. One is you use advertising to communicate with ... current adult smokers that smoke your brand to reinforce your brand name, your brand image, your brand position to people who currently claim your brand as what we call your usual brand, and you also use advertising to appeal—try to appeal to competitive adult smokers, to see if, in the case of Winston, can you convince a Marlboro smoker to try Winston, or in the case of Camel, convince a Marlboro smoker to try Camel. So the two core purposes of advertising is support your franchise, your usual brand, and see if you can get competitive adult smokers to try the brand."<sup>20</sup> (p 6846)

Subtheme 2B: Level of advertising is not related to level of consumption. Advertising can grow demand only for new products. Tobacco is a mature market

Q. "Does this [graph] indicate to you that total spending on cigarette advertising and promotion has caused cigarette consumption to rise over that time period?" A. "Well, it's pretty obvious it has not, because one goes up and the other goes down."<sup>11</sup> (p 4417)

"[T]here are a number of countries in which consumption has declined sharply which don't have an advertising ban and indeed a number of countries which do have an advertising ban in which consumption has clearly risen.... [I]f advertising bans had a substantial impact, it would show up much more clearly.... [T]here is very good and strong evidence that the advertising of manufactured branded goods doesn't have any impact, really, on the overall levels of consumption of products in general and tobacco in particular with the sole exception of brand new inventions like PCs and VCRs."<sup>23</sup> (pp 900–1, 905)

#### Counter-argument (subthemes 2A and 2B)

As noted above, the subthemes that advertising cannot increase the number of smokers or the amount of tobacco consumed are quite dominant in the testimony of defence witnesses. They are directly contradicted by the conclusions of the US Food and Drug Administration (FDA) as noted in its 1996 rule-making<sup>44</sup> (p 44494) on the sale and distribution of cigarettes and smokeless tobacco:

"FDA agrees with those comments that expressed the view that *labeling the tobacco market as a 'mature market' is a simplistic denotation*, which fails to recognize the movement into the market each day of new young smokers often motivated in part by advertising. Even 'mature' markets

must replenish their customer base as older consumers leave the market. In fact, approximately one million new young smokers enter the tobacco market each year. These new smokers are necessary to keep the mature market stable and to prevent decline. *There is no evidence to suggest that these new smokers are predestined to enter the market.*" (italics added, citation omitted)

The Institute of Medicine (IOM)<sup>45</sup> (p 115) came to the same conclusion in its 1994 report entitled *Growing up Tobacco Free*:

"In mature markets, awareness of a product is nearly universal and demand is relatively stable. *Most of the market segment is already using the product*, rises in product use are not dramatic, and *expansion results from getting consumers to use a product more often or in new ways*. In growth markets, new market segments are identified, *new users are a source of significant market expansion*, and rises in product use are significant.

"The cigarette market simultaneously displays characteristics of being both a mature and a growth market. The industry calls attention to the fact that cigarette sales have been fairly consistent over the last decade; however, it is clear *that per capita consumption has decreased, and that the tobacco industry loses 2 million smokers a year—those who quit and those who die.... Consequently, market expansion must be occurring to maintain total tobacco sales at a consistent level*. Adults are not a likely population for that market expansion because few new smokers are adults. Furthermore, for three decades the trend among adults has been to quit smoking. In fact, most new smokers are youths: *77% of daily smokers are daily smokers by age 20.*" (emphasis added)

Similarly, the US Surgeon General's 1994 report *Preventing tobacco use among young people*<sup>3</sup> (p 174) stated:

"It appears that no matter what the appropriate classification of the product [in the 'product life cycle'], different classes of potential consumers will still exist as market segments with different and particular circumstances. Marketing will thus have to address these individual segments—including that of young people for whom the product and brands are less well known, and for whom appeal must be created, since cigarettes are not a necessity of life."

These conclusions, drawn by three independent scientific authorities, were based on a wealth of evidence including the following:

- Although protecting existing market share and competitive attempts to gain market share are seen as a brand manager's primary and legitimate goals, empirical evidence suggests that advertising to recruit new smokers is a more economically sound reason to spend billions of dollars in marketing. Brand loyalty among cigarette smokers is higher than for almost any other consumer product.<sup>46</sup> Fewer than 10% of smokers switch brands in any given year and only 7% switch from one company's brands to another's.<sup>47–49</sup> As noted in the above comment from the IOM, 77% of daily smokers have become daily smokers by age 20. As a result, while a brand manager for Marlboro or Camel may think in terms of market share, that share inevitably grows or shrinks as a function of the

manager's effectiveness in recruiting *new* smokers to his company's brand relative to competing brands.

- Although individual studies produced conflicting results, a meta-analysis of 24 econometric studies providing estimates of advertising elasticity of cigarette demand found that overall, cigarette advertising increases aggregate cigarette consumption.<sup>50</sup> The weighted mean advertising elasticity for these studies was 0.060, meaning that a 10% increase in advertising is associated with a 0.6% increase in cigarette consumption. These findings are especially impressive given a basic limitation of such studies—they assess the effects of the annual fluctuations in advertising expenditures, which “presumably relate to the least productive slice of expenditure, on the reasonable assumption that advertising is subject to diminishing returns.”<sup>51</sup>
- In a study of 102 countries from 1981 to 1991, Saffer found that countries with *comprehensive* tobacco advertising bans experienced an average decrease in per capita cigarette consumption of about 8%, compared to an average decline of about 1% in countries without a comprehensive ad ban.<sup>52</sup> In a related study in 22 countries in the Organisation for Economic Co-operation and Development (OECD) community for the years 1970 to 1992, Saffer and Chaloupka showed that comprehensive ad bans had a clear effect in reducing tobacco use; however, *partial* ad bans (which the investigators called “limited bans”) were “minimally effective in reducing the impact of advertising” because tobacco companies were able to divert advertising from “banned” media to “allowed” media.<sup>6</sup>
- When the level of tobacco advertising rises suddenly or steeply, tobacco consumption rises substantially. In the mid-to-late 1980s, trade barriers for American cigarettes were eliminated in four southeast Asian countries—South Korea, Thailand, Japan, and Taiwan. This resulted in significant increases in advertising expenditures for American cigarettes, an increased market share for American cigarettes, and an estimated increase of 10% in total cigarette consumption above and beyond the secular trend. The increases were proportionately lower in South Korea and Thailand where relatively more restrictions were placed on the nature and amount of advertising, and proportionately greater in Japan where fewer restrictions were put in place.<sup>53</sup>

### Theme 3: The tobacco industry does not target, study, or track youth smoking

#### Subtheme 3A: Denial/denigration of the documentary evidence of surveys, tracking data, and basic research regarding youth smoking

In the first comment below, Claude Martin offers unique arguments to denigrate the importance of both corporate and government documents available to the court. He claims that: (1) there are so many documents that a comprehensive overview of them would be impossible; (2) the context of each document is not clear; and (3) he was not hired to look at the documents—hence he cannot comment on them. In Martin's second comment, he questions the source of a particular statement in a Surgeon General's report that is more than 300 pages long,<sup>3</sup> and implies that little if anything in the report can be trusted, given this “error”. The statement from defence witness (and former Philip Morris CEO) James Morgan suggests that because the documents in question came from a Philip Morris employee who was in Richmond (Virginia), not New York, and in the research and development department, not marketing, these documents have little significance. In a unique claim, Lynn Beasley (vice-president of marketing at RJR) insists that a document showing that

13- to 24-year-olds were targeted by RJR was not accurate but the result of a “typo”.

Q. “You offered three good reasons that you decided not to look at internal company documents. What were those reasons?” A. “[T]here are thousands or millions of documents. So physically, ... you couldn't look at all of those documents. And just looking at the title of them would not be enough. You'd literally have to look at every single document and review it.... [T]he second problem ... is that you have to understand the context in which those documents were written, to whom they were presented, and who were the people that wrote them. And in some cases, you know, maybe they weren't even delivered to somebody. And ... third ... I wasn't supposed to go and review company documents and see what they were like and characterize them. That was not my job in this case.”<sup>12</sup> (pp 4523–4)

“There's a statement in the Surgeon General's report that advertising can affect primary demand for products.... I have gone and looked for the book [that was the source of this conclusion]. And I cannot find anything in that textbook that even comes close to suggesting that proposition. And I'm concerned that somebody either misquoted, misunderstood or maybe they just made a clerical error.... [T]here's an example of why one wants to look at the underlying documentation.”<sup>12</sup> (pp 4525–6)

“Myron Johnston took ... public information as a demographer and did write 7, 8 or 9 memos over the course of 20 years that showed what smoking incidence was below 18.... [T]he copy lists ... were almost all confined primarily to Richmond, to within the operations group.... He was in research and development in Richmond. He wasn't in marketing ... [in] New York City.... Johnston's documents largely predicted both the size of the cigarette industry ... and the size of Philip Morris all based on demographics. A pure statistical analysis of projections.”<sup>16</sup> (pp 34764–8)

Q. “In your involvement with Project LF and Camel, had anybody ever said the project was [targeted to] 13 to 24 [year olds]?” A. “No.... it's obvious that that one isolated document is a typo. I was a secretary once, I can see how that can happen.”<sup>14</sup> (p 2777)

#### Subtheme 3B: Denial of targeting youth; insistence that only those aged 21 and over are targeted

“Philip Morris does not market or sell and has no intention to do so, does not do so, and actually takes many affirmative steps to make sure that it doesn't happen, sell to either nonsmokers or to minors.”<sup>16</sup> (p 34763)

Q. “In the entire period of time you were involved with the Camel campaign, Mrs. Beasley, did it ever include among its demographics people under the age of 18?” A. “No.” Q. “Did it ever do research on nonsmokers or people under the age of 18?” A. “No, we did not.”<sup>14</sup> (pp 2780–1)

“The perception that we were marketing to kids, I believe, is part of the reason that the industry had become as vilified as it is. Even though that is an incorrect assumption, I do believe that people believe that that's what we were doing, but it wasn't true, and it has created problems for us as a company, and we don't want kids to smoke.”<sup>15</sup> (p 4210)

### Subtheme 3C: Invocation of personal experience: "I was there...."; "I wasn't there...."

There is an interesting admixture in the testimony of senior tobacco executives. On the one hand, they claim a knowledge that, by implication, cannot be challenged: they were "there"—on the job—in the corporate environment. From this position, they report that they "know" the company did not target youth. On the other hand, when confronted with documents that provide contrary evidence, the same executives claim that they cannot comment because they did not attend the meeting in question, or do not know the individual who wrote the memo at issue. In any case, they argue that any suggestion in these documents that the company targeted youths was not what they experienced during their career.

"You can't manage the company without written documents. And the fact is that every activity for every week of every month of every year is documented. And the instructions of what to do are documented. And there's no reference to a strategy or a program or a review of a program or an activity that involves marketing to kids. It didn't happen.... I was there. I ran the show for a large number of years in marketing and then the company, and I'm telling you it didn't happen. I was there; you weren't. And I know."<sup>16</sup> (pp 34829–30)

"I have never in my 24 years with this company, in all of my experiences, had anybody suggest or talk about marketing cigarettes to 14-year-olds or 15-year-olds or 16-year-olds. I've never encountered that in my 24 years. I've been on the Executive Committee for 10 [years] and the president for four, and I've never, in my experience, ever heard anybody in the day-to-day business of working in the business, with all the issues and problems, talking about we have to increase our share of 14-year-olds."<sup>19</sup> (pp 6462–3)

Q. "Well, the board was being told about research for young adults which was being defined as 14, 15, 16 and 17, all the way up to 24 years old; correct, sir?" A. "I don't know what somebody said to the board beyond what is on this document. I have no knowledge, have never heard of, never seen anybody doing ad research ... against 14-, 15-, 16-, 17-year-olds.... And I would not look at this document and draw that conclusion. That is totally inconsistent with my experience, that they have ad research of 14-year-olds."<sup>19</sup> (pp 6465–6)

[Shown and asked about an advertising planning document] "I don't even know who presented this thing, and you want me to interpret what they were thinking in developing an ad campaign? I cannot do that. I have no idea what they were thinking. I know what the words say here, but I can't get into the minds of somebody at a meeting that I was never at. And I don't even know who was there."<sup>19</sup> (p 6462)

### Counter-argument (subthemes 3A–3C)

A wealth of corporate documents paint a clear picture showing that the major tobacco companies were concerned about the smoking behaviour of youth, studied them, and targeted them. A 1981 Philip Morris report<sup>54</sup> recognised how important teenage smokers were (and remain) to the company:

"It is important to know as much as possible about teenage smoking patterns and attitudes. Today's teenager

is tomorrow's potential regular customer, and the overwhelming majority of smokers first begin to smoke while still in their teens.... The smoking patterns of teenagers are particularly important to Philip Morris.... Furthermore, it is during the teenage years that the initial brand choice is made: At least a part of the success of Marlboro Red during its most rapid growth period was because it became the brand of choice among teenagers who then stuck with it as they grew older...." (emphasis in original)

A 1974 marketing research study by Philip Morris includes a table (table 5) entitled "Brand Smoked Most Often When First Started Smoking" (emphasis in original).<sup>55</sup> That table has a column providing data for 693 smokers aged "18 & Less", showing that Marlboro was the initial brand of choice for 69% of this group.

A 1975 RJR document<sup>56</sup> about the company's marketing plans for that year begins:

"Our paramount marketing objective in 1975 and ensuing years is to reestablish RJR's share of marketing growth in the domestic cigarette industry. We will speak to four key opportunity areas to accomplish this. They are: 1 - increase our young adult franchise.... [L]et's look at the growing importance of the young adult in the cigarette market. In 1960, *this young adult market, the 14–24 age group* represented 21% of the population.... [T]hey will represent 27% of the population in 1975. They represent tomorrow's cigarette business. *As this 14–24 age group matures*, they will account for a key share of the total cigarette volume—for at least the next 25 years." (emphasis added)

An internal memo to RJR president and CEO Edward Horrikan<sup>57</sup> commented on competition for underage consumers:

"Philip Morris had a total share of 59 among 14–17 year old smokers, and specifically, Marlboro had a 52 share.... [B]etween the spring and fall 1979 periods, RJR's total share declined from 21.3 to 19.9. Hopefully, *our various planned activities that will be implemented this fall* will aid in some way in reducing or correcting these trends." (emphasis added)

A 1976 RJR document<sup>58</sup> laying out "planning assumptions ... for the period 1977–1986+" argued:

"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 is to be maintained over the long term." (emphasis in original)

Even if one accepts at face value the tobacco industry's claim that it does not target underage youth, does that mean that teenagers aged 17 and under are unaffected by its marketing activities aimed at older persons? RJR executives and marketing personnel recognise that the 18-year-old minimum age target involves a very permeable boundary:

"As a group, younger smokers probably emulate the smoking habits of smokers in the next oldest group, the 18–24 year olds, since trends for younger smokers tend to follow (by 2–3 years) trends for the latter group."<sup>59</sup>

Q. "[D]o you think 18-year-olds influence 17-year-olds?"  
 A. "I imagine they do." Q. "Do you think 19-year-olds influence 17-year-olds?" A. "I imagine they might, yes."  
 Q. "They're called peers; aren't they?" A. "You—you could call them peers."<sup>19</sup> (pp 6438–9)

Moreover, as noted by the IOM, the FDA, the US Surgeon General,<sup>3</sup> and others,<sup>60</sup> the scope and nature of tobacco advertising and promotion assure that children and adolescents are exposed to tobacco companies' messages and images, irrespective of their intentions. The IOM stated: "The sheer amount of expenditures for advertising and promotion assures that young people will be exposed to these messages on a massive scale."<sup>45</sup> (p 131) As the FDA explained,<sup>44</sup> (p 44494)

"Children are not isolated from tobacco advertising's attractiveness or inducements. There is no 'magic curtain around children and teenagers who seek to learn how to fit into the adult world,' nor is there any evidence to support a claim that young people are immune from advertising's blandishments." (citation omitted)

### Subtheme 3D: Corporate culture precludes targeting youth

These comments suggest that the broader corporate culture acts as a check on unethical (and potentially illegal) behaviours such as targeting of youth.

"[T]he unwillingness to market to nonsmokers and to minors is something I inherited, was part of the culture when I walked in the door there. It was taken for granted: That's the way you operated. You just didn't do that.... [T]here have been instances where we were not perfect.... But if you're talking about what the intent of the company is, what its strategies are, what its stated executional desires are, and you allow it to be even just slightly human in execution, this is a company that has clearly stated what its [sic] willing to do and not do, and it's done it."<sup>16</sup> (p 34789)

"[T]he first topic on the mission statement is: Our goal is to be the most responsible, effective and respected developer, manufacturer, and marketer of consumer products made for adults. Our core business is manufacturing and marketing the best quality tobacco products available to adults who choose to use them.... [The first bullet point in our mission statement—'Do our part to proactively identify and capitalize on opportunities to discourage underage use of our products'—is] the single biggest issue in this company, in terms of what people believe about us, that we simply have to correct. It is an enormous problem. If people think that we're trying to sell this product to kids, then the company is never going to be able to be a successful company."<sup>22</sup> (pp 49–51)

### Subtheme 3E: Contrition for past behaviour regarding youth

Although industry witnesses often denied any targeting or study of youth (see above), other testimony acknowledged that it did occur (albeit rarely), and that if (or when) it occurred, it was inappropriate, wrong, unethical, or even illegal.

Q. "[D]o you think it was appropriate for the board to be discussing all age categories, including the 14- to 24-year

olds?" A. "No, I don't. In fact this was being discussed by the board, I don't think it's appropriate.... [I]f people in the company acted upon this and literally developed marketing plans at people under the legal age to buy the product, they were acting illegally ... unethically."<sup>19</sup> (pp 6447–51)

"I think they were wrong to be doing analysis of brand selections from people who were 14, 15 and 16 years old, and ... we don't do that today. It shouldn't have been done then in my opinion.... I think it was wrong. I don't think they should have been doing that. It is the core, the policy of the company, my personal belief is you don't market cigarettes to people under the legal age to buy the product; that if you did that, that would be something to be ashamed of. That is clearly, to me, unethical.... [But] when I worked in sales, ... I never heard anybody talking about directing marketing efforts at 14-year-olds."<sup>19</sup> (pp 6486–7)

"There's one other document ... which is a mistake that Philip Morris made and it was in 1974. It was a Roper [Organization] study, a research study, where Philip Morris actually—and this is the only instance I know of—actually authorized a research company to take an ongoing piece of research that was being done among 18 and over, and in that one time actually told Roper that they were free to interview people below 18. So there's that one time out of 30 years of research...."<sup>16</sup> (p 34765)

### Counter-argument (subthemes 3D and 3E)

Rather than acting more ethically or with real contrition for past behaviours, the tobacco companies have shifted their tactics. A key change has been the industry's move away from advertising in "measured media" (television, radio, magazines, and billboards) and toward promotional activities. The data in appendix 2 indicate how radical this shift has been over the past three decades: from 82% of cigarette marketing expenditures for advertising in measured media in 1970 to 99% of marketing expenditures for promotions in 2003.<sup>1</sup> Price discounts now account for the overwhelming majority of cigarette advertising and promotional expenditures—63.2% in 2002 and 71.4% in 2003 (appendix 4)—a development very relevant to youth, who are more price sensitive in cigarette purchasing than are adults.

Much of this promotional activity has occurred in convenience stores, where about 60% of all cigarettes are sold in the United States.<sup>61–62</sup> In a ranking of the top 10 in-store product categories for the convenience store industry (in terms of consumer sales, excluding gasoline), cigarettes and "other tobacco" (cigars, smokeless tobacco, and loose tobacco) ranked number 1 and number 5, respectively, in 2005.<sup>63</sup> These two categories accounted for 34.5% and 2.8% of convenience stores' in-store sales, respectively, in 2003.<sup>62</sup> This connection between convenience stores and cigarette sales and promotions is particularly germane to the question of industry contrition because the industry has had a longstanding interest in using point-of-purchase advertising and promotion in convenience stores as a means of reaching youth. For example, a 1974 RJR strategic plan<sup>56</sup> included a focus on outlets such as convenience stores to reach the 14- to 24-year-old market:

"[P]rograms have been developed to reach young adults [defined in the document as 14- to 24-year-olds] where they work, play and where they purchase their cigarettes. *Free-on-package trial inducement promotions are being used in high traffic, young adult package outlets such as convenience stores.... We will have permanent counter displays in 35,000 outlets catering to young adult package purchases.*" (emphasis added)



It is not hard to understand tobacco companies' interest in convenience stores: nationally, three out of four teenagers shop at a convenience store at least once a week, staying an average of 10 minutes per visit (twice as long as adults). One-third of teenagers stop in a convenience store at least two or three times a week.<sup>64</sup>

Research has demonstrated the effects of tobacco promotions in the retail environment on youth. In a national study, Wakefield *et al* found that the cigarette brand preferences of more than 3000 students (in grades 9–12) who smoked correlated with the brands most heavily advertised in the convenience stores within a one-mile radius of their schools.<sup>65</sup> In a study employing an experimental design, eighth- and ninth-graders exposed to photos of a convenience store that was dominated by tobacco advertising perceived easier access to cigarettes both in the pictured store and others in their neighbourhood, relative to the youths who saw photos of the store without such advertising.<sup>66</sup>

Also bearing on the question of industry contrition is research showing the continued or enhanced exposure of youth to tobacco advertising and promotion after the MSA. The sheer volume of tobacco advertising and promotion ensures that youth will continue to be exposed (as documented below). Total cigarette advertising and promotional expenditures more than doubled from \$6.6 billion in 1997, before the 1998 MSA,<sup>2</sup> to \$15.5 billion in 2003 (appendix 1).<sup>1</sup>

Hamilton and colleagues studied cigarette advertising in 19 magazines in which at least 15% of readers are youth under age 18 years. They found that cigarette advertising expenditures in these magazines increased dramatically after implementation of the MSA, and then fell dramatically after the increase was reported prominently in the news media.<sup>67</sup>

King and Siegel reported data on advertising expenditures for 15 different cigarette brands advertised in a total of 38 magazines, both before and after the MSA. They classified cigarette brands as “youth brands” if they were smoked by more than 5% of the smokers in grades 8, 10, and 12 in 1998. They classified magazines as “youth oriented” if at least 15% of their readers or at least two million of their readers were 12–17 years old. The investigators found that expenditures on advertising of youth brands in youth-oriented magazines increased by 3.7% between 1995 (\$56.4 million) and 1998 (\$58.5 million)—that is, before the MSA—but increased by 15.2% to \$67.4 million in 1999 (after the MSA). Expenditures then fell to a level slightly higher than the pre-MSA level in 2000 (\$59.6 million).<sup>68</sup>

The Massachusetts Department of Public Health studied advertising for smokeless tobacco products before and after the Smokeless Tobacco Master Settlement Agreement (STMSA) in 12 “youth magazines” (those with at least 15% youth readership or more than two million youth readers). The agency found that smokeless tobacco manufacturers increased their advertising in youth magazines by 136% after the STMSA, from \$4.7 million in 1997 to \$11.1 million in 2001. The increase was 161% (from \$3.6 million to \$9.4 million) for the largest smokeless tobacco manufacturer, United States Smokeless Tobacco Company (USST), the only smokeless tobacco manufacturer to have signed the STMSA (which contains the same prohibition against youth-targeted promotions as the MSA). Youth exposed to smokeless tobacco ads included 7.2 million adolescents aged 12–17 years who are readers of *Sports Illustrated* (a magazine that received an average of \$2.5 million each year in advertising revenue from USST during the post-settlement period).<sup>69</sup>

Wakefield and colleagues conducted observations of cigarette advertising and promotion at the point of sale in 3464 tobacco-selling retail stores in a total of 191 communities in the United States, during the period February to

June 1999. They found that after the MSA ban on tobacco billboards took effect in April of that year, increases occurred in the presence of tobacco sales promotions (for example, multi-pack discount offers, gift-with-purchase offers), the presence and extent of functional objects bearing cigarette brand names (for example, clocks, change mats, shopping baskets), the prevalence and extent of exterior store advertising for tobacco, and the prevalence of interior advertising of tobacco products. According to the authors, the findings suggest that the cigarette manufacturers shifted at least some of their expenditures previously spent on billboard advertising to point-of-purchase marketing following the MSA-imposed ban on billboard advertising.<sup>70</sup>

Celebucki and Diskin studied the amount of cigarette advertising visible from outside of over-the-counter tobacco retailers in Massachusetts before and after the MSA. For the 556 tobacco retailers in the study, they found significant post-MSA increases in the prevalence of exterior cigarette advertising on the buildings, windows, and doors of gas (petrol) stations and gas mini/marts. They also found that a greater amount of cigarette advertising visible from outside these retail establishments was associated with a higher occurrence of illegal sales of cigarettes to minors.<sup>71</sup>

In recent years the California Attorney General has had four successful prosecutions of RJR for violations of the MSA and state legislation on the sale and marketing of tobacco products. In the most recent prosecution, a San Diego court ruled in June 2002 that RJR unlawfully placed cigarette advertisements in magazines with a large percentage of readers aged 12–17 years.<sup>72</sup> In his ruling, the judge ordered the company to pay \$20 million in fines, and commented as follows:

“The evidence reveals that after it entered into the MSA, RJR made absolutely no changes to its advertising campaigns, failed to include the goal of reducing Youth exposure to tobacco advertising in its marketing plans and failed to take any actions to track whether or not it was meeting its professed goal of reducing Youth smoking... [S]ince the MSA was signed, RJR has exposed Youth to its tobacco advertising at levels very similar to those of targeted groups of adult smokers.”<sup>73</sup>

The recent marketing of candy-flavoured cigarettes and smokeless tobacco products provides further evidence that the industry is unchanged and unrepentant in its efforts to lure children and adolescents. These brands include a pineapple- and coconut-flavoured cigarette called “Kauai Kolada” and a citrus-flavoured cigarette called “Twista Lime” (RJR); flavoured versions of Kool cigarettes with such names as “Caribbean Chill”, “Midnight Berry”, “Mocha Taboo” and “Mintrigue” (Brown & Williamson); and smokeless tobacco products with flavours including berry blend, mint, wintergreen, apple blend, vanilla, and cherry (USST).<sup>74</sup>

#### **Theme 4: Tobacco advertising and promotion do not cause smoking initiation by youth**

Industry witnesses sometimes offer a blanket denial of tobacco advertising's influence on youth. Short of a total denial, they also argue that advertising may have a small influence on youth, but it is nothing like the powerful influence of other forces such as smoking by peers, siblings, and parents.

##### **Subtheme 4A: Advertising does not influence teens**

Q. “Do you agree with the proposition that minors are more influenced by cigarette advertising than adults are?”

A. "No, I think the consensus is that, early in life, ... minors establish a real suspicion ... about advertising, that they recognize ... why people are advertising at them, and ... they don't trust them."<sup>11</sup> (p 4444)

Q. "You don't believe that cigarette advertising promotes initiation of smoking amongst youth, do you?" A. "No, I do not." Q. "And you do not believe that cigarette advertising increases young people's risk of smoking?" ... A. "I don't believe so, no."<sup>12</sup> (p 4511-2)

#### Subtheme 4B: Other influences (peers, siblings, parents) are critical

"[I]n the influence process there are many, many vectors that come in. Advertising, of course, is one of these. But far more important are other mass media communications, books you read, what your friends do, peers do, the enormous pressure within the small group to do something or not do something."<sup>10</sup> (p 8508)

Q. [I]s this the chart that you had prepared in connection with the polling data with respect to adolescents and their self-reported reasons for smoking?" A. "Yes it is." Q. "And it shows friends smoking is the biggest single category, at 65 percent?" A. "Yes, sir." Q. "And what does it show for 'family smoked'?" A. "19 percent." ... Q. "And 'advertising' is shown at zero percent here; is that right?" A. "That is correct."<sup>11</sup> (pp 4436-7)

Q. "Joe Camel caused people to start smoking; didn't it?" ... A. "I don't believe the Camel campaign or any marketing advertising causes someone to start smoking. I believe smoking behavior is a peer influence, parental environment, social environment behavior. I don't believe somebody drives down the street who has decided not to smoke, looks at a billboard and says, 'You know, I think I'm going to start smoking, and I think it's going to be Camels.' ... And just totally ignores all of their social environment and goes off and starts smoking because of an ad on a billboard or in a magazine. I just don't believe that."<sup>19</sup> (pp 6565-6)

#### Counter-argument (subthemes 4A and 4B)

The US Surgeon General, the IOM, and the FDA, respectively, have concluded that cigarette advertising and teenage smoking are linked:

"A substantial and growing body of scientific literature ... offer(s) a compelling argument for the mediated relationship of cigarette advertising and adolescent smoking.... Cigarette advertising appears to affect young people's perceptions of the pervasiveness, image, and function of smoking. Since misperceptions in these areas constitute psychosocial risk factors for the initiation of smoking, cigarette advertising appears to increase young people's risk of smoking."<sup>3</sup> (pp 188, 195)

"[T]he substantial convergent evidence that advertising and promotion increases tobacco use by youths is impressive.... The question is not, 'Are advertising and promotion the causes of youth initiation?' but rather, 'Does the preponderance of evidence suggest that features of advertising and promotion tend to encourage youths to smoke?' The answer is yes...."<sup>45</sup> (pp 130-1)

"[T]he evidence in this proceeding demonstrates that cigarette and smokeless tobacco advertising plays a

material role in the decision of children and adolescents under the age of 18 to engage in tobacco use behavior. It therefore establishes that the harm from this advertising is real."<sup>44</sup> (p 44489)

These conclusions were based on several lines of evidence, including: (1) studies documenting youth exposure to tobacco advertising and promotion; (2) studies involving experimental manipulation of exposure to cigarette marketing; (3) research showing associations between cigarette advertising and brand preference among youth; and (4) cross-sectional and longitudinal studies that have found that smoking status and smoking initiation among youth are correlated with awareness, recognition, and approval of tobacco advertisements and promotions; exposure to tobacco advertisements and promotions; "receptivity" to tobacco advertising and promotion; receipt or ownership of tobacco promotional items; and a feeling that cigarette ads make them want to smoke a cigarette.<sup>60 66 75-81</sup>

Cochrane Collaboration investigators reviewed nine longitudinal studies of the effects of tobacco advertising and promotion on non-smoking adolescents' future smoking behaviour. Their conclusion was:

"Longitudinal studies consistently suggest that exposure to tobacco advertising and promotion is associated with the likelihood that adolescents will start to smoke. Based on the strength of this association, the consistency of findings across numerous observational studies, temporality of exposure and smoking behaviours observed, as well as the theoretical plausibility regarding the impact of advertising, we conclude that tobacco advertising and promotion increases the likelihood that adolescents will start to smoke."<sup>5</sup>

With regard to subtheme 4B, advertising, including tobacco advertising, works *in conjunction with and through peer influence*. To suggest that it is *either* advertising or peers/sibling/parents that influence youth is to set up a straw man. Advertising does not work simplistically by influencing people so that they respond in a robot-like manner to its "commands", as suggested mockingly by RJR's Schindler<sup>19</sup> (pp 6565-6). Rather, advertising and inter-personal influences operate synergistically, as indicated in an experiment conducted by Pechmann and Knight.<sup>80</sup> In their study, a large group of teenage subjects were shown a video of a group of adolescents smoking. A smaller subset of the teenage subjects were first exposed to tobacco advertisements, and it was this subset that later came to view the adolescent smokers as "cooler, sexier, etc" and also expressed a stronger intention to smoke in the future. That was not the case for the subset of teens who saw the group of adolescents smoking but were *not* first exposed to tobacco advertising. Viewing the advertising first served to shape or "prime" the teenagers so that they viewed both smokers and smoking more positively.

It has also been observed that to the extent studies document a relationship between having friends who smoke and smoking, this is reflective of peer *selection* and not peer *pressure*. Susceptible teens peruse their environment and identify peers with whom they would like to "hang out". As noted in the study by Pechmann and Knight,<sup>80</sup> for a significant subset of youths, the images shaped by tobacco advertising serve to enhance their views of smokers and thus they gravitate to these peers. Contrary to cigarette companies' assertions, this is not a situation in which a group of smoking teenagers approach a lone peer and pressure him/her to begin smoking.<sup>82 83</sup> Tobacco companies have developed advertising themes that make it evident that they understand this

adolescent dynamic quite well. An RJR document<sup>84</sup> appears to address the interplay between cigarette advertising and peer acceptance among teens:

“CAMEL advertising will be directed toward using peer acceptance/influence to provide the motivation for target smokers to select CAMEL. Specifically, advertising will be developed with the objective of convincing target smokers that by selecting CAMEL as their usual brand they will project an image that will enhance their acceptance among their peers.”

Furthermore, tobacco companies' use of “viral marketing” (marketing through street graffiti, parties, websites, peer conversations, and other covert means) demonstrates how advertising works *through* peer-to-peer influence.<sup>85–87</sup>

As noted above, Claude Martin, in his testimony for the tobacco industry, cited polling data indicating that adolescents do not acknowledge advertising as a reason for smoking<sup>11</sup> (pp 4436–7). However, the 1989 Surgeon General's report pointed out that in the case of polls on reasons for smoking, “conscious response to advertising is deemed to be a poor index of actual response”<sup>77</sup> (p 505).

### **Theme 5: Tobacco companies and the industry adhere closely to relevant laws, regulations, and industry voluntary codes**

Subtheme 5A: Our company (industry) works cooperatively with government

“When we became aware of the controversy [over the Joe Camel advertising campaign] we did many things.... [We] worked cooperatively with the Federal Trade Commission of the federal government who investigated the campaign for over three years, and whether in fact it did start kids to smoke or not. We provided our internal company documents. I met with all of the commissioners myself. We fully cooperated.”<sup>14</sup> (p 2779)

Subtheme 5B: The tobacco firms meet or exceed existing regulations. It's part of our corporate culture

Q. “Is that [Voluntary Cigarette Advertising and Promotion Code] a code that Philip Morris maintained in its records and followed and observed?” A. “Absolutely. I mean, it's more than a document; it's the principle and system under which we marketed.... Philip Morris on its own in recent years has added more to this.”<sup>16</sup> (p 34777)

Q. “Let me go to the last [point in Philip Morris' mission statement] ... Meet or exceed the legal and regulatory requirements that govern our products and business. Why was that important to put in your mission statement, sir?” A. “We have a product that's associated with harm. We have to make sure that we're within all the laws. And, frankly, we need to be pushing the envelope relative to regulation and legal issues, to make sure that, at a minimum, we're meeting them; but in a case like the MSA, we're exceeding them.”<sup>22</sup> (p 51)

“We believe in operating with integrity, trust and respect, both as individuals and as a company. This means we conduct ourselves within both the spirit and the letter of the law, regulations, agreements and policies that govern us. We are honest with one another and with our

stakeholders, fully disclosing all appropriate information, and not just that which supports our point of view. We have the courage to do what's right.”<sup>22</sup> (p 53)

### **Counter-argument (subthemes 5A and 5B)**

The Joe Camel campaign succeeded in boosting Camel's share of (mainly male) underage smokers from 4% in 1987 to 13% in 1993.<sup>44</sup> Any “cooperation” from RJR did not occur in time to prevent this shift, or the campaign's likely impact on overall smoking prevalence among youth (the percentage of 12th-grade boys who smoked increased from 24% to 31% during the same time period<sup>88</sup>). RJR opposed the FTC's attempts to take action against Joe Camel, challenging the evidence concerning the campaign's impact on smoking by youth.<sup>89</sup> After the company “voluntarily” retired Joe Camel in 1997, it developed other advertising campaigns for the brand that were also youth oriented.<sup>74 90</sup> Furthermore, it continued to use cartoon camels in its marketing overseas.<sup>91</sup> RJR violated the MSA's prohibition of cigarette marketing targeted to youth, and resisted efforts by the California Attorney General to limit the company's advertising in magazines with large teenage readerships, forcing the Attorney General to file suit against the company (see above).<sup>72 73</sup>

Several studies have documented poor compliance with the various versions of the Cigarette Advertising and Promotion Code,<sup>92–95</sup> as reviewed in a forthcoming National Cancer Institute monograph tentatively titled *The Role of the Media in Promoting and Discouraging Tobacco Use*. One of the code's clauses, for example, states that “No one depicted in cigarette advertising shall be or appear to be under 25 years of age”. At least three studies have shown that sizable proportions of adolescents perceive the models in many cigarette ads to be younger than 25 years.<sup>95–97</sup> In one of these studies, 55% of 597 adolescents (ages 11–17) and 54% of 1101 adults (ages 18 and older) estimated the age of the female model in a Virginia Slims ad as less than 25 years<sup>97</sup> (Virginia Slims is manufactured by Philip Morris).

The MSA occupies a “middle ground” between legislation/regulation and voluntary self-regulation, in that it is a binding agreement negotiated between the major cigarette manufacturers and 46 state attorneys general (and was driven by the companies' interest in ending the states' lawsuits against them). As noted above, RJR and other cigarette companies have violated provisions of the MSA and have shifted their marketing activities to mitigate its effects.

### **CONCLUSION**

As shown above, tobacco industry-affiliated witnesses have marshalled many arguments to deny the adverse effects of tobacco marketing activities and to portray tobacco companies as responsible corporate citizens. Effective rebuttals to these arguments exist, and plaintiffs' attorneys have, with varying degrees of success, presented them to judges and juries. Federal Judge Gladys Kessler, in an encyclopaedic decision issued on 17 August 2006 in a civil lawsuit waged against the industry by the US Department of Justice, chronicled this evidence in a lengthy section under the heading, “From the 1950s to the present, different defendants, at different times and using different methods, have intentionally marketed to young people under the age of twenty-one in order to recruit ‘replacement smokers’ to ensure the economic future of the tobacco industry.”<sup>98</sup>

A key defence strategy employed by tobacco companies appears to be to “throw a lot of mud at the wall, hoping that some of it will stick”<sup>99</sup>—in other words, to offer a multiplicity of arguments to judges and juries, in the hope that at least one of the arguments will create enough doubt in their minds to achieve a verdict for the defendants. The themes in the

## What this paper adds

Tobacco industry arguments about tobacco advertising and promotion—as they have been articulated in legislative hearings, media communications, public relations materials, and other outlets—are well known. However, no systematic review of these arguments, as presented to juries and judges in tobacco litigation, has been conducted previously.

This paper draws on litigation testimony by a sample of defence witnesses (including three academic expert witnesses, six senior executives of tobacco companies, and one industry advertising consultant) to identify themes in industry testimony on tobacco advertising and promotion. The paper also provides evidence and arguments in rebuttal to those themes.

industry's testimony on marketing contribute to that mud, and some of their arguments may seem reasonable to jurors unless refuted effectively by plaintiffs. Further research using DATTA documents could assess the extent to which the industry's arguments on marketing have been counter-balanced by evidence-based testimony from plaintiffs' witnesses.

Tobacco company defendants may face more difficulty in dismissing the public health impact of their marketing activities in the years to come, because of the Framework Convention on Tobacco Control (FCTC). Article 13 of the FCTC, the first international treaty on health, calls on each "party" to the treaty to

"recognize that a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products ... [and] in accordance with its constitution or constitutional principles, undertake a comprehensive ban on all tobacco advertising, promotion and sponsorship."<sup>100</sup>

As of 1 October 2006, 140 countries had ratified the treaty,<sup>101</sup> providing an extraordinary level of governmental recognition of the harms caused by tobacco marketing and the need for remedial action.

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To view appendices 1-4, visit the *Tobacco Control* website—<http://www.tobaccocontrol.com/> supplemental

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