UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	Civil Action
	)	No. 99-CV-02496 (GK)
Plaintiff,	)	
	)	
v.	)	Next scheduled court appearance:
	)	
PHILIP MORRIS INCORPORATED, et al.	)	April 15, 2003
	)	
Defendants.	)	
	)	

UNITED STATES' PRELIMINARY PROPOSED CONCLUSIONS OF LAW

TABLE OF CONTENTS

I

THE UNITED STATES HAS ESTABLISHED THE SUBSTANTIVE RICO OFFENSE ALLEGED IN COUNT THREE

A. Introduction

1. History of Proceedings

On September 22, 1999, the United States filed a complaint against the Cigarette Company Defendants and related entities pursuant to the Medical Care Recovery Act, 42 U.S.C. §§ 2651- 2653 (Count I), the Medicare Secondary Payer provisions of Subchapter 18 of the Social Security Act, 42 U.S.C. § 1395y(b)(2)(B)(ii) & (iii) (Count II), and the civil provisions of RICO, 18 U.S.C. §§ 1961-1968 (Counts III and IV). This action was filed: (1) under Counts One and Two, to recover the health care costs borne by the federal government for expenditures for care of individuals with certain tobacco-related illnesses; (2) to restrain the Defendants and their coconspirators from engaging in further fraudulent and unlawful conduct; and (3) to compel the Defendants to disgorge the proceeds of their unlawful conduct.

On September 28, 2000, the Court dismissed Counts One and Two of the complaint for failure to state a claim, and held that the RICO counts properly allege claims for relief. United States v. Philip Morris Inc., 116 F. Supp. 2d 131 (D.D.C. 2000). In particular, the Court held, among other matters, that the RICO counts adequately allege RICO's enterprise and pattern of racketeering activity elements. Id. at 152-54. The Court also held that the RICO counts adequately allege a basis for injunctive and other equitable relief and that disgorgement of the Defendants' ill-gotten gains was an equitable remedy available to the United States under RICO. Id. at 147-52.

Subsequently, the Court held that the Defendants were not entitled to a jury trial on the RICO counts because the RICO claims seek solely equitable relief to which a right to a jury trial does not attach. United States v. Philip Morris Inc., 2002 WL 1925881 (D.D.C. 2002). In that regard, the Court explained that the alleged RICO violations, unlike "common-law fraud [which carries a right to a jury trial]. . . do not require proof of reliance or damages or completion of the scheme to defraud." Id. at *2. Likewise, the Court held that the United States "is not required to prove that it suffered any injury as a result of Joint Defendants' conduct. Neither is the Government required to sue for damages." Id.

Rather, in government civil RICO suits to obtain equitable relief, as involved here, the United States need only prove the same elements as in a RICO criminal case. See, e.g., United States v. Local 560, Int'l Bhd. of Teamsters, 780 F. 2d 267, 284 (3d Cir. 1985); United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 812 F. Supp. 1303, 1309 (S.D.N.Y. 1993), modified on other grounds, 831 F. Supp. 167 (S.D.N.Y. 1993), aff'd sub nom. United States v. Carson, 52 F.3d 1173 (2d Cir. 1995). This action is similar to numerous other civil RICO suits brought by the United States in which courts have granted equitable relief, including permanent injunctions against future racketeering activity, disgorgement, and court-appointed officers to monitor and implement the relief granted, as sought here.[1]

[1]The United States has brought approximately 19 civil RICO suits against labor unions and related entities and at least another 17 civil RICO suits against other defendants to obtain equitable relief. These lawsuits have generated numerous reported decisions. For summaries of these civil RICO cases brought by the United States and the leading decisions ensuing from them, see Racketeer Influenced and Corrupt Organizations (RICO): A Manual For Federal Prosecutors, (United States Department of Justice, Washington, DC)(July 2000) at pp. 289-97. (Located online at http://www.usdoj.gov:80/usao/eousa/foia_reading_rom/usam/title9/rico.pdf).

2. Summary of Defendants' Scheme to Defraud and Disgorgement

Likewise, the Court finds that the United States is entitled to similar equitable relief for the reasons set forth below. As more fully explained in the Court's Findings of Fact, the Court finds that the Defendants devised an extensive scheme to defraud the public of money that they executed for nearly 50 years, which continues to this day. The Defendants carried out this massive scheme to defraud through a variety of means, including, but not limited to, causing the public dissemination of numerous false, deceptive and misleading statements that, among other things; denied that smoking causes disease and other adverse health effects; denied that cigarettes are addictive or that Defendants manipulated nicotine; denied that Defendants targeted the youth market; and fraudulently promised to sponsor independent, disinterested research into the potential adverse health effects of smoking. Contrary to the Defendants' fraudulent representations, overwhelming evidence, including Defendants' internal records and documents, conclusively establishes that the Defendants long knew the falsity of their representations.

The Defendants' fraudulent conduct is particularly pernicious because the Defendants knowingly exploited an especially vulnerable class, the "Youth-Addicted Population", i.e., every smoker regardless of age who became addicted to smoking cigarettes in their youth. The evidence establishes that the Cigarette Company Defendants well knew that their ability to continue to earn profits depended upon their acquiring youth-smokers to replace smokers who had quit smoking or died. Therefore, the Cigarette Company Defendants conducted research into young people's vulnerabilities to cigarette marketing, and knew that youths were highly susceptible to advertising, would underestimate the health risks of smoking and that once addicted to cigarettes in their youth, the vast majority of Youth-Addicted smokers are unable to

quit smoking. Indeed, 88 percent of daily smokers tried their first cigarette before they were age 18, and 70 percent of people who have ever smoked daily began smoking daily before they were 18 years old. Accordingly, the Defendants designed their advertising and other marketing practices to induce youths to begin and to continue smoking. The evidence also establishes that the Defendants' fraudulent conduct succeeded in inducing youths to become addicted to smoking. Moreover, Defendants suppressed and failed to disclose to the public evidence that smoking cigarettes causes disease and is addictive, information which is material to the decisions of persons, especially youths and their parents, whether to begin or to continue to smoke. Therefore, Defendants' fraudulent misconduct is causally related to Defendants' proceeds from the sale of cigarettes to the Youth-Addicted Population.

Consequently, the Court finds the United States is entitled to disgorgement of unlawful proceeds the Defendants obtained from the "Youth-Addicted Population". In that regard, the United States seeks disgorgement of approximately $289 billion in proceeds the Defendants unlawfully obtained during the period 1971 to 2001 from approximately 33 million Youth-Addicted smokers who were smoking more than five cigarettes a day when they became age 21 (which is a predictor of continued smoking and nicotine dependence). The Court's imposition in this case of the requested injunctive relief and disgorgement will significantly advance the salutary purposes of such relief – to deter unlawful conduct and deprive the wrongdoers of their ill-gotten gains – and hence will protect youths from the Defendants' predatory, fraudulent conduct. Therefore, as explained more fully below, the Court concludes that the requested disgorgement of $289 billion is appropriate and reasonable, especially since the United States is entitled to disgorgement of a considerably greater amount, i.e., all unlawful

proceeds Defendants' obtained from smokers from late 1953, the beginning of their RICO offenses and scheme to defraud. In short, this subset of proceeds to be disgorged – proceeds derived from the Youth-Addicted Population (as opposed to all proceeds) and from 1971 to 2001 (as opposed to 1953 to the present) – is both reasonable and appropriate.

3. Elements of the RICO Substantive Count

Count Three of the First Amended Complaint alleges that from the early 1950's and continuing up to the date of the filing of the Amended Complaint, each Defendant participated in the conduct, management and operation of the alleged Enterprise through a pattern of racketeering activity, including, but not limited to, the alleged acts of racketeering, in violation of 18 U.S.C. § 1962(c) which provides:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

To establish this violation the plaintiff, the United States, must prove each of the following elements:

1. Existence of an enterprise;
2. The enterprise was engaged in or its activities affected interstate or foreign commerce;
3. Each defendant was employed by or associated with the enterprise;
4. Each defendant conducted or participated, directly or indirectly, in the conduct of the affairs of the enterprise;
5. Each defendant committed, or aided and abetted the commission of, at least two acts of racketeering; and
6. The racketeering acts constitute a pattern of racketeering activity.

See, e.g., Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496-97 (1985); United States v. Hoyle, 122 F.3d 48, 50 (D.C. Cir. 1997)(listing elements); United States v. Starrett, 55 F.3d 1525, 1541

(11th Cir. 1995) (same); United States v. Console, 13 F.3d 641, 652-53 (3d Cir. 1993) (same); United States v. Alvarez, 860 F.2d 801, 818 (7th Cir. 1988)(collecting cases).[2]

For the reasons set forth below, this Court finds that the United States has proved each of these elements by a preponderance of the evidence, the required standard of proof under civil RICO. See, e.g., Local 560, Int'l Bhd. of Teamsters, 780 F.2d at 279 n.12 (collecting cases); Local 1804-1, Int'l Longshoremen's Ass'n, 812 F. Supp. 1303, 1309 (S.D.N.Y. 1993)(collecting cases).

4. Corporate Liability For Acts of Officers, Employees, Agents

Because a corporation may act only through its agents, a corporation may be held liable for the acts of its officers, employees, and other agents. This is true in both criminal prosecutions, see United States v. Wise, 370 U.S. 405 (1962); United States v. Najjar, 300 F.3d 466, 485 (4th Cir. 2002); United States v. Sun-Diamond Growers of California, 138 F.3d 961, 970 (D.C. Cir. 1998), aff'd, 526 U.S. 398 (1999), as well as civil cases. United States v. Brothers Constr. Co., 219 F.3d 300, 310-311 (4th Cir. 2000). See also Davis v. Mutual Life Ins. Co. of New York, 6 F.3d 367, 378-80 (6th Cir. 1993) (*respondeat superior* liability in RICO cases permissible, since "corporate principals may act only through their agents."). [3] Therefore, a

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[2] Moreover, every court that has considered the issue has held that RICO does not require any **mens rea** or scienter element beyond what the predicate offenses require. See, e.g., United States v. Baker, 63 F.3d 1478, 1492-93 (9th Cir. 1995); United States v. Blinder, 10 F.3d 1468, 1477 (9th Cir. 1993); United States v. Biasucci, 786 F.2d 504, 512-13 (2d Cir. 1986); United States v. Pepe, 747 F.2d 632, 675-76 (11th Cir. 1984); United States v. Scotto, 641 F.2d 47, 55-56 (2d Cir. 1980); United States v. Boylan, 620 F.2d 359, 361-62 (2d Cir. 1980).

[3] See also Oki Semiconductor Co. v. Wells Fargo Bank, 298 F.3d 768, 775-76 (9th Cir. 2002)("This possibility of respondeat superior liability for an employee's RICO violations encourages employers to monitor closely the activities of their employees to ensure that those

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corporation may be held liable for the statements or wrongful acts of its agents or employees when they are acting within the scope of their authority or the course of their employment, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 756 (1998); Restatement (Second) of Agency § 219 et seq., so long as the action is motivated, at least in part, to benefit the principal. Sun-Diamond Growers, 138 F.3d at 970; Local 1814, Int'l Longshoremen's Ass'n v. NLRB, 735 F.2d 1384, 1395 (D.C. Cir. 1984); Restatement (Second) of Agency § 236. Moreover, in civil actions, "there may be no need to show that the agent acted to further the principal's interests–a showing of 'apparent authority' is often enough." Sun-Diamond Growers, 138 F.3d at 970 n.9 (D.C. Cir. 1998) (citing American Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 573-74 (1982)). And, finally, even where the agent's action is beyond the original express, implied, or apparent authority, an act may be attributed to the principal if it is later ratified, either explicitly or by implication. Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386 (11th Cir. 1994); IBJ Schroder Bank & Trust Co. v. Resolution Trust Corp., 26 F.3d 370, 375 (2d Cir. 1994); Yellow Bus Lines, Inc. v. Drivers, Chauffeurs, & Helpers Local Union 639, 883 F.2d 132, 136 (D.C. Cir. 1989), rev'd in part on other grounds, 913 F.2d 948 (D.C. Cir. 1990) (en banc). The Court finds that the conduct and statements of the Defendants' agents and employees, as set forth below and in the United States' Preliminary Proposed Findings of Fact ("PFF"), may be attributed to the Defendants, which are corporate-principals.

This litigation also involves one parent corporation, Defendant Philip Morris Companies,

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[3](...continued)
employees are not engaged in racketeering. . . . It also serves to compensate the victims of racketeering activity. . . . Vicarious liability based on the doctrine of respondeat superior thereby fosters RICO's deterrent and compensatory goals.") (citations omitted).

Inc. ("Philip Morris Companies"), which, although it does not itself manufacture or distribute cigarettes, has been a parent corporation for Defendant Philip Morris Inc. since Philip Morris Companies was incorporated in 1985. Also, Defendant British American Tobacco (Investments) Limited ("BATCo") until 1979 was a parent corporation of Defendant Brown & Williamson Tobacco Corporation, as well as (at various times, including currently) a direct manufacturer of certain brands of cigarettes sold in the United States. It is important to note that both Philip Morris Companies and BATCo, independently of their subsidiaries, have directly participated in the Enterprise, in the scheme to defraud, the pattern of racketeering activity and in the conspiracy as set forth in PFF § § I, III, IV, VI and VII and infra, Sections I and II. Therefore, their liability is not dependent upon the conduct of their subsidiaries, who are also defendants in this litigation.[4]

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[4] Nevertheless, in RICO cases, a parent company can be held vicariously liable for the conduct of its subsidiary. See, e.g., In re Sumitomo Copper Litigation, 104 F. Supp. 2d 314, 325 (S.D.N.Y. 2000) (Parent company can be held vicariously liable under RICO for subsidiary's violations of Commodity Exchange Act); In re Conti Commodity Services, Inc., Securities Litigation, 733 F. Supp. 1555, 1566 (N.D. Ill. 1990), rev'd in part, 976 F.2d 1104 (7th Cir. 1992), and aff'd in part, 63 F. 3d 438 (7th Cir. 1995)(§ 1962(a) & (b)).

The Court acknowledges–for the sake of distinguishing–that there are some cases indicating that vicarious liability for a substantive RICO offense in a private civil RICO action for treble damages does not attach from a subsidiary to a parent corporation where the parent corporation is the defendant and its subsidiary the alleged enterprise. See, e.g., Lorenz v. CSX Corp., 1 F.3d 1406, 1412 (3d Cir. 1993) ("it is still theoretically possible for a parent corporation to be the defendant and its subsidiary to be the enterprise under section 1962(c). However, the plaintiff must plead facts which, if assumed to be true, would clearly show that the parent corporation played a role in the racketeering activity **which is distinct from the activities of its subsidiary**. A RICO claim under section 1962(c) is not stated where the subsidiary merely acts on behalf of, or to the benefit of, its parent."). (emphasis added). However, the Court recognizes (as have other courts) that these cases relate to the requirement that the RICO enterprise be distinct from each defendant. See Davis v. Mutual Life Ins. Co. of New York, 6 F.3d 367, 378-79 (6th Cir. 1993) (discussing limitations on vicarious liability as "firmly rooted in the non-

(continued...)

Additionally, Defendant American Tobacco Company merged into Brown & Williamson Tobacco Corporation on February 28, 1995. By its own concession, Brown & Williamson is being sued directly and as successor by merger to American. See also United States v. Alamo Bank, 880 F.2d 828 (5th Cir. 1989); Holland v. Williams Mountain Coal Co., 256 F.3d 819 (D.C. Cir. 2001). See Brown & Williamson's Answer to the Complaint, "Statement As To The American Tobacco Company", at 1-2.

B. The Defendants Established An Association-In-Fact Enterprise

1. The Governing Legal Principles

The RICO statute, 18 U.S.C. § 1961(4), provides:

> "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

Pursuant to this definition, the Supreme Court has held that an association-in-fact enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." United States v. Turkette, 452 U.S. 576, 583 (1981). The Turkette Court also explained that although the "enterprise" and "pattern of racketeering" elements of RICO are separate elements "the proof used to establish

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[4](...continued)
identity requirement" and therefore "not ... particularly instructive in the instant case, where the corporate defendant charged with vicarious liability is **separate from** the RICO 'enterprise.'"); Schofield v. First Commodity Corp. of Boston, 793 F.2d 28, 32-33 (1st Cir. 1986)("Both the language of [§1962(c)] and the articulated primary motivation behind RICO show that Congress intended to separate the enterprise from the criminal 'person' or 'persons.'"). Because in this case this Court has found that the RICO enterprise is distinct from each defendant (see infra Section I. D. 1), there is no impediment to a finding that a parent-defendant is vicariously liable for the conduct of its subsidiary, another defendant.

these separate elements may in particular cases coalesce." Id.

In accordance with Turkette, the Court of Appeals for the District of Columbia Circuit has consistently held that an association-in-fact "enterprise is established by (1) a common purpose among the participants, (2) organization, and (3) continuity," and that the enterprise need only involve "some structure to distinguish an enterprise from a mere conspiracy." United States v. Richardson, 167 F.3d 621, 625 (D.C. Cir. 1999)(citations omitted). Accord United States v. White, 116 F.3d 903, 924 & 925 n.7 (D.C. Cir. 1997) (collecting cases); United States v. Perholtz, 842 F.2d 343, 362-63 (D.C. Cir. 1988). As the District of Columbia Circuit further explained:

> It is not necessary that the enterprise . . . have any particular or formal structure but it must have sufficient organization that its members function and operated together in a coordinated manner in order to carry out the common purpose alleged.

Perholtz, 842 F.2d at 364.[5]

Establishing that the members of the enterprise operated together in a coordinated manner in furtherance of a common purpose may be proven by a wide variety of direct and circumstantial evidence including, but not limited to, inferences from the members' commission of similar racketeering acts in furtherance of a shared objective, financial ties, coordination of activities, community of interests and objectives, interlocking nature of the schemes, and overlapping

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[5] The District of Columbia Circuit has rejected views expressed in United States v. Bledsoe, 674 F.2d 647, 665-67 (8th Cir. 1983), that the plaintiff is required to prove that the enterprise has an ascertainable structure distinct from that which is inherent in the conduct of a pattern of racketeering activity and has a hierarchical structure beyond what is necessary to commit the predicate acts of racketeering. See Perholtz, 842 F.2d at 362-63. Indeed, it is particularly significant that Turkette does not require the plaintiff to prove such matters to establish an enterprise.

nature of the wrongful conduct.[6]

Moreover, the District of Columbia Circuit stated that "it is not essential that each and every person named in the indictment [as a member of the enterprise] be proven to be a part of the enterprise. The enterprise may exist even if its membership changes over time. . . or if certain defendants are found by the [fact finder] not to have been members at any time." Perholtz, 842 F.2d at 364.[7] Likewise, it is not necessary to prove "that every member of the enterprise participated in or knew about all its activities." United States v. Cagnina, 699 F.2d 915, 922 (11th Cir. 1983). Accord United States v. Hewes, 729 F.2d 1302, 1310-11 (11th Cir. 1984); United

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[6] See, e.g., United States v. Owens, 167 F.3d 739, 751 (1st Cir. 1999)(members of drug trafficking enterprise provided other members with financial assistance and coordinated transportation of drugs); Richardson, 167 F.3d at 625 ("Additional evidence of [the enterprise's] organization and continuity comes from the robberies' consistent pattern"); United States v. Davidson, 122 F.3d 531, 535 (8th Cir. 1997)("The length of these associations, the number and variety of crimes the group jointly committed, and Davidson's financial support of his underlings demonstrates an ongoing association with a common purpose to reap the economic rewards flowing from the crimes, rather than a series of ad hoc relationships"); Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 263-64 (2d Cir. 1995)(jury could infer that two corporations engaged in manufacturing electromagnetic locks were members of an association-in-fact enterprise from their pattern of disseminating false and deceptive statements about a competitor's electromagnetic locks to obtain business); United States v. Blinder, 10 F.3d 1468, 1470 (9th Cir. 1993)("The essence of the enterprise. . . was the identical means by which the constituent blind pool companies were formed and taken public through Blinder Robinson"); Perholtz, 842 F.2d at 355 ("The interlocking nature of the schemes and the overlapping nature of the wrongdoing provides sufficient evidence for the jury to conclude that this was a single enterprise"); United States v. Qaoud, 777 F.2d 1105, 1116-17 (6th Cir. 1985)(holding that the jury could have inferred the existence of the alleged association-in-fact enterprise from the "coordinated nature of the defendants' activity" and that the defendants' racketeering acts were facilitated by their nexus to the enterprise); United States v. Griffin, 660 F.2d 996, 1000 (4th Cir. 1981)("Proof of the existence of an associated - in - fact enterprise requires proof of a 'common purpose' animating its associates"); United States v. Elliott, 571 F.2d 880, 898 (5th Cir. 1978)("A jury is entitled to infer the existence of an enterprise on the basis of largely or wholly circumstantial evidence.").

[7] Accord White, 116 F.3d at 925 n.7; United States v. Mauro, 80 F.3d 73, 77 (2d Cir. 1996); United States v. Church, 955 F.2d 688, 698 (11th Cir. 1992); United States v. Elliott, 571 F.2d 880, 898 n.18 (5th Cir. 1978).

States v. Rastelli, 870 F.2d 822, 827-28 (2d Cir. 1989).

2. The Defendants Formed an Enterprise

In a previous decision in this litigation, this Court held that under Turkette, Richardson, and Perholtz, supra, the Complaint here adequately alleges an association-in-fact enterprise having the requisite: "(1) common purpose among the participants, (2) organization and (3) continuity", stating that:

> [T]he Complaint alleges that Defendants decided on a joint objective to "preserve and expand the market for cigarettes and to maximize" their profits and "agreed that the strategy they were implementing was a 'long-term one' that required defendants to act in concert with each other on the current health controversy, as well as on issues that would face them in the future. Compl. at ¶¶ 33-34.

United States v. Philip Morris Inc., 116 F. Supp. 2d 131, 152-53 (D.D.C. 2000).

The Court finds that the Defendants in this action established an association-in-fact enterprise as alleged. See PFF § I.[8] In order to further the common purposes of its members, the Enterprise had a discernible organization and functioned as a continuing unit beginning in late 1953 and continuing for decades. First, the Defendants formed an association-in-fact enterprise to advance their principal common goals: to preserve and enhance their profits and to avoid adverse liability verdicts in litigation in the face of the growing body of scientific and medical

[8] The First Amended Complaint alleges (¶ 173) that the Enterprise is a group of business entities and individuals associated-in-fact consisting of Defendants Philip Morris Inc. ("Philip Morris"), R.J. Reynolds Tobacco Company ("Reynolds" or "RJR"), Brown & Williamson Tobacco Corporation ("Brown & Williamson" or "B&W"), Lorillard Tobacco Company, Inc. ("Lorillard"), Liggett Group, Inc. ("Liggett"), American Tobacco Company ("American"), Philip Morris Companies, Inc. ("Philip Morris Companies"), British American Tobacco (Investments) Ltd., formerly known as British-American Tobacco Company Limited ("BATCo"), Council For Tobacco Research–U.S.A., Inc. ("CTR"), and the Tobacco Institute, Inc. ("TI" or "Tobacco Institute"), and other entities and persons, including agents and employees of the Defendants.

evidence about the adverse health effects and addictiveness of smoking. In furtherance of this primary objective, the Enterprise developed and executed a scheme to defraud the public that was designed to preserve and enhance the market for cigarettes. Second, the Enterprise operated through both formal and informal structures. For example, certain Defendants organized themselves through jointly funded and directed entities, such as the Defendants Council for Tobacco Research and the Tobacco Institute, as well as various foreign organizations, committees and conferences, to further the execution of the scheme to defraud and to maintain a united front. See PFF § I. A-I; § II. I and J. In addition, Defendants entered formal and informal agreements intended to ensure adherence to achieve their shared aims. See PFF § I. I and J. Third, the United States has proved that the Defendants' association-in fact Enterprise has possessed the requisite continuity. The evidence is overwhelming that myriad formal and informal mechanisms for joint communication and action have existed since at least late 1953, and that Defendants have indeed participated in and utilized such mechanisms to function as a continuing unit throughout the relevant time period. Moreover, although the plaintiff is not required to prove that the enterprise had an ascertainable structure distinct from that which is inherent in, and beyond what is necessary to commit, the charged predicate acts, this Court finds that the United States has established such a structure to the Enterprise. See PFF § I. A.

a. Members of the Enterprise Had a Common Purpose

The central shared objectives of Defendants have been to maximize their profits by acting in concert to preserve and enhance the market for cigarettes through an overarching scheme to defraud the public and to avoid legal liability that could result in large damage awards and increased public recognition of the harmful effects of smoking. Indeed, documents recounting

the December 1953 meeting at the Plaza Hotel attended by the Chief Executive Officers for Defendants Philip Morris, RJR, B&W, Lorillard, and American – a meeting called by American's president to discuss an "industry response" to several research studies linking cigarette smoking to lung cancer -- report that the executives agreed to jointly sponsor a public relations campaign

> which is positive in nature and is entirely "pro-cigarettes" . . . . [The executives] are also emphatic in saying that the entire activity is a long-term, continuing program, since they feel that the problem is one of promoting cigarettes and protecting them from these and other attacks that may be expected in the future. Each of the company presidents attending emphasized the fact that they consider the program to be a long-term one.

See PFF § I. A, ¶¶ 6-11. Over the next several decades, that common goal remained central to the actions of Defendants, who, both individually and collectively, uniformly denied: that smoking had been proven as a cause of cancer and other serious diseases, that smoking was addictive, that the industry marketed its products to youths, and the Defendants falsely promised that the industry was funding independent research to discover the health effects of smoking.[9] The United States has shown that the Defendant members of the Enterprise who were not physically present at the Plaza Hotel meeting – including Liggett, Philip Morris Companies

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[9] See, e.g., May 1, 1972 memo from TI's Fred Panzer to TI President Horace Kornegay:

> For nearly twenty years, this industry has employed a single strategy to defend itself on three major fronts — litigation, politics, and public opinion . . . [a strategy] consisting of — creating doubt about the health charge without actually denying it — advocating the public's right to smoke, without actually urging them to take up the practice — encouraging objective scientific research as the only way to resolve the question of the health hazard. * * * In the cigarette controversy, the public — especially those who are present and potential supporters (e.g., tobacco state congressmen and heavy smokers) — must perceive, understand, and believe in evidence to sustain their opinions that smoking may not be the causal factor. As things stand, we supply them with too little in the way of ready-made credible alternatives. See PFF § I. C.

(which was formed in 1985), BATCo, TI (which was formed in 1958), and CTR (which was created as the Tobacco Industry Research Committee in the wake of that December 1953 meeting) – shared the common goals of the Enterprise and acted in furtherance of those goals. See PFF §§ I, III and IV.

Moreover, in furtherance of the central objectives of the Enterprise, all Defendants endeavored to conceal or suppress information and documents or to destroy documents to avoid adverse liability in litigation involving smoking and health issues and to prevent discovery of information that constituted, or could lead to, evidence of a link between smoking cigarettes and adverse health consequences and addictiveness. See PFF § I. K. and § IV. F.

b. The Enterprise Has Utilized Both Formal and Informal Organization

The United States has also presented ample evidence that the Enterprise had a discernible organization. Each Defendant is a legally distinct corporation. Two Defendant members of the Enterprise – TIRC/CTR and TI – were jointly formed and funded by other Defendant - members of the Enterprise to help the industry execute the strategy devised to achieve their shared goal.[10] TIRC/CTR served as the research sponsorship arm for the Enterprise. It sponsored and funded research and studies that attacked scientific studies demonstrating the harmful effects of smoking

[10] In January 1954, Defendants Philip Morris, R.J. Reynolds, B&W, Lorillard and American founded TIRC, which changed its name to CTR in 1964. Liggett was a member of CTR from 1964 to 1969, and even when it was not a member, Liggett made contributions to CTR's Special Projects fund from 1966 through 1975 and to CTR's Literature Retrieval Division from approximately 1971 through 1983. See PFF § I. B, ¶¶ 14-30 and § II. J, ¶¶ 68-70. These six Defendants contributed over $500 million to fund TIRC/CTR. See PFF § II. J, ¶¶ 68-70.

In January 1958, Defendants Philip Morris, R.J. Reynolds, B&W, Lorillard, American and Liggett and the American Snuff Company, Larus & Brother Co., Inc. and Stephano Brothers, Inc. founded TI. See PFF § I.C, ¶¶ 74-75. These six Defendants, thereafter, contributed over $618 million to fund TI. See PFF § II. I, ¶ 68-70.

cigarettes and did not address the fundamental questions regarding the adverse health effects of smoking. Moreover, attorneys for Defendants also created a mechanism to fund "Special Projects" through CTR – research projects conceived and directed by industry representatives, including industry lawyers, to support scientists who had shown a willingness and ability to generate information and provide testimony that could bolster the industry's litigation defenses before courts and governmental bodies. See PFF § I. B and C and § IV. A. Similarly, from 1958 to 1998, TI actively designed and wrote press releases, advertisements, pamphlets, and testimony that advanced the Defendants' jointly formulated positions on smoking and health issues, including denying that smoking cigarettes caused diseases and was addictive, and supporting the false claim that the link between smoking cigarettes and adverse health effects was an "open question". TI also caused such materials to be publicly disseminated and published. See PFF § I. C and § IV.

Defendants used numerous other means – including structures of varying degrees of formality (e.g., the Committee of Counsel, the Ad Hoc Committee, research and scientific subcommittees under the aegis of CTR and TI, the Center for Indoor Air Research, and other industry organizations both in the United States and abroad) and direct communications between and among members of the Enterprise – to coordinate their activities, to ensure continued adherence to the joint strategy, and to enable the Enterprise to respond as new threats to the industry arose. See PFF § I. A-H.

Finally, Defendants employed less formal mechanisms to organize the affairs of the Enterprise. For example, documents prepared by high-level scientists at both Defendants Philip Morris and RJR describe "Gentlemen's Agreements" that existed among the Cigarette Company

Defendants (except Philip Morris Companies) to share any innovation that could lead to the development of "an essentially 'safe' cigarette" and not to use intact animals in-house in bio-medical research. See PFF § I. J and § IV. G.

c. The Enterprise Has Functioned as a Continuous Unit

The evidence also convincingly demonstrates that the Enterprise has functioned as a continuous unit from December 1953, when the executives of five Defendants (Philip Morris, RJR, B&W, Lorillard and American) agreed to launch their long-term public relations campaign, and jointly announce both the industry's position that smoking had not been proven a cause of disease, and the formation of TIRC to investigate the health effects of smoking. TIRC was founded in January 1954, changed its name to CTR in 1963, and existed through 1998, when certain Defendants entered the Master Settlement Agreement ("MSA") in settlement of 46 lawsuits brought by States' Attorneys General. See PFF § I. B and G and supra n.10. Likewise, in January 1958, Defendants Philip Morris, R.J. Reynolds, Lorillard, American and Liggett founded TI, and like CTR it functioned as an industry-supported body acting in furtherance of the aims of the Enterprise continuously from its founding until 1998, when as part of the MSA, CTR and TI were required to disband. See PFF § I. C and G, § II. I and J and § IV. A wealth of evidence shows that throughout the period covered by the United States' Complaint, Defendants not only communicated directly with one another on matters relevant to the aims of the Enterprise, but also created, supported, and controlled a web of organizations, committees, and other bodies that facilitated coordinated behavior. See PFF § I.

In sum, the evidence establishes that all the Defendants, which are members of the Enterprise, were entities having separate structures that worked together. Specifically, they

worked together to coordinate significant activities over 45 years through TIRC/CTR, TI, and other entities to achieve shared objectives, including their primary goals of maximizing their profits by preserving and expanding the market for cigarettes and avoiding liability in smoking and health cases through a joint strategy of deceiving the public that the link between smoking cigarettes and adverse health effects was an "open question" and that cigarettes were not addictive. Pursuant to this joint strategy, the Cigarette Company Defendants caused Defendants CTR and TI to carry out numerous racketeering acts at the same time as the Cigarette Company Defendants also committed numerous parallel racketeering acts, all in furtherance of the Enterprise's primary objective and other shared objectives. Thus, the evidence shows the interlocking nature of the scheme to defraud, the overlapping nature of the Defendants' wrongful conduct, and that this Enterprise functioned as a continuous unit from its inception. In far less compelling circumstances than those present here, courts have found the existence of an association-in-fact enterprise.[11]

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[11] See, e.g., United Health Care Corp. v. American Trade Ins. Co., 88 F.3d 563, 570 (8th Cir. 1996)("This association of corporations exhibited continuity in both structure and personnel in its insurance sales and marketing activities. . . Further, the record shows that the enterprise engaged in some legitimate functions and maintained a discrete existence beyond that necessary to perform acts of mail and wire fraud"); Securitron Magnalock Corp., 65 F.3d at 263-64 (association-in-fact enterprise established by evidence that two corporations and an individual tied to both, engaged in manufacturing electromagnetic locks, made similar false and deceptive statements about a competitor's electromagnetic locks to obtain business); Perholtz, 842 F.2d at 355 ("[a] reasonable juror could conclude from the evidence that the members of the enterprise were all linked together by a network of contracts, transactions and pay-offs orchestrated and organized by defendant Perholtz with the knowing and willful participation and assistance of others. The interlocking nature of the schemes and the overlapping nature of the wrongdoing provides sufficient evidence for the jury to conclude that this was a single enterprise that started with the alleged conspiracy of Perholtz, Jackson and Gentile and added or dropped members over time as the scheme became more complex and expansive."); United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 812 F. Supp. 1303, 1310-15 (S.D.N.Y. 1993)(association-in-fact

(continued...)

C. The Evidence Establishes That the Alleged RICO Enterprise Is Engaged in and Its Activities Affect Interstate and Foreign Commerce

1. 18 U.S.C. §§ 1962(c) and (d) require the plaintiff to prove that the alleged "enterprise engaged in, or the activities of which affect[ed], interstate or foreign commerce." The courts of appeals uniformly have held that to satisfy this element, the plaintiff is not required to prove that each defendant or each member of the enterprise was engaged in, or affected, interstate or foreign commerce; rather, it is sufficient that the enterprise engaged in, or its activities considered in their entirety affected, interstate or foreign commerce, and that this requirement may be satisfied by evidence of the enterprise's members' individual nexus to interstate or foreign commerce.[12]

Moreover, when the enterprise "engaged in" interstate or foreign commerce, it is not necessary to prove that the enterprise's activities "affected" interstate or foreign commerce. For example, in United States v. Robertson, 514 U.S. 669 (1995), the defendant was convicted of a

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[11](...continued)
enterprise consisting of local union, employers, union officials, and members of La Cosa Nostra established by evidence that the members of the enterprise coordinated activities to control an "integrated" market on the waterfronts in the Port of New York and New Jersey), modified on other grounds, 831 F. Supp. 167 (S.D.N.Y. 1993), aff'd sub nom. United States v. Carson, 52 F.3d 1173 (2d Cir. 1995); Mitland Raleigh-Durham v. Myers, 807 F. Supp. 1025, 1055 (S.D.N.Y. 1992) (association-in-fact enterprise consisting of an individual and several limited partnerships that functioned as a continuing unit "with the purpose of defrauding plaintiffs and continuing such fraudulent activities through the continued fraudulent management" of the limited partnerships). See also cases cited supra n. 6.

[12] See, e.g., United States v. Farmer, 924 F.2d 647, 651 (7th Cir. 1991); United States v. Norton, 867 F.2d 1354, 1359 (11th Cir. 1989)(collecting cases); United States v. Doherty, 867 F.2d 47, 68 (1st Cir. 1989); United States v. Muskovsky, 863 F.2d 1319, 1325 (7th Cir. 1988); United States v. Qaoud, 777 F.2d 1105, 1116-17 (6th Cir. 1985); United States v. Conn, 769 F.2d 420, 423-24 (7th Cir. 1985); United States v. Bagnariol, 665 F.2d 877, 892-93 (9th Cir. 1981); United States v. Long, 651 F.2d 239, 241-42 (4th Cir. 1981); United States v. Stratton, 649 F.2d 1066, 1075 (5th Cir. 1981); United States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979). See also cases cited infra n. 15.

RICO violation for investing proceeds of racketeering activity in an enterprise "which is engaged in, or the activities of which affect, interstate or foreign commerce." See 18 U.S.C. § 1962(a). The Supreme Court held that the government established sufficient evidence that the enterprise, a gold mine located in Alaska, "engaged in" interstate commerce by evidence that: (1) some of the $100,000 in equipment used in the mine's operation was purchased in California and transported to Alaska; (2) "on more than one occasion, [defendant] Robertson sought workers from out of state and brought them to Alaska to work in the mine"; and (3) "Robertson, the mine's sole proprietor, took $30,000 worth of gold, or 15% of the mine's total output, with him out of the state." Id. at 671. The Court added that "a corporation is generally 'engaged in commerce' when it is itself directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce." Id. at 672 (citations and internal quotations ommitted).

Because the Supreme Court found that the evidence was sufficient to establish that the enterprise was "engaged in" interstate commerce, it ruled that it need not consider "whether the activities of the [enterprise] 'affected' interstate commerce." Id. at 671.[13]

Here, undisputed evidence establishes that each of the Cigarette Company Defendants, that are members of the alleged RICO Enterprise, has been directly engaged in the manufacturing and sale of billions of dollars worth of cigarettes throughout the United States and in foreign countries for many years. For example, each of the Cigarette Company Defendants stipulated that from 1953 to the present it has been engaged in, and its activities affect, interstate and foreign commerce within the meaning of 18 U.S.C. § 1962 (c) and (d). See PFF § II. Moreover,

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[13] See also United States v. Thomas, 114 F.3d 228, 253 (D.C. Cir. 1997)(noting that the jurisdictional element of 18 U.S.C. § 1962(c) may be satisfied by alternative evidence that either the enterprise was "engaged in" **or** its activities "affect interstate or foreign commerce.").

the relevant Defendants' financial reports establish that the Cigarette Company Defendants from 1954 through 2001 received approximately one trillion dollars in revenue in interstate and foreign commerce. See PFF Appendix E (which contains a chart of Defendants' revenues from 1954 through 2001). For the year 2001 alone, the Cigarette Company Defendants reported the following revenues from the sale of goods in interstate commerce (Id.):

DEFENDANT	TOTAL REVENUES IN BILLIONS OF DOLLARS	TOTAL REVENUES FROM SALES OF CIGARETTES
Philip Morris Companies, Inc.	$89.92	$51.37
Philip Morris Inc.	$24.78	$24.78
R.J. Reynolds	$8.59	$8.59
Lorillard	$4.53	$4.53
Liggett	$0.73	$0.73
Brown and Williamson (1999) (Latest data available)	$5.02	$5.02
BATCo (1999) (Latest data available)	£0.007 B (est. $.011 B)	£0.007 B (est. $.011 B)

In addition, during the relevant time period since 1954, each of the Cigarette Company Defendants purchased billions of dollars of goods produced in interstate commerce, and had thousands of employees located in plants and offices in numerous states. See PFF § II. One Defendant, Philip Morris Companies, calls itself "the largest consumer package goods company on earth." See PFF § II, ¶ 6. Another Defendant, BATCo, is based in London but markets its cigarettes throughout much of the United States. See PFF § II, ¶¶ 46-47.

Similarly, during the period 1954 to 1998, Defendants CTR and TI each received over $500 million in funding in interstate commerce via the interstate banking system from various Cigarette Company Defendants, some of which are located in different states from CTR and TI. See PFF § II, ¶¶ 68-70 and 75-77. Moreover, during that time period CTR funded millions of dollars of research projects in interstate commerce, which were conducted by researchers and institutions in various states and countries, and the results were published in periodicals and other venues throughout the United States and in foreign countries. See PFF § II, ¶¶ 76-81. Similarly, TI issued numerous press releases and funded numerous public relations advertisements which were disseminated in interstate commerce throughout the United States in various newspapers, magazines, periodicals and other venues. See PFF § II, ¶¶ 71-72.

Under Robertson, the foregoing undisputed evidence overwhelmingly establishes that the alleged RICO Enterprise was "engaged in" interstate or foreign commerce, and hence it is not necessary to establish that the Enterprise's activities "affected" interstate or foreign commerce.

2. In any event, the above-referenced evidence also establishes that the alleged Enterprise "affected" interstate or foreign commerce. In that regard, every court of appeals that has decided the issue has held that the plaintiff is only required to prove that the activities of the RICO enterprise, viewed in their entirety, had a "de minimis" effect on interstate or foreign commerce.[14] The foregoing evidence which establishes that the alleged RICO Enterprise was "engaged in" interstate commerce also establishes that the activities of the Enterprise "affected"

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[14] See, e.g., United States v. Marino, 277 F.3d 11, 34-35 (1st Cir. 2002); United States v. Riddle, 249 F.3d 529, 537 (6th Cir. 2001); De Falco v. Bernas, 244 F.3d 286, 309 (2d Cir. 2001); United States v. Frega, 179 F.3d 793, 800-801 (9th Cir. 1999); United States v. White, 116 F.3d 903, 925 & n.8 (D.C. Cir. 1997); United States v. Beasley, 72 F.3d 1518, 1526 (11th Cir. 1996); Farmer, 924 F.2d at 651; Muskovsky, 863 F.2d at 1325.

interstate or foreign commerce.[15] Indeed, Congress has explicitly recognized that the activities of tobacco companies substantially affects interstate and foreign commerce. See 7 U.S.C. § 1311(a): "The marketing of tobacco constitutes one of the great basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point. . . . Tobacco produced for market is sold on a Nation-wide market and, with its products,

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[15] See, e.g., Riddle, 249 F.3d at 536-38 (Ohio based association-in-fact enterprise affected interstate commerce in that some members of the enterprise purchased lottery tickets from Pennsylvania to protect losses in an illegal gambling business, some members sold in Pennsylvania a ring stolen in Ohio, and some members extorted money from a victim who sold fireworks in New York); United States v. Feliciano, 223 F.3d 102, 107, 118-19 (2d Cir. 2000)(a Connecticut association-in-fact enterprise affected interstate commerce where members sold cocaine and heroin locally in Connecticut); United States v. Thomas, 114 F.3d 228, 253 (D.C. Cir. 1997)(association-in-fact enterprise which distributed drugs in the District of Columbia affected interstate commerce by purchasing millions of dollars of cocaine from persons in New York and California); United States v. Beasley, 72 F.3d 1518, 1526-27 (11th Cir. 1996)(enterprise consisting of a religious cult affected interstate and foreign commerce by distributing publications and tapes in various states and foreign countries); United States v. Maloney, 71 F.3d 645, 663-65 (7th Cir. 1995)(enterprise consisting of a county court affected interstate commerce "through its purchase of law books and computer equipment"); United States v. Norton, 867 F.2d 1354, 1359 (11th Cir. 1989)(enterprise consisting of the Laborers' International Union and its subordinate locals in various states, representing thousands of employees in the building and construction industries, affected interstate commerce); Muskovsky, 863 F.2d at 1325 & n.5 (enterprise consisting of a night club in Illinois affected interstate commerce by buying plastic cups and napkins from companies located outside Illinois and natural gas produced in six states other than Illinois); United States v. Allen, 656 F.2d 964, 964 (4th Cir. 1981)("the supplies used in [one defendant's] bookmaking operations which originated outside of Maryland provided a sufficient nexus between the enterprise and interstate commerce"); United States v. Altomore, 625 F.2d 5, 7-8 & n.8 (4th Cir. 1980)(sufficient evidence that the enterprise, a West Virginia prosecutor's office, affected interstate commerce where "interstate telephone calls regularly were placed from the prosecutor's office, that certain of the supplies and materials purchased and used by the prosecutor's office had their origins outside of West Virginia, and that persons who were not citizens or residents of the state were involved in investigations and litigation conducted by the prosecutor's office."); United States v. Parness, 503 F.2d 430, 439 n.11 (2d Cir. 1974)("We reject out of hand the claim that the activities of Hotel Corp. [a foreign corporation in St. Maarten] did not have the requisite effect on interstate or foreign commerce. It was owned by Goberman, an American citizen. It was financed by Pennsylvania banks and Massachusetts businessmen. It had numerous domestic creditors. It served primarily American tourists. And its accounts were payable in U.S. dollars to Olympic, a New Jersey corporation.").

moves almost wholly in interstate and foreign commerce from the producer to the ultimate consumer."

Furthermore, in the execution of their fraudulent scheme, the Defendants employed the mails and wires, which are instrumentalities of interstate commerce. See PFF § V. This proof alone is sufficient to demonstrate the requisite nexus to interstate commerce. See, e.g., Cadle Co. v. Schultz, 779 F. Supp. 392, 397-98 (N.D. Tex. 1991) ("A plaintiff who alleges that the defendant used an instrumentality of interstate commerce, the United States postal service, to execute the defendant's fraudulent scheme sufficiently has alleged such a nexus."); State Farm Mutual Auto Ins. Co. v. Rosenfield, 683 F. Supp. 106, 109 n.9 (E.D. Pa. 1988) ("The nexus may be demonstrated merely by proving that defendants used an instrumentality of interstate commerce to execute their fraudulent scheme. Raskin used the United States mails in perpetrating the scheme to defraud." (citation omitted)); see also R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1353 (5th Cir. 1985).

To be sure, the evidence that the Defendant-members of the alleged RICO Enterprise since 1954 have bought and sold literally over one trillion dollars of goods and services in interstate and foreign commerce far exceeds the evidence of an effect on interstate commerce found sufficient in any reported RICO decision, and conclusively establishes the requisite effect on interstate commerce.

D. Each Defendant is Distinct From and Associated With the RICO Enterprise

1. Each Defendant is Distinct From the RICO Enterprise

In Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001), the Supreme Court held that "to establish liability under § 1962(c), one must allege and prove the existence of

two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name". The Court explained that RICO's section 1962(c) "applies to 'person[s]' who are 'employed by or associated with' the 'enterprise.' In ordinary English one speaks of employing, being employed by, or associating with others, not oneself." Id. (citation omitted). Therefore, the Court concluded that a RICO defendant, or "person", must be distinct from the RICO enterprise with which the defendant is "associated" or "employed" by. Id. at 161-62.

Applying this principle, the Court concluded that the RICO enterprise in King, a corporation, was distinct from the defendant, a natural person who was the president and sole shareholder of the corporation-enterprise. The Court stated that the requisite distinctness is satisfied where there is "either formal or practical separateness", and that "[t]he corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity." Id. at 163.

Here, the Court finds that both methods of establishing distinctness are satisfied. First, each Defendant is a corporation which is a legally different entity from the group of entities and individuals comprising the Enterprise (see supra n.10), and hence "formal" distinctness is established. Moreover, the group of entities and individuals which constitute the "Enterprise" is plainly broader than each entity that is a member of the Enterprise. Hence, "practical" distinctness is established.

For example, most courts of appeals have held that the requisite distinctness between the defendant-person and the enterprise is lacking only when there is complete identity between a particular defendant and the enterprise. As the Eleventh Circuit stated "a defendant can clearly

be a person under [Section 1962(c)] and also be **part** of the enterprise. The prohibition against the unity of person and enterprise applies only when the singular person or entity is defined as both the person and the only entity comprising the enterprise." United States v. Goldin Indus., Inc., 219 F.3d 1271, 1275-1276 (11th Cir. 2000)(collecting cases). Accordingly, courts have concluded in a variety of circumstances that individual RICO defendants are distinct from an enterprise that is broader than any single defendant, notwithstanding that the defendants may collectively comprise the enterprise and may have close relationships among themselves.[16]

2. Each Defendant is Associated With the RICO Enterprise

a. 18 U.S.C. 1962(c) requires proof that each defendant was "employed by or associated with" the alleged enterprise. It is well settled that to prove a defendant's association with an association-in-fact enterprise, it is not necessary to prove that the defendant had a formal position in the enterprise, participated in all the activities of the enterprise, "or had full knowledge of all the details of" its activities, or knew about the participation of all the other members in the enterprise; rather, "it is sufficient that the defendant know the general nature of the enterprise and

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[16] See, e.g., United States v. Fairchild, 189 F.3d 769, 776-777 (8th Cir. 1999)(distinctness requirement satisfied where individual defendants collectively form the enterprise); United States v. London, 66 F.3d 1227, 1243-1245 (1st Cir. 1995)(distinctness requirement satisfied where the enterprise consists of defendant's sole proprietorship and a closely held corporation); Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 258, 262-263 (2d Cir. 1995)(officer, agent, and owner of two corporations is distinct from RICO enterprise consisting of that individual and the corporations). That rule has been applied in the context of corporate defendants, as well as natural persons. See, e.g., Goldin Indus., 219 F.3d at 1273, 1275-1276 (distinctness requirement satisfied where enterprise consists of four natural persons and three corporations, all of whom were also defendants); Cullen v. Margiotta, 811 F.2d 698, 703, 729-730 (2d Cir. 1987) (distinctness requirement satisfied where enterprise consists of three entities, all of whom were also defendants), overruled in part on other grounds, Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143 (1987); Perholtz, 842 F.2d at 351-53 (distinctness requirement satisfied where enterprise consists of individuals and corporations who were also charged as defendants).

know that the enterprise extends beyond his individual role." United States v. Rastelli, 870 F.2d 822, 828 (2d Cir. 1989)(collecting cases).[17]

Furthermore, courts have taken a flexible approach regarding the evidence sufficient to prove that the defendant was "associated with" the enterprise. For example, in Perholtz, 842 F.2d at 351 n.12, the RICO enterprise consisted of ten corporations and partnerships and seven individuals associated-in-fact to obtain government contracts through bribery and fraud. The District of Columbia Circuit found that the defendants were "associated with" the enterprise, stating: "The individual defendants joined with each other and formed the corporations to further their common objectives. This relationship of individuals and corporations is precisely what Section 1962(c) was designed to attack." Perholtz, 842 F.2d at 354.[18]

Moreover, "[a] defendant is considered to have 'associated with' a RICO enterprise if he either engages in the predicate act violations with other members of the enterprise, even if he is not an actual 'insider' of the enterprise", Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 113 F. Supp. 2d 345, 366 (E.D.N.Y. 2000), or otherwise commits racketeering acts in the

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[17] Accord United States v. Marino, 277 F.3d 11, 33 (1st Cir. 2002); United States v. Zichetello, 208 F.3d 72, 99 (2d Cir. 2000); United State v. Tocco, 200 F.3d 401, 425 (6th Cir. 2000); United States v. Console, 13 F.3d 641, 653 (3d Cir. 1993); United States v. Eufrasio, 935 F.2d 553, 577 n.29 (3d Cir. 1991); United States v. Riccobene, 709 F.2d 214, 225 (3d Cir. 1983); United States v. Martino, 648 F.2d 367, 394 (5th Cir. 1981).

[18] See also Marino, 277 F.3d at 33 ("Association may be by means of an informal or loose relationship. To associate has its plain meaning. . . 'Associated' means to be joined, often in a loose relationship, as a partner, fellow worker, colleague, friend, companion or ally. Thus, although a person's role in the enterprise may be very minor, a person will still be associated with the enterprise if he knowingly joins with a group of individuals associated in fact who constitute the enterprise.").

conduct of the enterprise's affairs.[19] Beyond this, a defendant "associates with" an enterprise when he conducts business with or through the enterprise, or otherwise has an effect on its activities, including its unlawful activities.[20]

b. Under the foregoing authority, the evidence establishes that not only did each Defendant know the general nature of the Enterprise and that it extended beyond its individual role, but each Defendant also knew that all the other Defendants were participating in the Enterprise to achieve their shared objectives. Thus, as noted above in Section I. B., Defendants Philip Morris, Reynolds, Brown & Williamson, Lorillard, and American attended the December 15, 1953 meeting at the Plaza Hotel to devise a joint "industry response" to mounting evidence of the link between smoking cigarettes and adverse health effects. As planned at that meeting, the above named five Defendants created TIRC, which later became Defendant CTR. Defendant Liggett was a member of CTR from 1964 to 1969, and continued to fund TI even when it was not a member. Defendants Philip Morris, R.J. Reynolds, Lorillard, American and Liggett created TI in 1958. These Defendants controlled and funded CTR and TI and other entities to further their shared unlawful objectives. See supra Section I. B. and PFF § I. A - H and § IV. Throughout the life of the Enterprise, all the Defendants have coordinated their deceptive activities through TIRC/CTR, TI, the Committee of Counsel and other entities as well as through informal agreements to further their shared objectives. See supra, Section I.B and PFF § I. A - J. The

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[19] See, e.g., United States v. Watchmaker, 761 F.2d 1459, 1476 (11th Cir. 1985); United States v. Swiderski, 593 F.2d 1246, 1248-49 (D.C. Cir. 1978).

[20] See, e.g., United States v. Mokol, 957 F.2d 1410, 1417 (7th Cir. 1992); United States v. Horak, 833 F.2d 1235, 1239 (7th Cir. 1987); United States v. Yonan, 800 F.2d 164, 167 (7th Cir. 1986); United States v. Tille, 729 F.2d 615, 620 (9th Cir. 1984); United States v. Bright, 630 F.2d 804, 830 (5th Cir. 1980).

documentary and testimonial evidence of direct communications among Defendants – phone calls, meetings, and correspondence at the highest levels of their respective corporate, scientific, and legal hierarchies – is overwhelming. This evidence proves that each Defendant knew that (and in innumerable instances, knew how) other Defendants were knowingly acting to further the common purposes of the Enterprise.

Moreover, all of the Defendants associated with the Enterprise through periodic meetings, correspondence and decisions regarding, inter alia, research projects, public statements and advertising designed to advance the primary objectives of the Enterprise – to maximize profits by acting in concert to preserve and enhance the market for cigarettes and to avoid legal liability that could result in large damage awards and increase public recognition of the harmful effects of smoking and its addictiveness. See supra Section I.B, infra Section I. E. and PFF § I. A- J. Also, all the Cigarette Company Defendants (except for BATCo and Philip Morris Companies) caused and aided and abetted Defendants CTR and TI to engage in numerous, specifically alleged racketeering acts in furtherance of the shared objectives of the Enterprise, and the Cigarette Company Defendants also committed other racketeering acts in furtherance of the shared objectives of the Enterprise. See infra section I. F and PFF §§ IV, V and VI.

At bottom, each of the Defendants is a principal participant in implementing significant aspects of the affairs of the Enterprise, and hence is "associated with" the Enterprise.

E. Each Defendant Participated in the Conduct of the Enterprise's Affairs

1. 18 U.S.C. § 1962(c) requires proof that each defendant did "conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs." In Reves v. Ernest & Young, 507 U.S. 170 (1993), the Supreme Court addressed this element, holding that a defendant is not

liable for a substantive RICO violation under 18 U.S.C. § 1962(c) unless the defendant "participate[s] in the operation **or** management of the enterprise itself." Id. at 185 (emphasis added).[21]

In describing its "operation or management" test, the Supreme Court stated:

> Once we understand the word "conduct" to require some degree of direction and the word "participate" to require some part in that direction, the meaning of § 1962(c) comes into focus. In order to "participate, directly or indirectly, in the conduct of such enterprise's affairs," **one must have some part in directing those affairs**.

Id. at 179. (emphasis added).

In Reves, the Supreme Court made clear that a defendant may satisfy this test even if he did not have significant control over the enterprise's affairs. For example, the Court stated that "RICO liability is not limited to those with primary responsibility for the enterprise's affairs" and therefore "we disagree with the suggestion of the Court of Appeals for the District of Columbia Circuit that § 1962(c) requires '**significant control** over or within an enterprise.'" Reves, 507 U.S. at 179 & n.4 (citing Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948, 954 (D.C. Cir. 1990)(en banc)(emphasis in Reves)).

The Court further stated:

> We agree that liability under § 1962(c) is not limited to upper management, but we disagree that the "operation or management" test is inconsistent with this proposition. An enterprise is

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[21] The defendant in Reves, Ernst & Young, provided accounting services to the alleged RICO enterprise, a farmer's cooperative. Thus, the defendant was not an employee or member of the enterprise, but rather was an "outsider" of the enterprise. The plaintiffs alleged that Ernst & Young misled investors by preparing and explaining the cooperative's financial information through a pattern of false and misleading statements. The Court concluded that this tangential nexus to the enterprise was insufficient to impose RICO liability under 18 U.S.C. § 1962(c). Reves, 507 U.S. at 186.

> "operated" not just by upper management but also by **lower-rung** participants in the enterprise who are under the **direction** of upper management. An enterprise also might be "operated" or "managed" by others "**associated with**" the enterprise who exert control over it as, for example, by bribery.

Reves, 507 U.S. at 184 (emphasis added).

Furthermore, the Court noted that:

> § 1962(c) cannot be interpreted to reach complete "outsiders" because liability depends on showing that the defendants conducted or participated in the conduct of the "enterprise's affairs," not just their own affairs. Of course, "outsiders" may be liable under § 1962(c) if they are "associated with" an enterprise and participate in the conduct of its affairs--that is, participate in the operation or management of the enterprise itself . . . .

Id. at 185.

Following Reves, the federal circuit courts of appeals have made it clear that a defendant need not be among the enterprise's "control group" to be liable for a substantive RICO violation; rather, a defendant need only intentionally perform acts that are related to, and foster, the operation or management of the enterprise. As one court explained: "The terms 'conduct' and 'participate' in the conduct of the affairs of the enterprise include the intentional and deliberate performances of acts, functions, or duties which are related to the operation or management of the enterprise." United States v. Weiner, 3 F.3d 17, 23-24 (1st Cir. 1993).[22]

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[22] See also United States v. Posada-Rios, 158 F.3d 832, 857 (5th Cir. 1998) (finding that Reves does not require that the defendant have decision-making power, only that the defendant "take part in" the operation of the enterprise and holding that the defendant was liable under Reves since he bought multi-kilogram amounts of cocaine from the drug enterprise on a regular basis); United States v. To, 144 F.3d 737, 747 (11th Cir. 1998) (holding that Reves test was satisfied by evidence that the defendant planned and carried out a robbery with other members of an Asian crime gang that committed a series of robberies targeting Asian-American business owners and managers); United States v. Houlihan, 92 F.3d 1271, 1298 (1st Cir. 1996)(upholding instruction (continued...)

Likewise, numerous courts have held that Reves is satisfied by evidence that lower-rung members of an enterprise implemented decisions directed by higher-ups in the enterprise or committed racketeering acts, which furthered the integral goals of the enterprise, at the direction of other members of the enterprise. See, e.g., United States v. Parise, 159 F.3d 790, 796 (3d Cir. 1998) ("[T]he [Reves] Court made clear that RICO liability may extend to those who do not hold a managerial position within an enterprise, but who do nonetheless knowingly further the illegal aims of the enterprise by carrying out the directives of those in control." The Parise court held that Reves liability extended to an investigator for a law firm who paid kickbacks to union (the enterprise) agents to obtain personal injury cases for the law firm under the direction of the union's president), habeas corpus granted on other grounds, 2000 WL 876894 (E.D. Pa. 2000); United States v. Shifman, 124 F.3d 31, 35-36 (1st Cir. 1997) (The defendant "set up" and referred prospective debtors to the leaders of a loanshark enterprise); United States v. Hurley, 63 F.3d 1, 9 (1st Cir. 1995)(The defendants were employees of the enterprise who assisted higher-ups in money laundering activities); United States v. Starrett, 55 F.3d 1525, 1548 (11th Cir.

(...continued)
that jury could find defendant participated in the conduct of the enterprise's affairs even though he had no part in the management or control of enterprise where defendant was an "insider" integral to carrying out enterprise racketeering activity); United States v. Darden, 70 F.3d 1507, 1526, 1542-43 (8th Cir. 1995)(holding Reves was satisfied by evidence that the defendant participated in several murders and murder conspiracies and at least three drug trafficking transactions in an association-in-fact drug enterprise; confirming that the defendant need not participate in control of the enterprise as lower rung participation may satisfy Reves); Napoli v. United States, 32 F.3d 31, 36 (2d Cir. 1994) (Reves test satisfied where evidence that attorneys, although "of counsel" to the law firm enterprise, were not merely providing peripheral advice, but participated in the core activities that constituted the affairs of the firm), reh'g granted, 45 F.3d 680, 683 (2d Cir. 1995)(upholding convictions of law firm investigators who were "lower-rung participants" whose racketeering activities were conducted "under the direction of upper management").

1995)("[W]e agree with the First Circuit that one may be liable under the operation or management test by knowingly implementing decisions, as well as by making them."); United States v. Wong, 40 F.3d 1347, 1371-75 (2d Cir. 1994) (Defendants included low level members of the Green Dragons organized group (the enterprise) who participated in acts of extortion and kidnapping. The court stated "Reves makes it clear that a defendant can act under the direction of superiors in a RICO enterprise and still 'participate' in the operation of the enterprise within the meaning of § 1962(c)."); United States v. Oreto, 37 F.3d 739, 750-753 (1st Cir. 1994)(The defendant participated in the collection of loans by extortionate means on behalf of the loansharking enterprise; the court noted (id. at 750) that "nothing in [Reves] precludes our holding that one may 'take part in' the conduct of an enterprise by knowingly implementing decisions, as well as by making them.").

2. Each Defendant not only participated in the operation and management of the Enterprise, but also was a significant participant in the making and implementation of decisions in furtherance of the Enterprise's affairs. See PFF § III. For example, each Defendant had some part in directing the affairs of the Enterprise through directing and causing the public dissemination of false, misleading or deceptive statements regarding the links between smoking cigarettes and adverse health effects and addictiveness and by the commission of related racketeering acts, all in furtherance of the primary, shared objective of the Enterprise. See supra, Section I. B, infra Section I. F and PFF §§ I, III, IV, and VI.

Moreover, Defendants Philip Morris, R.J. Reynolds, American, B&W and Lorillard established TIRC/CTR, and thereafter these Defendants and Liggett controlled and funded TIRC/CTR to further the objectives of the Enterprise. See supra n. 10 and accompanying text

and PFF § I.A. Likewise, Defendants American, Liggett, Lorillard, Philip Morris, B&W, and R.J. Reynolds established, funded and controlled TI to further the objectives of the Enterprise referenced above. See supra n. 10 and PFF § I.C. CTR and TI also participated in the operation and management of the Enterprise by helping to coordinate and implement aspects of the Cigarette Company Defendants' scheme to defraud the public, especially its fraudulent public relations schemes. See supra Section I.B and PFF § I. B and C, and §§ IV and V.

Each Defendant (except for BATCo and Philip Morris Companies) caused and aided and abetted Defendants TIRC/CTR and TI to commit specifically alleged racketeering acts in furtherance of the affairs of the Enterprise. See PFF § I.B and C and §§ III, IV and V.

Each Defendant participated in the conduct of the Enterprise's affairs through one or more of various projects and committees designed to further the above-referenced objectives of the Enterprise, including CTR Special Projects, Ad Hoc Special Projects, the Center for Indoor Air Research ("CIAR"), the Research Liaison Committee, the Industry Technical Committee, the International Tobacco Information Inc. ("INFOTAB"), Cooperation for Scientific Research Relative to Tobacco ("CORESTA"), the International Committee on Smoking Issues ("ICOSI") and its successor, the International Tobacco Documentation Center ("TDC"), the Tobacco Research Council ("TRC") and the Tobacco Manufacturers' Standing Committee ("TMSC"). See PFF § I. A-H.[23]

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[23] For example, each Defendant Cigarette Company (except for BATCo and Philip Morris Companies) agreed to fund, and did jointly fund, numerous Special Projects through CTR that were designed to generate information and support research that could bolster the tobacco industry's litigation positions. See PFF § I. B and E.

Each Defendant Cigarette Company (except for BATCo and Philip Morris Companies) also participated in the Committee of Counsel to further the Enterprise's objectives. PFF § I. E.

(continued...)

Furthermore, overwhelming evidence of correspondence between and among the Defendants and their representatives' participation in frequent meetings establishes that all the Defendants directed and coordinated activities in furtherance of the affairs of the Enterprise and their joint scheme to defraud. See supra Section I. B., infra Section I. F. and PFF § I. A - I and § IV.

The Cigarette Company Defendants (except for Philip Morris Companies) established a "Gentlemen's Agreement" whereby they agreed that any tobacco company that discovered an innovation that could lead to the manufacture of a less hazardous or "safer" cigarette would share that discovery with other tobacco companies and that no domestic tobacco company would use intact animal in-house biomedical research. Pursuant to this "Gentlemen's Agreement", the

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[23](...continued)

For instance, in a presentation to the Committee of Counsel in the early 1980s, Ernest Pepples, B&W General Counsel reported that "[t]he products liability environment is growing more hostile with dramatic speed. . . A mistake–any concession–by a defendant will be costly." Complaining of certain health claims in a Philip Morris advertisement that suggested that certain cigarettes were unsafe, Pepples noted that:

> The frightening mathematics of smoking and health products liability actions is that a verdict against one company will soon result in verdicts against the others. Consequently, **the primary function of this Committee of Counsel has been to circle the wagons, to coordinate not only the defense of active cases, but also to coordinate the advice which the General Counsels give to ongoing operations of their companies pertaining to products liability risks.**

See PFF § I. E. This internal document corroborates the findings of the 1964 trip report, entitled "Report on Policy Aspects of the Smoking and Health Situation in U.S.A." from certain British scientists, including G.F. Todd, Director of the Tobacco Research Council. See PFF § I ¶ 51. That report described the import of the lawyers' Policy Committee, made up from representatives from R.J. Reynolds, American, B&W, Philip Morris, Liggett, and Lorillard: "This Committee is extremely powerful; it determines the high policy of the industry on all smoking and health matters - research and public relations matters, for example, as well as legal matters - and it reports directly to the Presidents [of the cigarette companies]."

Cigarette Company Defendants (except for Philip Morris Companies) sought to retard, if not prevent, the development and marketing of a potentially less hazardous cigarette. See PFF § I. I and § IV. G.

Finally, each Defendant endeavored to conceal or suppress information and documents and/or to destroy records which may have been detrimental to the interests of the members of the Enterprise, including information which could be discoverable in tobacco and health related liability cases against the Defendants or in Congressional and other governmental proceedings, and evidence of the link between smoking cigarettes and adverse health consequences and addictiveness. See PFF § I. K and § IV F.(4).

In all these circumstances, each Defendant participated in the operation or management of the Enterprise in full satisfaction of Reves.[24] Indeed, because each Defendant is an "insider" - i.e., a member of the Enterprise that had some part in directing significant aspects of the

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[24] See, e.g., Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 269 (3d Cir. 1995)("[W]hen officers and/or employees operate and manage a legitimate corporation, and use it to conduct, through interstate commerce, a pattern of racketeering activity, those defendant persons are properly liable under § 1962(c)"); Davis v. Mutual Life Ins. Co. of New York, 6 F.3d 367, 371-72, 380 (6th Cir. 1993)(holding that a corporation (The Mutual Life Insurance Company of New York "MONY") participated in the operation and management of an association-in-fact enterprise consisting of MONY, another insurance company (TWA), and an insurance agency (FIA) controlled by Donald Fletcher (an independent contractor who sold life insurance for MONY and later for TWA through fraud), because "the evidence revealed that, even after MONY had received numerous warnings concerning FIA's fraudulent sales tactics, MONY continued to allow, if not actively encourage, Fletcher and his associates to carry on with their [fraudulent] scheme"); Resolution Trust Corp. v. Stone, 998 F.2d 1534, 1540-42 (10th Cir. 1993)(holding that a corporation ("PIIGI") participated in the operation or management of an association-in-fact enterprise consisting of PIIGI and other corporations and some of their officers through PIIGI's control of one of the other corporate members of the enterprise and through PIIGI's deceptive and fraudulent conduct in coordination with other members of the enterprise to further the principal goal of the enterprise to sell automobile loan paper known as "enhanced automobile receivables" through fraud). See also cases cited supra, pp. 31-33 & n.22.

Enterprise's affairs, including the public dissemination of false, misleading or deceptive statements regarding the links between smoking cigarettes and adverse health consequences and addictiveness, this case does not even implicate the concerns of Reves. See, e.g., United States v. Owens, 167 F.3d 739, 754 (1st Cir. 1999)(holding that since Reves involved the liability of an "outsider" to an enterprise, the "Reves's analysis does not apply where a party is determined to be **inside** a RICO enterprise."). Accord Houlihan, 92 F.3d at 1298-99; United States v. Gabriele, 63 F.3d 61, 68 (1st Cir. 1995). Cf. Parise, 159 F.3d at 797.

F. Each Defendant Committed At Least Two Racketeering Acts

1. A Defendant's Liability for a Racketeering Act May be Based on "Aiding and Abetting"

To establish the commission of a pattern of racketeering activity, 18 U.S.C. §§ 1961(5) and 1962(c) require that each defendant commit at least two acts of racketeering, "the last of which occurred within ten years . . . after the commission of a prior" racketeering act. See H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 237 (1989). The federal circuits have uniformly held in both criminal[25] and civil[26] RICO cases that a defendant's liability for personally

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[25] See, e.g., United States v. Shifman, 124 F.3d 31, 36-37 (1st Cir. 1997); United States v. Rastelli, 870 F.2d 822, 832 (2d Cir. 1989); United States v. Pungitore, 910 F.2d 1084, 1131-32 (3d Cir. 1990); United States v. Cauble, 706 F.2d 1322, 1339-40 (5th Cir. 1983); United States v. Phillips, 664 F.2d 971, 1039 (5th Cir. 1981); United States v. Qaoud, 777 F.2d 1105, 1117-18 (6th Cir. 1985); United States v. Hogan, 886 F.2d 1497, 1501-02 (7th Cir. 1989); United States v. Coon, 187 F.3d 888, 895-96 (8th Cir. 1999); United States v. Darden, 70 F.3d 1507, 1526 (8th Cir. 1995); United States v. Wyatt, 807 F.2d 1480, 1482-83 (9th Cir. 1987); United States v. Hobson, 893 F.2d 1267, 1269 (11th Cir. 1990).

[26] See, e.g., Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1560 (1st Cir. 1994); McLaughlin v. Anderson, 962 F.2d 187, 192-93 (2d Cir. 1992); Petro-Tech, Inc. v. Western Co. of N. Am., 824 F.2d 1349, 1356-57 (3d Cir. 1987); United States v. Local 560 Int'l Bhd. of Teamsters, 780 F.2d 267, 283-86 (3d Cir. 1985); Armco Indus. Credit Corp. v. SLT Warehouse

(continued...)

committing a predicate racketeering act may be established by proof that the defendant aided and abetted the commission of the racketeering act.[27] "To prove aiding and abetting, the evidence must show that the defendant in some way associated himself with the criminal venture as something he wished to bring about and that he sought by his actions to make it succeed." Pungitore, 910 F.2d at 1132 (internal quotations and citation omitted). (See also infra Section I.F.7).

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[26](...continued)
Co., 782 F.2d 475, 485 (5th Cir. 1986); Cox v. Adm'r United States Steel & Carnegie, 17 F.3d 1386, 1410 (11th Cir. 1994). See also In re American Honda Motor Co. Dealerships Relations Litig., 958 F. Supp. 1045, 1057-59 (D. Md. 1997); Wait Radio by Rosenfield v. Price Waterhouse, 691 F. Supp. 102, 108 (N.D. Ill. 1988); Baumer v. Pachl, 8 F.3d 1341, 1347 (9th Cir. 1993); Downing v. Halliburton & Assocs., Inc., 812 F. Supp. 1175, 1182 (M.D. Ala. 1993). Cf. First American Corp. v. Al-Nahyan, 17 F. Supp. 2d 10, 23-24 (D.D.C. 1998).

[27] Moreover, imposition of aiding and abetting liability for racketeering acts in this case does not conflict with Third Circuit's ruling that in a civil action for treble damages brought by "a private plaintiff", a defendant's liability for an entire RICO violation may not be based upon aiding and abetting the RICO violations. See, e.g., Pennsylvania Ass'n of Edwards Heirs v. Rightenour , 235 F.3d 839, 841-44 (3d Cir. 2000); Rolo v. City Co. Liquidating Trust, 155 F.3d 644, 656-57 (3d Cir. 1998), abrogation on other grounds recognized, Forbes v. Eagleson, 228 F.3d 471 (3d Cir. 2000). The rationale of those cases is that "Congress has not enacted a general civil aiding and abetting statute . . . under which a person may sue and recover damages from a private defendant", and that 18 U.S.C. § 2 "has no application to private causes of action". Rolo 155 F. 3d at 656-57, quoting Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A. 511 U.S. 164, 181 (1994). However, this case, in contrast, is not a private action for damages, but rather is a RICO action for injunctive relief brought by the United States. Furthermore, liability for the entire RICO offense is not being imposed under a theory of aiding and abetting, but rather aiding and abetting liability attaches **only** to certain discrete racketeering acts. The Third Circuit itself, and other courts as well, has held that in such **government** civil RICO suits, liability for predicate acts may be established by aiding and abetting under 18 U.S.C. § 2. See United States v. Local 560, Int'l Bhd. of Teamsters, 780 F. 2d 267, 283-89 (3d Cir. 1985). Accord United States Local 1804-1, Int'l Longshoremen's Ass'n, 812 F. Supp. 1303, 1338-39 (S.D.N.Y 1993), modified on other grounds, 831 F. Supp. 167 (S.D.N.Y. 1993), aff'd sub nom. United States v. Carson, 52 F.3d 1173 (2d Cir. 1995); United States v. District Council, 778 F. Supp. 738, 748-49 (S.D.N.Y. 1991). See also cases cited supra, notes 25 and 26 and infra note 53.

As set forth below, each Defendant personally committed at least two racketeering acts and also caused and aided and abetted additional racketeering acts.

2. Elements of Mail and Wire Fraud Offenses

All the alleged predicate racketeering acts (which, as alleged, will conform to match the evidence) in this case involve mail or wire fraud offenses, in violation of 18 U.S.C. § 1341 or § 1343. The mail fraud statute, 18 U.S.C. § 1341, provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, [mails or causes the mailing of any matter]. . . shall be fined under this title or imprisoned not more than 20 years, or both.

To establish an offense under § 1341, the plaintiff must prove by a preponderance of evidence the following elements:

1. The defendant knowingly devised or intended to devise any scheme or artifice to defraud a victim of money or property, **or** the defendant knowingly devised or intended to devise any scheme for obtaining money or property by means of material false or fraudulent, representations, pretenses, or promises, **and**

2. The defendant mailed any matter, or caused the mailing of any matter, for the purpose of furthering or executing such scheme or artifice, **and**

3. The defendant acted with the specific intent to defraud or deceive.[28]

As this Court recognized previously in this litigation, because the wire fraud statute, 18 U.S.C. § 1343, was patterned after the mail fraud statute and has virtually identical language, courts have construed them identically. See United States v. Philip Morris Inc., 116 F. Supp. 2d

[28] See, e.g., Neder v. United States, 527 U.S. 1, 24-25 (1999); Pereira v. United States, 347 U.S. 1, 8-9 (1954); United States v. Trapilo, 130 F.3d 547, 551-52 (2d.Cir. 1997); United States v. Sawyer, 85 F.3d 713, 723 (1st Cir. 1996); United States v. Manzer, 69 F.3d 222, 226 (8th Cir. 1995); United States v. Jordan, 626 F.2d 928, 930-31 (D.C. Cir. 1980).

131, 153 & n.31 (D.D.C. 2000). Accord Sawyer, 85 F.3d at 723; Manzer, 69 F.3d at 226; United States v. Griffith, 17 F.3d 865, 874 (6th Cir. 1994); United States v. Lemire, 720 F.2d 1327, 1335 n.6 (D.C. Cir. 1983). Accordingly, all references herein to the required elements of the mail fraud statute also apply to the wire fraud statute, and vice-versa. [29]

3. Mail and Wire Fraud Offenses Are Not Limited to Common Law Fraud and Hence Do Not Require Proof of Affirmative Misrepresentations of Fact. Rather, a Scheme to Defraud May Include Material Omissions, Half-Truths and Literally True Statements In Furtherance of a Scheme to Deceive

In Durland v. United States, 161 U.S. 306 (1896), the Supreme Court ruled that the mail fraud statute broadly covers all intentional schemes to defraud. Id. at 314. It therefore rejected the defendant's contention that the mail fraud statute "reaches only such cases as, at common law, would come within the definition of 'false pretenses,' [which requires] a misrepresentation as to some existing fact, and not a mere promise as to the future." Id. at 312. Rather, the Court held that the statute encompasses "everything designed by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose." Id. at 313. The Court added that "it would strip [the mail fraud statute] of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the allurement of a specious and glittering promise." Id. at 314. Since intent to defraud is the central element, the Court concluded that a mail fraud offense did not require proof that the mailing was

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[29] The only material difference is that the wire fraud statute requires that the wire transmission be "in interstate or foreign commerce", whereas the mail fraud statute covers "intrastate" use of the mails as well as those in interstate or foreign commerce. See, e.g., United States v. Photogrammetric Data Services, Inc., 259 F.3d 229, 247-48 (4th Cir. 2001), cert. denied, 122 S. Ct. 1295 (2002); United States v. Marek, 238 F.3d 310, 317-18 (5th Cir.), cert. denied, 534 U.S. 813 (2001).

> effective in carrying out the fraudulent scheme. It is enough if, having devised a scheme to defraud, the defendant with a view of executing it deposits in the post office letters, which he thinks may assist in carrying it into effect, although in the judgment of the jury they may be absolutely ineffective therefor.

Id. at 315.

In accordance with the Supreme Court's expansive reading of the mail fraud statute, the federal courts of appeals have repeatedly ruled that a mail or wire fraud offense does not necessarily require proof of any misrepresentation of fact or affirmative false statement, although such would be highly probative of a scheme to defraud.[30] It is sufficient, therefore, if under the totality of the circumstances, the defendant intentionally devised or participated in a scheme reasonably calculated to deceive with the purpose of either obtaining or depriving another of money or property.[31]

As the Supreme Court explained in McNally v. United States, 483 U.S. 350, 358 (1987), "the words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit,

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[30] See, e.g., United States v. Munoz, 233 F.3d 1117, 1131 (9th Cir. 2000); United States v. Richman, 944 F.2d 323, 331-32 (7th Cir. 1991); United States v. Falcone, 934 F.2d 1528, 1539 n.28 (11th Cir. 1991), modified in part on other grounds, 960 F.2d 988 (11th Cir. 1992)(en banc); McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc., 904 F.2d 786, 791 (1st Cir. 1990); United States v. Cronic, 900 F. 2d 1511, 1513-14 (10th Cir. 1990); Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 991 (8th Cir. 1989); United States v. Rafsky, 803 F.2d 105, 108 (3d Cir. 1986); United States v. Clausen, 792 F.2d 102,105 (8th Cir. 1986); Blachly v. United States, 380 F.2d 665, 673-74 (5th Cir. 1967); Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958); Silverman v. United States, 213 F.2d 405, 407 (5th Cir. 1954).

[31] See, e.g., McEvoy Travel Bureau, Inc., 904 F.2d at 791-93; Cronic, 900 F.2d at 1513-14; Atlas Pile Driving Co., 886 F.2d at 991; United States v. Holzer, 816 F.2d 304, 309 (7th Cir. 1987), vacated on other grounds, 484 U.S. 807 (1987); Blachly, 380 F.2d at 671; Silverman, 213 F.2d at 405-06; Deaver v. United States, 155 F.2d 740, 743 (D.C. Cir. 1946).

chicane or overreaching'". (citation omitted). Such deceptive or overreaching conduct within the scope of the mail and wire fraud statutes include literally true statements, half-truths and material omissions.[32]

4. The Defendants Knowingly and Intentionally Devised and Executed a Scheme To Defraud the Public of Money

a. The Court finds that under the foregoing authority the Defendants intentionally devised and executed a scheme to defraud the public, consumers of cigarettes and potential consumers of cigarettes, of money and property in order to maximize their profits by preserving and enhancing the market for cigarettes through at least seven principal means: (1) to deceive consumers into starting and continuing to buy and smoke cigarettes by endeavoring to misrepresent and conceal the adverse health effects caused by smoking cigarettes and exposure to cigarette smoke and by maintaining that there was an "open question" as to whether smoking cigarettes causes disease and other adverse effects, despite the fact that the Defendants knew

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[32] See, e.g, Emery v. American General Finance, Inc., 71 F.3d 1343, 1348 (7th Cir. 1995)("A half truth, or what is usually the same thing a misleading omission is actionable as fraud, including mail fraud if the mails are used to further it, if it is intended to induce a false belief and resulting action to the advantage of the misleader and the disadvantage of the misled"); United States v. Townley, 665 F. 2d 579, 585 (5th Cir. 1982)(holding that misleading newspaper ads and letters which were mailed "need not be false or fraudulent on their face, and the accused need not misrepresent any fact" since "it is just as unlawful to speak 'half truths' or to omit to state facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading"); United States v. Halbert, 640 F.2d 1000, 1007 (9th Cir. 1981)("A defendant's activities can be a scheme or artifice to defraud whether or not any specific misrepresentations are involved")(collecting cases); United States v. Allen, 554 F.2d 398, 410 (10th Cir. 1977)("fraudulent representations [proscribed by the mail fraud statute include] deceitful statements or half-truths or the concealment of material facts"); Williams v. United States, 358 F.2d 972, 975 (10th Cir. 1966)(same); Lustigar v. United States, 386 F.2d 132, 134-38 (9th Cir. 1967)(holding that literally true statements in advertising materials provided the basis for mail fraud conviction where they were misleading and deceptive in context); Silverman, 213 F.2d at 407 ("the fact that there is no misrepresentation of a single existing fact makes no difference" provided that the scheme was otherwise reasonably calculated to deceive).

otherwise (see PFF § IV. A); (2) to deceive consumers into starting and continuing to smoke cigarettes by undertaking an obligation to take actions, including funding independent research, in order to determine if smoking cigarettes causes cancer or other diseases, while concealing and suppressing relevant research and funding self-serving or irrelevant research (see PFF § IV. F); (3) to deceive consumers into becoming or staying addicted to cigarettes by maintaining that nicotine is not addictive, despite the fact that Defendants knew that nicotine is addictive (see PFF § IV. B); (4) to deceive consumers into becoming or staying addicted to cigarettes by manipulating the design of cigarettes and the delivery of nicotine to smokers, while at the same time denying that they engaged in such manipulation (see PFF § IV. C); (5) to deceive consumers, particularly parents and young people, by claiming that they did not market to young people, while engaging in marketing and advertising with the intent of addicting young people and enticing them into becoming lifetime smokers (see PFF § IV. E); (6) to deceive consumers through deceptive marketing and cigarette design modifications to exploit smokers' desire for less hazardous and "low tar" cigarettes (see PFF § IV. D); and (7) to deceive consumers regarding Defendants' concerted efforts not to make or market potentially less hazardous cigarettes. See PFF § IV. G.

The Court notes that the District of Columbia Circuit and other courts have consistently held that it is not necessary to prove all the alleged alternative means or all the alleged fraudulent representations were undertaken since it is perfectly proper to allege in the conjunctive, and prove in the disjunctive. Accordingly, it is sufficient to prove under the totality of the circumstances that the defendant devised a scheme intended to defraud which included one or

more of the alternatives alleged.[33] In any event, this Court finds the United States has proven that the Defendants knowingly and intentionally implemented all seven means alleged to execute the alleged scheme to defraud. See PFF § IV.

Beyond this, all the Defendants, except for Philip Morris Companies, voluntarily undertook a duty to take action, including funding independent research, to determine if smoking caused cancer or other diseases and to disclose to the public the results of such independent research. See PFF § I. A-E, § IV. A and F. However, the Defendants intentionally violated their duty in this regard by concealing and suppressing relevant research and by funding self-serving, irrelevant research. See PFF § I. K and § IV. F. The Defendants' violation of their voluntary duty to disclose may provide the basis for mail and wire fraud charges. United States v. Maxwell, 920 F.2d 1028, 1036 (D.C. Cir. 1990) (defendant who established fraudulent loan scheme liable under 18 U.S.C. § 1343 because she "clearly held herself out as the trustee," and "thus, by her own actions and representations, she assumed the responsibilities and duties attendant to such a position of trust."); Tabas v. Tabas, 47 F.3d 1280, 1290 n.15 (3d Cir. 1995) (noting the "broad" scope of the mail fraud statute as encompassing "'everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.'") (quoting Durland v. United States, 161 U.S. 306, 313 (1896)); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 113 F. Supp. 2d 345, 387-88 (E.D.N.Y. 2000) (plaintiff's civil RICO claims predicated in part on voluntarily assumed duty, including the Frank

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[33] See, e.g, United States v. Lemire, 720 F.2d 1327, 1345-46 (D.C. Cir. 1983); United States v. Jordan, 626 F.2d 928, 931 (D.C. Cir. 1980). Accord Clausen, 792 F.2d at 105; United States v. Stull, 743 F.2d 439, 442 & n.2 (6th Cir. 1984)(collecting cases similarly holding); United States v. Halbert, 640 F.2d 1000, 1007 (9th Cir. 1981); United States v. Amrep Corp., 560 F.2d 539, 546-47 (2d Cir. 1977)(collecting cases similarly holding).

Statement).

Moreover, even absent a duty to disclose, it is well established that a defendant's concealment, non-disclosure and other omission of material information may provide the basis for mail and wire fraud charges where, as here, the omission was intended to induce a false belief and was part of a scheme involving deceptive conduct.[34]

c. The Court also finds that all the Defendants' false, misleading and deceptive statements and omissions referenced above and in PFF § IV are "material". In Neder, the Supreme Court noted that "a matter is material if:

> '(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or
>
> (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.'"

Neder, 527 U.S. at 22, n.5, quoting Restatement (Second) of Torts § 538 (1976).

The above referenced false statements, misrepresentations and concealments about the seven principal aspects of the scheme to defraud, particularly about the adverse health effects of smoking cigarettes, including the link to life-threatening diseases, premature death, and about the addictive properties of cigarettes, are material because such false statements, misrepresentations, and concealment had a natural tendency to influence a person's decision to initiate, continue, or

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[34] See, e.g., United States v. Hitt, 249 F.3d 1010 (D.C. Cir. 2001); United States v. Reibold, 135 F.3d 1226, 1229 (8th Cir. 1998); Emery v. American Gen. Finance, Inc., 71 F.3d 1343, 1346-48 (7th Cir. 1995); United States v. Moore, 37 F.3d 169, 172-73 (5th Cir. 1994); United States v. Keplinger, 776 F.2d 678, 697-99 (7th Cir. 1985)(collecting cases similarly holding); United States v. Townley, 665 F.2d 579, 585 (5th Cir. 1982)("half truths"); Blachly v. United States, 380 F.2d 665, 674 (5th Cir. 1967); United States v. Allen, 554 F.2d 398, 410 (10th Cir. 1977); United States v. Curtis, 537 F.2d 1091, 1097 (10th Cir. 1976); Post v. United States, 407 F.2d 319, 325 (D.C. Cir. 1968); Cacy v. United States, 298 F. 227, 229 (9th Cir. 1961).

quit smoking, and also had a natural tendency to influence the decisions of others to initiate, forgo or otherwise affect efforts to address smoking and health issues. Defendants had reason to know – and Defendants' internal documents demonstrate that Defendants in fact expressly recognized – that members of the public were likely to regard such matters as important in deciding whether to initiate, continue, or quit smoking. Cf. United States v. Philip Morris Inc., Slip Op. p. 2 (D.D.C. September 30, 2002). See also PFF § IV. E and § IX. A.

5. The Defendants May Not Escape Liability for Their Scheme to Defraud by Claiming That the Public Was Not Deceived or Otherwise Injured by Their Misconduct and Could Not Have Reasonably Relied Upon Their Fraudulent Representations

As this Court ruled previously, it is well established that to establish a mail or wire fraud violation a plaintiff is not required to prove that: (1) the wrongdoer succeeded in deceiving or defrauding the intended victim; (2) the victim suffered any loss of money, property, or other harm; or (3) the intended victim detrimentally relied upon the wrongdoer's fraudulent misconduct.[35]

In accordance with these principles, the District of Columbia Circuit has repeatedly rejected the claims that "no fraudulent scheme existed because no reasonable [prudent] person would have believed [the defendant's] misrepresentations . . . [or] where the persons defrauded

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[35] See Philip Morris Inc., 116 F. Supp. 2d at 153; United States v. Philip Morris Inc., 2002 WL 1925881*2 (D.D.C. 2002). Accord Neder, 527 U.S. at 24-25 ("The common-law requirements of 'justifiable reliance' and 'damages' . . . plainly have no place in the federal fraud statutes."); Carpenter v. United States, 484 U.S. 19, 26-27 (1987)("Petitioners cannot successfully contend . . . that a scheme to defraud [under mail and wire fraud statutes] requires a monetary loss."); Durland, 161 U.S. at 315 (proof that the mailing succeeded in deceiving the intended violation is not required); United States v. Pollack, 534 F.2d 964, 971 (D.C. Cir. 1976)(the mail and wire fraud statutes "do not require that the deception bear fruit for the wrongdoer or cause injury to the intended victim").

unreasonably believed the misrepresentations made to them". United States v. Maxwell, 920 F.2d 1028, 1036 (D.C. Cir. 1990). Rather, the District of Columbia Circuit has explained that "it makes no difference whether the persons the scheme is intended to defraud are gullible or skeptical, dull or bright. . . . The only issue is whether there is a plan, scheme or artifice intended to defraud." Id. at 1036, quoting United States v. Brien, 617 F.2d 299, 311 (1st Cir. 1980) (collecting other cases similarly holding). Accord United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 971 (D.C. Cir. 1998) ("when an individual is swindled, the offender does not escape mail or wire fraud liability just because the victim was unwary, or even 'gullible'"), aff'd, 526 U.S. 398 (1999); Deaver v. United States, 155 F.2d 740, 744-45 (D.C. Cir. 1946)(holding in mail fraud prosecutions that "the monumental credulity of the victim is no shield for the accused"); United States v. Pollack, 534 F.2d 964, 971 (D.C. Cir. 1976)(To require reliance and actual loss to the fraud victim "would lead to the illogical result that the legality of a defendant's conduct would depend on his fortuitous choice of a gullible victim.").[36]

Likewise, it is not a valid defense that no reasonably prudent consumer would have relied

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[36] See also United States v. Masten, 170 F.3d 790, 795 (7th Cir. 1999)(rejecting the defense that the mail fraud victims "acted imprudently" when they invested in the defendant's business without first researching its solvency and that the defendant's "inept scheme was too unbelievable to fool any reasonable" victim); United States v. Stockheimer, 157 F.3d 1082, 1087 (7th Cir. 1998)(rejecting defense that the defendants' claims "were so preposterous that no reasonable person would have acted on them", stating that "a scheme that a sophisticated person would recognize as incredible is not beyond the reach of the mail fraud statute"); United States v. Biesiadeck, 933 F.2d 539, 544 (7th Cir. 1991)("Those who are gullible, as well as those who are skeptical, are entitled to the protection of the mail fraud statute"); United States v. Faulhaber, 929 F.2d 16, 18 (1st Cir. 1991)(rejecting requested instruction that the jury "was required to find that [the defendant's] scheme would have to defraud a person of ordinary prudence and comprehension."); United States v. Kreimer, 609 F.2d 126, 132 (5th Cir. 1980)("The victim's negligence is not a defense to criminal conduct. . . [E]ven the monumental credulity of the victim is no shield for the accused.") (citations and internal quotation marks omitted).

upon or believed the Defendants' fraudulent misrepresentations because of contrary evidence in the public domain regarding the nexus between smoking cigarettes and adverse health effects and addictiveness. The gullibility, negligence or lack of intelligence of the intended victim is no defense, particularly here where the majority of victims of the Defendants' scheme to defraud are non-smokers who began smoking cigarettes and became addicted in their youth. In a variety of contexts, the law recognizes that such minors are a "protected class" in need of special protection, because they lack "that full capacity for individual choice", Ginsberg v. New York, 390 U.S. 629, 650 (1968), and "are not assumed to have the capacity to take care of themselves". Schall v. Martin, 467 U.S. 253, 265 (1984). (See infra, Section IV. B. 4.e). Accord United States v. Kreimer, 609 F.2d 126, 132 (5th Cir. 1980)("The laws protecting against fraud are most needed to protect the careless and the naive from lupine predators, and they are designed for that purpose."). Indeed, the evidence establishes that the Defendants designed their fraudulent misconduct to target the youth market because of their vulnerability and because they believed that most of the non-smoking young people who become daily smokers in their youth will become addicted lifetime smokers. See PFF § IV. E. Therefore, it would be legally incongruous to allow Defendants to avoid liability **because** they marketed their cigarettes to youths.

In sum, it is no defense that a reasonably prudent consumer would not have relied upon the Defendants' representations at issue. Rather, the dispositive issue is whether the Defendants devised a scheme intended to defraud, which they plainly did.

6. The Defendants Caused the Alleged Mailings and Wire Transmissions For the Purpose of Executing the Scheme to Defraud

a. It is settled law that the matter or communication sent via the mails or wires need not itself contain false or misleading information or evidence fraud. Rather, "'innocent' mailings –

ones that contain no false information – may supply the mailing element." Schmuck v. United States, 489 U.S. 705, 715 (1989) (citing Parr v. United States, 363 U.S. 370, 390 (1960)).[37] It is also settled law that the mailing or wire transmission need not be essential to the scheme or succeed in deceiving, rather it need only be "for the purpose of executing the scheme." United States v. Maze, 414 U.S. 395, 400 (1974).[38] "The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive . . . ." Schmuck, 489 U.S. at 715.

Moreover, courts have taken a flexible approach to the "in furtherance" requirement, holding that it is sufficient that the mailing or wire transmission was "incident to an essential part of the scheme. . . or 'a step in [the] plot'." 489 U.S. at 711 (quoting Badders v. United States, 240 U.S. 391, 394 (1916)).[39]

It is also well established that the plaintiff is not required to prove that the defendant

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[37] Accord United States v. Hickok, 77 F.3d 992, 1004 (7th Cir. 1996); Demearth Land Co. v. Sparr, 48 F.3d 353, 355 (8th Cir. 1995); Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1413-14 (3d Cir. 1991); United States v. Murr, 681 F. 2d 246, 249 (4th Cir. 1982); United States v. Reid, 533 F.2d 1255, 1265 (D.C. Cir. 1976).

[38] Accord United States v. Coyle, 63 F.3d 1239, 1244 (3d Cir. 1995); United States v. Waymer, 55 F.3d 564, 569 (11th Cir. 1995); Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1413 (3d Cir. 1991); United States v. Haimowitz, 725 F.2d 1561, 1571 (11th Cir. 1984); United States v. Garner, 663 F.2d 834, 838 (9th Cir. 1981); Reid, 533 F.2d at 1264.

[39] Accord Sun-Diamond Growers, 138 F.3d at 972; Coyle, 63 F.3d at 1244; United States v. Waymer, 55 F.3d 564, 569 (11th Cir. 1995); United States v. Hollis, 971 F.2d 1441, 1448 (10th Cir. 1992). See also United States v. Wormick, 709 F.2d 454, 462 (7th Cir. 1983)("mailings made to promote the scheme . . . or which facilitate the concealment of the scheme"); United States v. McClelland, 868 F.2d 704, 707-09 (5th Cir. 1989)(mailings which tended to further the scheme).

personally mailed the matter or even specifically knew about or intended the mailing to occur. Rather, the plaintiff need only prove that the defendant "caused" the use of the mails in an effort to further the scheme to defraud. "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." Pereira v. United States, 347 U.S. 1, 8-9 (1954).[40]

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[40] Accord Maze, 414 U.S. at 400; United States v. Serang, 156 F.3d 910, 914 (9th Cir. 1998); Sawyer, 85 F.3d 713, 723 n.6 (1st Cir. 1996); United States v. Alexander, 135 F.3d 470, 474-75 (7th Cir. 1998); United States v. McClelland, 868 F.2d 704, 707 (5th Cir. 1989); United States v. Haimowitz, 725 F.2d 1561, 1571 (11th Cir. 1984); United States v. Diggs, 613 F.2d 988, 998 (D.C. Cir. 1979).

An early case on the mail fraud statute (formerly 18 U.S.C. § 338), United States v. Weisman, 83 F.2d 470 (2d Cir. 1936), further illustrates the "causing" requirement. In that case, the defendant, who operated a fraudulent property purchase scheme, responded to a series of advertisements placed by individuals who sought to sell properties. The court of appeals noted that "Weisman, so far as possible, abstained from using the mails in connection with his fraudulent transactions," and that with regards to one customer, Lewis, the defendant dictated a typewritten response to Lewis' advertisement, and the defendant's agent delivered the response to the newspaper by hand delivery. Id. at 472.

Unbeknownst to Weisman, Lewis had left instructions for the newspaper that any responses be forwarded to him by mail, and the newspaper followed these directions by sending Weisman's fraudulent response to Lewis. Id. Therefore, "[i]n spite of [Weisman's] general efforts on his part to avoid the use of the mails, they undoubtedly were used for the purpose of executing the schemes to defraud" his victims. Id. Moreover, despite the fact that Weisman had not himself used the mails, and neither intended – nor even knew of – Lewis' instructions to the newspaper to forward the response, Weisman in fact "caused" the letter to be mailed:

> When Weisman had a letter delivered to the [New York] Times office in New York, there was every chance that the Times would forward it to its customer by mail. It has long been settled that a defendant may cause a letter to be sent or delivered by mail though such a mode of transmission was neither known nor intended, provided mailing or delivery by post might reasonably have been foreseen.

(continued...)

Moreover, effective September 13, 1994, Congress amended the mail fraud statute to attach liability to anyone who in furtherance of a scheme to defraud, "deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier." Pub. L. 102-322 (codified as amended at 18 U.S.C. § 1341 (1994)). See, e.g., Photogrammetric Data Services, Inc., 259 F.3d at 246-49, cert. denied, 122 S. Ct. 1295 (2002); United States v. Marek, 238 F.3d 310, 318 (5th Cir.), cert. denied, 534 U.S. 813 (2001).

Furthermore, direct proof that the specific matter at issue was mailed or transmitted via the wires is not required. Rather, it is sufficient that the evidence shows that it was the defendant's routine or standard business practice to send or receive matters via the mails or wire transmission or other circumstantial evidence shows that it was more likely than not that the matter was sent or received via the mails or wires.[41]

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[40](...continued)
Id. at 473 (citing United States v. Kenofskey, 243 U.S. 440 (1917) and other cases).

[41] See, e.g., United States v. Sprick, 233 F.3d 845, 854-55 (5th Cir. 2000)(testimony that checks "most likely" were mailed pursuant to routine business practice sufficient to establish mailing beyond a reasonable doubt); Alexander, 135 F.3d at 475 ("There also was nothing in the trial testimony to indicate that S.B. Baker may have deviated from that standard practice in its handling of the police report at issue here. Under our cases, such evidence of a standard office or business practice is sufficient circumstantial proof to take the mailing issue to the jury."); United States v. Griffith, 17 F.3d 865, 874-75 (6th Cir. 1994)("Thus, in most cases, a witness's testimony that he placed a telephone call to or received a call from an individual in another state will support the inference of the requisite interstate wire communication. Similarly, a witness's testimony that he mailed or received a document in the mail, or that his company routinely posts and receives documents through the mail, will suffice."); United States v. Metallo, 908 F.2d 795, 798 (11th Cir. 1990)(testimony "that it was the airline's routine practice to send business correspondence by United States mail. . . was sufficient to [establish the use of the mails])"; United States v. McClellan, 868 F. 2d 210, 216 (7th Cir. 1998)(holding it was immaterial that the witnesses "could not remember exactly where or when the vouchers were mailed. The precise details of the mailing need not be established, however; it is sufficient to establish that mailing is the sender's regular business practice"); Keplinger, 776 F.2d at 691 ("The inference that the
(continued...)

b. Applying the foregoing authority, the United States has convincingly established that the Defendants charged in each racketeering act caused the mailing or wire transmission in furtherance of the scheme to defraud. See PFF § V.[42] All but six of the explicitly alleged 148 racketeering acts involve correspondence between parties located in different cities or states, or press releases and advertisements the Defendants sent to newspapers and other news outlets for dissemination to the public throughout the United States. (See infra notes 44-46 and accompanying text). Likewise, Defendants' routine business practices were to generally send such matters via wire transmissions, the United States mails or other carrier covered by 18 U.S.C. § 1341 and § 1343. Similarly, newspapers, magazines and news outlets routinely disseminated

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[41](...continued)
sender acted in accord with its ordinary practice [to use the mails] is reasonable, and the absence of a recollection of departure from the practice strengthens the inference that the practice was followed"). See also United States v. Shyres, 898 F.2d 647, 654-55 (8th Cir. 1990); United States v. Bowman, 783 F.2d 1192, 1196-97 (5th Cir. 1986); United States v. Green, 745 F.2d 1205, 1208 (9th Cir. 1985); United States v. Ledesma, 632 F.2d 670, 675 (7th Cir. 1980); United States v. Brackenridge, 590 F.2d 810, 811 (9th Cir. 1979).

[42] The United States Postal Service has maintained, for the most part, a statutory monopoly on delivery of letters by virtue of the "Private Express Statutes." See 39 U.S.C. §§ 401, 404, 601-606; 18 U.S.C. §§ 1693-1699, 1724. See also Associated Third Class Mail Users v. United States Postal Service, 600 F.2d 824 (D.C. Cir. 1979); United States Postal Service v. O'Brien, 644 F. Supp. 140 (D.D.C. 1986) (discussing the constitutionality of the Private Express Statutes). Prior to 1974, private carrier mailing was permissible only by "opinion letter" permission of the Postal Department. In 1974, the Postal Service (previously Postal Department) set forth most of 39 C.F.R. Part 310, which dealt with enforcement of the Private Express statutes (39 U.S.C. 601 et seq.). Section 310.3 of 39 C.F.R., implemented September 14, 1974, set forth certain exceptions, but the largest exception occurred in 1979, which listed various suspensions of the Private Express statute. That included, on October 24, 1979, the "extremely urgent letter" suspension (39 C.F.R. Section 320.6), under which most courier services now operate. See O'Brien, 644 F. Supp. at 142; Air Courier Conference of America v. American Postal Workers Union, 498 U.S. 517, 519 (1991). Therefore, the relative unavailability of other means of mailing prior to October 1979 lends further evidence that pre-1979 material must have been sent by the United States Postal Service or its predecessor, the Postal Department. See PFF § V. A, ¶ 6.

information from press releases and advertisements to the public via the United States mails or wire transmissions. See PFF § V. A.

Moreover, the circumstances surrounding these communications compel the inference that the Defendants' customary business practice was followed in transmitting them: It blinks reality to believe that hand delivery or some means other than the use of wire transmissions or carriers covered by 18 U.S.C. § 1341 would be used to transmit correspondence between parties in different cities or states or press releases and advertisements intended to be publicly disseminated to millions of people. Thus, the evidence establishes the requisite use of the mails or wire transmission. Accord cases cited supra, nn. 40-41 and accompanying text.[43]

Moreover, the Defendants "caused" such use of the mails and wire transmissions. See PFF § V. A, ¶¶ 15-18. All the racketeering acts charged against each Defendant directly (the racketeering acts alleged to be committed "through" Defendant TI or CTR are discussed infra section I. F. 7) involve either: (1) correspondence or other communications sent or received directly by the Defendants or their agents or representatives;[44] (2) press releases or advertisements sent by the Defendants or their agents or representatives to newspapers, magazines or other news outlets with the expectation that the transmitted information would be disseminated to the public throughout the United States;[45] or (3) televised statements made by the

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[43] See PFF § V. A, ¶¶ 1-15.

[44] See, e.g., Racketeering Acts 4, 9, 11, 14, 15, 16, 19, 20, 22, 25, 26, 28, 30, 32, 40, 41, 45, 50, 51, 52, 53, 54, 55, 57, 58, 59, 60, 62, 63, 68, 69, 71, 72, 74, 75, 78, 80, 82, 85, 86, 89, 90, 92, 94, 95, 96, 99, 103, 104, 106, 107, 108, 114, 115, 116, 121, 122, 123, 124, 125, 126, 127, 128, 129, 131, 134, 143, 144, 145 and 146.

[45] See, e.g., Racketeering Acts 1, 36, 37, 39, 47, 48, 61, 64, 65, 76, 83, 84, 97, 100, 101, (continued...)

Defendants' representatives.[46]

Plainly, the Defendants "caused" the mailings of matters which they had sent or received in response to correspondence that they sent. See, e.g., Hollis, 971 F.2d at 1448; McClelland, 868 F.2d at 707; Diggs, 613 F.2d at 998-99; United States v. United Medical & Surgical Supply Corp., 989 F.2d 1390, 1404 (4th Cir. 1993) (defendant's broker mailed fraudulent reports); United States v. Bortnovsky, 879 F.2d 30, 36-37 (2d Cir. 1989) (defendant's agent sent the mailings); United States v. Tiller, 302 F.3d 98, 103 (3d Cir. 2002) (defendant's employer). See also cases cited supra n.40.

Moreover, where the defendant sets a course of events in motion, and then receives a mailing, this is sufficient to "cause" the use of the mails for purposes of § 1341. See, e.g., United States v. Toliver, 541 F.2d 958, 966-67 (2d Cir. 1976) (where defendants made fraudulent representations to state unemployment office, which then mailed unemployment checks to defendants, defendants "caused" the mailings); United States v. Otto, 742 F.2d 104, 109 (3d Cir. 1984) (letter written by investor-victim was responsive to defendant's failure to fulfill terms of earlier agreement); United States v. Weisman, 83 F.2d 470, 472-473 (2d Cir. 1936).[47]

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[45](...continued)
102, 119, 135, 136, 137, 138, 139, 140, 141, 142, 147 and 148.

[46] See, e.g., Racketeering Acts 105, 109, 110, 111, 112 and 113.

[47] Furthermore, it is important to note that 18 U.S.C. § 1341 criminalizes not only sending the communication in furtherance of the scheme to defraud, but also receiving the communication. See, e.g., United States v. Coyle, 943 F.2d 424, 425 (4th Cir. 1991); United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978). For instance, as detailed in Racketeering Act 17, CTR mailed a communication to Liggett, Philip Morris, Reynolds, Brown & Williamson, and Lorillard. In addition to the Cigarette Company Defendants' "causing" of CTR to send the mailing, they (as members of the scheme to defraud) are liable for receiving it.

Similarly, it was reasonably foreseeable to the Defendants that the newspapers, magazines and other news outlets would use the United States mails to send to their subscribers advertisements that the Defendants placed with them for the purpose of disseminating to the public throughout the United States.[48] To be sure, it was also reasonably foreseeable to the Defendants that the **televised testimony** of their representatives before Congress would be transmitted to the public throughout the United States via wire transmission. (See Racketeering Acts 109-113).

Regarding the "in furtherance" requirement, many of the mailings and wire transmissions underlying the racketeering acts on their face contain false, fraudulent or misleading matters, which constitute the gravamen of the scheme to defraud and hence directly and substantially further the central aspects of the scheme to defraud.[49] The mailings and wire transmissions underlying the other racketeering acts also further the scheme to defraud in a variety of ways, as explained in the Court's Findings of Fact. See PFF § V.B.

In sum, the evidence firmly establishes that the Defendants intentionally caused the alleged mailings and wire transmissions for the purpose of executing the scheme to defraud. See

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[48] See, e.g., Carpenter v. United States, 484 U.S. 19, 28 (1987)("[U]sing the wires and the mail to print and send the [Wall Street] Journal to its customers" containing the column at issue "was not only anticipated but an essential part of the scheme."); Atlas Pile Driving Co. v. DiCon Financial Co., 886 F.2d 986, 992 (8th Cir. 1989) ("[I]t was almost certain that notice of [foreclosure sales] would be mailed to other claimants or that notice would be published in newspapers and copies of the notice distributed through the mails."); United States v. Bowers, 644 F.2d 320 (4th Cir. 1981)(holding that it was reasonably foreseeable that newspapers would be mailed to some subscribers containing the advertisements the defendant placed in the newspapers); Atkinson v. United States, 344 F.2d 97, 98-99 (8th Cir. 1965)(same); United States v. Weisman, 83 F.2d 470, 473 (2d Cir. 1936).

[49] As noted supra, pp. 48-49, the mailings and wire transmissions need not contain any false or fraudulent matter and may be totally "innocent" in themselves.

PFF § V.

7. Cigarette Company Defendants Are Liable For the Racketeering Acts Committed by CTR and TI

Various Defendants are charged in the Amended Complaint with the mailings and wire transmissions of CTR and TI while they were members of or involved in these organizations.[50] All of those Defendants are liable for the racketeering acts of TI and CTR on three independent legal grounds: (1) under liability principles as aiders and abettors, pursuant to 18 U.S.C. § 2(a); (2) pursuant to 18 U.S.C. § 2(b), for having "caused" an offense; and (3) under the predicate provisions of 18 U.S.C. §§ 1341 and 1343, the mail and wire fraud statutes, respectively.[51]

As stated in the Court's Findings of Fact and supra, pp. 14-16, 33-34 and n. 10, each charged Cigarette Company Defendant, except for BATCo, participated in the creation of, funding, or the activities of TIRC/CTR, and TI. See PFF § I. A-E. The Cigarette Company Defendants formed, funded, and staffed these groups for the purposes of furthering their scheme to defraud, including to fund research that supported the Cigarette Company Defendants' position on smoking and health issues and to serve as a forum to address issues on smoking and health and related matters.[52] Additionally, the Defendant Cigarette Companies schemed with

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[50] See Racketeering Acts 2, 3, 5, 6, 7, 8, 10, 12, 13, 17, 18, 21, 23, 24, 27, 29, 31, 33, 34, 35, 42, 43, 44, 46, 49, 56, 66, 67, 70, 73, 77, 79, 81, 87, 88, 91, 93, 98, 117, 118, 120, 130, 132, and 133.

[51] Moreover, because CTR and TI were acting on behalf of the Cigarette Company Defendants, the Cigarette Company Defendants may be held liable under an agency theory. See United States v. Godwin, 272 F.3d 659, 668 n.6 (4th Cir. 2001) ("Moreover, Godwin is liable under an agency theory for mailings in furtherance of the fraud scheme initiated by his agent, ..." (citing United States v. Kenofskey, 243 U.S. 440, 443 (1917)).

[52] Even by the Defendants' own "sterilized" accounts of these organizations, these trade (continued...)

these associations to disseminate self-serving research, as well as false, misleading, and otherwise fraudulent public statements in the press and elsewhere. See PFF § I. B and C and § IV.

a. First, under 18 U.S.C. § 2(a), "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a

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[52](...continued)
associations were established for the purpose of jointly sponsoring "disinterested" research on behalf of the cigarette companies; to lobby and conduct public relations activities on behalf of the cigarette companies; and to otherwise act, at least in part, as Defendants' research and public relations arms. See, e.g., "A Frank Statement to Cigarette Smokers" (describing mission of Tobacco Industry Research Committee: "We are pledging aid and assistance to the research effort into all phases of tobacco and health. . . . 2. For this purpose we are establishing a joint industry group consisting initially of the undersigned [tobacco company sponsors and leaf grower associations]. This group will be known as the TOBACCO INDUSTRY RESEARCH COMMITTEE."); Statement Concerning the Origin and Purpose of the Tobacco Industry Research Committee and its Proposed Functions, dated January 25, 1954 (See PFF. § I. A) (noting the formation of TIRC "in the interest of the public as well as of the industry to meet the challenge raised by widely publicized reports in the press, purporting to link tobacco smoking with the cause of lung cancer," and further noting that "In the light of the foregoing agitation and in the absence of authoritative findings, there is a responsibility on the part of the management of the tobacco manufacturers and others engaged in the tobacco industry to aid in the final determination of this controversy. It is the earnest wish of the industry to encourage competent scientific authority to find ultimate facts which will dispel the present confusion and to communicate authoritative factual information on the subject to the public." The Statement further listed the members (tobacco executives and related associations), and described Paul Hahn's telegram to the executives in December 1953, and the meetings in New York City on December 14, 15, and 28, 1953, and the plan for the joint funding of the Committee, its chairmanship, and the retainer of a public relations firm. See also Certificate of Incorporation of The Tobacco Institute, Inc., (listing various tobacco company executives as members of the Board of Directors and the purpose of TI as including "to promote a better understanding by the public of the tobacco industry and its place in the national economy; to cooperate with governmental agencies and public officials with reference to the tobacco industry; to collect and disseminate information relating to the use of tobacco; to collect and disseminate scientific and medical material relating to tobacco; to collect and disseminate information relating to the tobacco industry published or released by any governmental agency, federal or state, or derived from sources independent of the industry; to collect and disseminate information relating to legislative and administrative developments, federal or state, affecting the tobacco industry; to promote public good will; . . . .").

principal."[53] See, e.g., In re Nofziger, 956 F.2d 287, 290-91 (D.C. Cir. 1992) ("[T]he law is well-settled that one may be found guilty of aiding and abetting another individual in his violation of a statute that the aider and abettor could not be charged personally with violating .... The doctrine is of ancient origin."); United States v. Raper, 676 F.2d 841, 849 (D.C. Cir. 1982) (defendant convicted of aiding and abetting the possession of heroin with intent to distribute after he collected the money for a heroin transaction even though he was not the one who actually passed the heroin to the purchaser).[54]

The elements of aiding and abetting under 18 U.S.C. § 2(a) are set forth in United States v. Teffera, 985 F.2d 1082, 1086 n.3 (D.C. Cir. 1993):

> (1) the specific intent to facilitate the commission of the crime by another; (2) "guilty knowledge" by the alleged abettor; (3) commission of the substantive

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[53] The Court notes that aider/abettor liability for a RICO predicate act (which has been adopted by every court of appeals that has considered the issue (see supra Section I.F.1)) is quite distinct from a claim of liability for aiding and abetting the entire RICO violation itself. See 131 Main Street Associates v. Manko, 897 F. Supp. 1507, 1528 n.17 (S.D.N.Y. 1995) ("We do not read the operation-or-management rule enunciated in Reves as changing the rule that '[c]ivil RICO liability can be predicated on aiding and abetting the commission of the predicate acts by the primary offender.' . . . Clearly, a person can operate or manage an enterprise and yet, through delegation, avoid directly committing predicate acts." (citation omitted)); Fidelity Federal Sav. & Loan Ass'n v. Felicetti, 830 F. Supp. 257 (E.D. Pa. 1993) (aider and abettor of two predicate acts can be civilly liable under RICO; aider and abettor liability is not necessarily inconsistent with Reves test for liability for operation or management of RICO enterprise).

[54] See also United States v. Kegler, 724 F.2d 190, 200-201 (D.C. Cir. 1983) (18 U.S.C. § 2 "abolishes the distinction between common law notions of 'principal' and 'accessory.' Under it, the acts of the perpetrator become the acts of the aider and abettor and the latter can be charged with having done the acts himself. An individual may be indicted as a principal for commission of a substantive crime and convicted by proof showing him to be an aider or abettor. The indictment need not specifically charge a violation of 18 U.S.C. § 2. An aiding and abetting instruction may be given in a case where the indictment does not allege violation of the aiding and abetting statute. An aider and abettor of a crime may be tried and convicted even though the principal is not tried, convicted or identified.") (footnotes omitted).

> offense by someone else; and (4) assistance or participation in the commission of the offense.

Accord United States v. Monroe, 990 F.2d 1370, 1373 (D.C. Cir. 1993). As applied to a mail or wire fraud prosecution, when a defendant is proven to be a participant in the scheme to defraud, and a document is transmitted via the mails or wires in furtherance of the scheme, the defendant may be convicted of aiding and abetting, even if he did not know about the mailing or wire transmission. See, e.g., United States v. Johnson, 700 F.2d 699 (11th Cir. 1983); United States v. Archambault, 62 F.3d 995 (7th Cir. 1995). In other words, in order to convict a defendant of aiding and abetting a mail or wire fraud violation, in addition to finding the mailing (or transmission) in furtherance of the scheme to defraud, "the government must prove that the defendant in some way associated himself with the fraudulent scheme and that he shared the criminal intent of the principal." United States v. Serrano, 870 F.2d 1, 6 (1st Cir. 1989).

As set forth in the Court's Findings of Fact, PFF § I. B and C and supra, pp. 14-16, 33-34 and n.10, the six Cigarette Company Defendants who created, funded and controlled TI and CTR were indisputably associated with the scheme to defraud, and, like the actual authors of the mailings, shared their fraudulent intent. Moreover, in addition to actually forming these two entities, the Cigarette Company Defendants were the primary source of the funding of CTR and TI; provided directors and officers of the associations; reviewed, approved or recommended approval of various research proposals and public statements (including research reports and press releases); and provided sundry other forms of assistance which both enabled and encouraged the mailings and wire transmissions in furtherance of the scheme to defraud. See PFF § I. A - E and § IV. Indeed, the Defendants' essential purpose in forming CTR and TI was to use them to issue advertisements, press releases, and research reports that are the gravamen of

many of the mailings and wire transmissions at issue. Accord United States v. United Medical & Surgical Supply Corp., 989 F.2d 1390, 1404 (4th Cir. 1993) (defendant liable where defendant's broker mailed fraudulent reports) (citing United States v. Kenofskey, 243 U.S. 440, 443 (1917)); United States v. Tiller, 302 F.3d 98, 100-102 (3d Cir. 2002) (defendant's employer, unaware of the fraud, performed the mailings); United States v. Dynalectric Co., 859 F.2d 1559, 1578 (11th Cir. 1988).[55]

b. Second, under subsection (b) of 18 U.S.C. § 2, "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." The Court of Appeals for the District of Columbia Circuit interpreted 18 U.S.C. § 2(b) in two recent cases. See United States v. Hsia, 176 F.3d 517 (D.C. Cir. 1999); United States v. Kanchanalak, 192 F.3d 1037 (D.C. Cir. 1999). In Hsia, the defendant was charged with violating various laws by willfully causing illegal campaign contributions through straw donors, or conduits, thus causing false statements to the Federal Election Commission. Rejecting the district court's conclusion that such contributions were too "attenuated," the circuit court concluded that "Section 2(b) does not, of course, limit by its terms the particular means by which the defendant may 'cause' another to commit the act, nor the degree of permissible 'attenuation' between these two people's actions." 176 F.3d at 522. In Kanchanalak, the court of appeals reiterated its holding in Hsia and concluded that, by its

[55] Accord United States v. Serafino, 281 F.3d 327, 333 (1st Cir. 2002) (defendant in "kickback" scheme liable where victim sends money to vendors, the "eminently foreseeable mechanism" money was delivered to defendants for the surpluses); United States v. Buchanan, 544 F.2d 1322 (5th Cir. 1977) (defendant liable for advertisements sent by newspaper); Richardson v. United States, 150 F.2d 58, 62 (6th Cir. 1945) (defendant liable for cotton grower's association's mailing of loan release).

reasoning, "[b]y thus causing political committees to report conduits instead of the true sources of donations, defendants have caused false statements to be made to a government agency." 192 F.3d at 1042. See also United States v. Maxwell, 920 F.2d 1028, 1036 (D.C. Cir. 1990) (use of intermediary does not insulate defendant for purposes of wire fraud liability so long as defendant was member of fraudulent scheme).

As stated above and further detailed in the Court's Findings of Fact, CTR and TI were created for the express purpose of serving as the industry's research and propaganda/public relations arms, respectively. Over the course of the scheme to defraud, the Cigarette Company Defendants provided over half a billion dollars each to both CTR and TI, reviewed and approved certain research proposal and press releases, and provided corporate officers and directors to serve as directors of each entity. See PFF § I. A - E, § II. I and J and § IV. A, B, E and F.

c. Lastly, the Cigarette Company Defendants are liable for the racketeering acts committed by CTR and TI under the mail and wire fraud statutes, wholly independent of aiding and abetting liability. As stated above in Section I.F.6, to establish a violation of the mail fraud statute it is not necessary to show that the defendant actually mailed anything himself or herself; it is sufficient to prove that he caused it to be done or that use of the mails was reasonably foreseeable. For example, as alleged in the Appendix to the Complaint, certain Defendants created, designed, organized, and controlled the Special Projects program at CTR. Thus, these Defendants caused the mailings and wire transmissions made in execution of that program. Indeed, they often received such communications, and responded to them in writing, utilizing the mails and/or wires to transmit their responses. Thus, the mail and wire transmissions by CTR were reasonably foreseeable to Defendants. Similarly, TI's communications disseminated

through the mails and via the wires that touted the industry's joint position on smoking and health issues – including causation, addiction, nicotine, ETS, and youth marketing – were reasonably foreseeable to the Defendants who founded, funded, and participated in the direction of TI. As such, the tobacco companies must be held liable for the mailings of their "co-schemers." United States v. Rodgers, 624 F.2d 1303, 1308-1309 (5th Cir. 1980) ("co-schemers" liable for mail fraud); United States v. Craig, 573 F.2d 455 (7th Cir. 1977); United States v. Maxwell, 920 F.2d 1028, 1036 (D.C. Cir. 1990) ("All that is required is that appellant have knowingly and willingly participated in the scheme; she need not have performed every key act herself."); United States v. Amrep Corp., 560 F.2d 539, 545 (2d Cir. 1977) ("So long as a transaction is within the general scope of a scheme on which all defendants had embarked, a defendant not directly connected with a particular fraudulent act is nonetheless responsible therefor if it was of the kind as to which all parties had agreed."); United States v. Stapleton, 293 F.3d 1111 (9th Cir. 2002); United States v. Joyce, 499 F.2d 9, 16 (7th Cir. 1974) ("As a member of a mail fraud scheme, [the defendant] was responsible for any letter which any other member of the scheme caused to be mailed in execution of the scheme.") (citing cases).

Therefore, under each of the above grounds, the Court finds that CTR and TI and the other charged Defendants are liable for the acts of TI and CTR, as alleged in the Racketeering Acts and as set forth, as modified to conform to the evidence, in PFF § V.B.

G. The Defendants Engaged in A Pattern of Racketeering Activity

In H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 239, 242 (1989), the Supreme Court stated that "to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related," **and** that they either extended over "a

substantial period of time", "or pose a threat of continued criminal activity." This factor is commonly referred to as the "continuity plus relationship test."

1. The Racketeering Acts Are Related

a. As for the requisite relationship, the Supreme Court stated "that Congress intended to take a flexible approach, and envisaged that a pattern might be demonstrated by reference to a range of different ordering principles or relationships between predicates, within the expansive bounds set." H.J. Inc., 492 U.S. at 238. The Supreme Court added that the requisite relationship would be established when the racketeering acts "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events", but that such was not the exclusive means of establishing the requisite relationship. H.J. Inc., 492 U.S. at 240.

In accordance with Congress' intended flexible approach, the federal courts of appeals have repeatedly held that the racketeering acts need not be similar or directly related to each other; rather it is sufficient that the racketeering acts are related in some way to the affairs of the charged enterprise,[56] including, for example, that the racketeering acts furthered the goals of or benefitted the enterprise,[57] or the enterprise or the defendant's role in the enterprise enabled the

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[56] See, e.g., United States v. White, 116 F.3d 903, 925, n. 7 (D.C.Cir. 1997); United States v. Eufrasio, 935 F.2d 553, 566-67 (3d Cir. 1991); United States v. Gonzalez, 921 F.2d 1530, 1540 (11th Cir. 1991); United States v. Angiulo, 897 F.2d 1169, 1180 (1st Cir. 1990); United States v. Indelicato, 865 F.2d 1370, 1382-84 (2d Cir. 1989) (en banc); Qaoud, 777 F.2d at 1115; United States v. Carter, 721 F.2d 1514, 1526-27 (11th Cir. 1984); United States v. Provenzano, 688 F.2d 194, 200 (3d Cir. 1982); United States v. Lee Stoller Enterprises, Inc., 652 F.2d 1313, 1319 (7th Cir. 1981); United States v. Weisman, 624 F.2d 1118, 1121-23 (2d Cir. 1980); United States v. Elliott, 571 F.2d 880, 899 (5th Cir. 1978).

[57] See, e.g., United States v. Polanco, 145 F.3d 536, 541 (2d Cir. 1998); United States v. (continued...)

defendant to commit or facilitated the commission of the racketeering acts.[58]

b. Here, the alleged predicate acts possess the requisite relationship under all of the permissible alternatives. See PFF § VI. All the racketeering acts have the same or similar purposes and methods of commission - i.e., the acts involve mailings or wire transmissions by the Defendants to carry out shared purposes of the charged scheme to defraud consumers and potential consumers of cigarettes. (See H.J. Inc., 492 U.S. at 249-250; see also cases cited infra n.61; and supra Section F). Moreover, all the predicate acts furthered the goals of the Enterprise and benefitted the Enterprise in that they were in furtherance of the overarching scheme to defraud the public. Additionally, the Defendants' control of, or participation with others in, the Enterprise facilitated their commission of the racketeering acts. See PFF § VI.

2. The Requisite Continuity Has Been Established

Regarding the requisite "continuity," the Supreme Court made clear in H.J. Inc., 492 U.S. at 240-243, that a wide variety of proof may establish the required "continuity" and that no single particular method of proof is required. By way of illustration, the H.J. Inc. Court provided several alternative methods of establishing the "continuity" requirement, stating:

> [1] A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial

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[57](...continued)
Wong, 40 F.3d 1347, 1375 (2d Cir. 1994); Eufrasio, 935 F.2d at 564-67; United States v. Salerno, 868 F.2d 524, 533 (2d Cir. 1989); United States v. Phillips, 664 F.2d 971, 1011-12 (5th Cir. 1981).

[58] See, e.g., United States v. Posada-Rios, 158 F.3d 832, 856-57 (5th Cir. 1998); United States v. Grubb, 11 F.3d 426, 439 (4th Cir. 1993); United States v. Tillem, 906 F.2d 814, 822 (2d Cir. 1990); United States v. Pieper, 854 F.2d 1020, 1026-27 (7th Cir. 1988); United States v. Horak, 833 F.2d 1235, 1239-40 (7th Cir. 1987); United States v. Robilotto, 828 F.2d 940, 947-48 (2d Cir. 1987).

period of time. [Id. at 242].

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> [2] A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit. Suppose a hoodlum were to sell "insurance" to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would be reappearing each month to collect the "premium" that would continue their "coverage." Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity. [Id.].

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> [3] The continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO "enterprise." [Id. at 243].[59]

The determination of the requisite continuity is not confined to consideration of the specific racketeering acts charged against each defendant standing alone. Rather, as the Supreme Court, the District of Columbia Circuit and other courts have ruled, the requisite continuity may be established by the nature of the enterprise and other unlawful activities of the enterprise and its members considered in their entirety, including uncharged unlawful activities.[60]

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[59] Following H.J. Inc., the District of Columbia Circuit has likewise adopted a flexible approach to determine whether "continuity" has been established. See United States v. Richardson, 167 F.3d 621, 626 (D.C. Cir. 1999).

[60] For example, in H.J. Inc., 492 U.S. at 242-43, the Supreme Court noted that a relatively few predicate acts over a short time span may nevertheless satisfy the threat of continuity where the racketeering acts were committed in association with other individuals or businesses that likewise committed or posed a threat of commission of other unlawful activities. Similarly, in Richardson, 167 F.3d at 625-26, the District of Columbia Circuit explained that in light of the totality of all the co-defendants' serious unlawful conduct, their "'past conduct...by its nature (continued...)

Here, the Defendants committed over 148 racketeering acts over 45 years which clearly constitutes a "substantial period" of time which easily satisfies "closed ended" continuity. See PFF § VI. Moreover, these racketeering acts "are a regular way of conducting defendant's ongoing legitimate business" (H.J. Inc., 492 U.S. at 243), and since the Defendants continue to

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[60](...continued)
project[ed] into the future with a threat of repetition,' thus satisfying RICO's pattern requirement." Id. at 626 (quoting H.J. Inc., 492 U.S. at 241).

See also Tabas v. Tabas, 47 F.3d 1280, 1294-95 (3d Cir. 1995) (en banc) (continuity in RICO case based on mail fraud predicates may be established by the overall nature of the underlying fraudulent scheme in addition to the alleged predicate acts); United States v. Busacca, 936 F.2d 232, 238 (6th Cir. 1991) (The defendant, a union president and trustee of a benefit fund, embezzled $258,435 from the fund by issuing six checks to himself over a 2 ½ month period. The court said that "the threat of continuity need not be established solely by reference to the predicate acts alone; facts external to the predicate acts may, and indeed should, be considered." The court found the requisite threat of continuity from the defendant's control of the union and the fund, the acts of concealment and disregard for proper procedures, and that there was nothing to stop the defendant's unlawful conduct until he was found liable); United States v. Alkins, 925 F.2d 541, 551-53 (2d Cir. 1991) (The requisite continuity may be established against a defendant by evidence of crimes by other members of the enterprise not charged in the indictment); United States v. Coiro, 922 F.2d 1008, 1017 (2d Cir. 1991) (continuity established where a corrupt attorney's bribery of public officials and money laundering spanning approximately four months was part of a long term drug enterprise that engaged in other unlawful activities that was likely to continue "absent outside intervention"); United States v. Gonzalez, 921 F.2d 1530, 1544-45 & n.23 (11th Cir. 1991) (evidence of continuity was not limited to the defendant's single short lived episode of interstate travel to possess or import drugs and the act of importation and possession of the drugs on the same day, but rather was adequately established by evidence of ongoing drug trafficking by other members of the enterprise); United States v. Link, 921 F.2d 1523, 1527 (11th Cir. 1991) (evidence of continuity was not limited to the defendant's two acts of possession of drugs with intent to distribute, but rather was adequately established by evidence of other unlawful drug trafficking by other members of the enterprise); United States v. Hobson, 893 F.2d 1267 (11th Cir. 1990) (continuity established where the defendant's two racketeering acts for importation of a load of marijuana and possession of the **same** load of marijuana where they were committed pursuant to an enterprise's ongoing drug trafficking); United States v. Kaplan, 886 F.2d 536, 543 (2d Cir. 1989) (continuity may be established by "external facts" in addition to the defendant's racketeering acts and the nature of the enterprise); United States v. Indelicato, 865 F.2d 1370, 1383-84 (2d Cir. 1989) (continuity established where the defendant's simultaneous murder of three persons was done in furtherance of an organized crime group that was an ongoing enterprise).

be in a position to continue their fraudulent activity, "the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future." Id. at 242. Therefore, the evidence establishes "open-ended" continuity. See PFF § VI. Accordingly, the evidence convincingly establishes that all the several alternative methods of establishing the "continuity" requirement are satisfied. Indeed, in far less compelling circumstances than those found here, the circuit courts of appeals have frequently held in civil RICO cases that multiple acts of mail and/or wire fraud extending over considerably shorter periods of time than were sufficient to satisfy the requisite "relationship plus continuity".[61]

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[61] See, e.g., Fujisawa Pharmaceutical Co. v. Kapoor, 115 F.3d 1332, 1338 (7th Cir. 1997) (multiple mailings and wire transmissions over six years designed to lure the plaintiff into purchasing $800 million in stock of an otherwise lawful entity controlled by the defendant); United Health Care Corp. v. American Trade Ins. Co., 88 F.3d 563, 571-72 (8th Cir. 1996) (multiple acts of mail fraud and wire fraud over two years to fraudulently divert insurance premium payments; Gagan v. American Cablevision, Inc., 77 F.3d 951, 962-64 (7th Cir. 1996) (multiple mailings and wire transmissions during four year period to defraud investors in an otherwise legal cable television limited partnership); Uniroyal Goodrich Tire Co. v. Mutual Trading Corp., 63 F.3d 516, 522-24 (7th Cir. 1995) (multiple mailings and wire transmissions during three years to defraud the plaintiff of money through four schemes); Tabas v. Tabas, 47 F.3d 1280, 1293-95 (3d Cir. 1995) (multiple mailings during 3½ years to defraud heirs of their interest in a business); Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1560-61 (1st Cir. 1994) (multiple mailings of false insurance claims over two years); Metromedia Co. v. Fugazy, 983 F.2d 350, 368 (2d Cir. 1992) (multiple mailings and wire transmissions to sell otherwise legitimate stock through fraud); Akin v. Q-L Investiments, Inc., 959 F.2d 521, 533 (5th Cir. 1992) (multiple mailings over several years containing misrepresentations to sell limited partnership interests); Abell v. Potomac Ins. Co. of Illinois, 946 F.2d 1160, 1167 (5th Cir. 1991) (multiple mailings over six years to sell tax-exempt revenue bonds involving more than 500 victims); Landry v. Air Line Pilots Ass'n Int'l, 901 F.2d 404, 428-29, 432-33 (5th Cir. 1990) (multiple acts of mail and wire fraud to defraud the plaintiff-pilots of their jobs and pension benefits by relocation of the pilots' base from New Orleans to El Salvador); Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio, 900 F.2d 882, 884-86 (6th Cir. 1990) (multiple mailings of bills and invoices during 17 year period to further scheme to defraud plaintiff through misrepresentations that plaintiff would be receiving the benefit of cost reductions resulting from hospital rebates); Morley v. Cohen, 888 F.2d 1006, 1009-11 (4th Cir. 1989) (multiple mailings and wire transmissions during six year period to sell otherwise legitimate interests in coal mines); Atlas

(continued...)

Moreover, many of these cases involved the sale of lawful products or other property interests through schemes to defraud. At bottom, the requisite pattern of racketeering activity has been established. See PFF § VI.

II

THE DEFENDANTS CONSPIRED TO VIOLATE RICO

A. Elements of a RICO Conspiracy Offense

Count Four of the First Amended Complaint alleges that from the early 1950's and continuing up to the date of the filing of the Amended Complaint, each Defendant conspired to conduct and participate in the affairs of the Enterprise, "through a pattern of racketeering activity consisting of multiple acts indictable under 18 U.S.C. § 1341, and 1343, in violation of 18 U.S.C.

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[61](...continued)
Pile Driving Co. v. Dicon Financial Co., 886 F.2d 986, 993-95 (8th Cir. 1989) (multiple mailings over three years by contractors to defraud subcontractors who provided materials and labor free for housing projects); Fleischhauer v. Feltner, 879 F.2d 1290, 1297-98 (6th Cir. 1989) (multiple mailings and wire transmissions during two year period to defraud 19 plaintiffs in the marketing and selling of film rights to the plaintiffs); Procter & Gamble Co. v. Big Apple Indus. Bldgs., Inc., 879 F.2d 10, 18 (2d Cir. 1989) (over 8000 mailings during two year period to defraud plaintiff in connection with construction costs and television studio leases); Beauford v. Helmsley, 865 F.2d 1386, 1391-92 (2d Cir. 1989) (thousands of mailings over several years to defraud purchasers of condominium apartments), vacated, 492 U.S. 914 (in light of H.J. Inc.), adhered to on further consideration, 893 F.2d 1433 (2d Cir. 1989); Blake v. Dierdorff, 856 F.2d 1365, 1368-69 (9th Cir. 1988) (multiple mailings and wire transmissions over 14 months to inflate the price of stock to defraud purchasers); United Energy Owners Comm., Inc. v. United Energy Mgmt. Sys., Inc., 837 F.2d 356, 361 (9th Cir. 1988) ("We conclude that the plaintiffs' allegations of multiple fraudulent acts involving multiple victims over more than one year are sufficiently related and pose a sufficient threat of continuing activity to satisfy the rules"); Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1304 (7th Cir. 1987) (57 acts of mail and wire fraud over a 7 month period to defraud one victim); Sun Sav. and Loan Ass'n v. Dierdorff, 825 F.2d 187, 192-94 (9th Cir. 1987) (four acts of mail fraud occurring over several months to defraud a single victim); Illinois Dep't of Revenue v. Phillips, 771 F.2d 312, 313 (7th Cir. 1985) ("the defendant's mailing of nine fraudulent tax returns . . . over a nine month period constitutes a pattern of racketeering").

§ 1962(d)". (Compl. ¶ 201). The Complaint also alleges that:

> Each defendant agreed that at least two acts of racketeering activity would be committed by a member of the conspiracy in furtherance of the conduct of the Enterprise. It was part of the conspiracy that defendants and their co-conspirators would commit numerous acts of racketeering activity in the conduct of the affairs of the Enterprise, including, but not limited to, the acts of racketeering set forth in the Appendix, in the District of Columbia and elsewhere.

(Compl. ¶ 203).

To establish this conspiracy violation under 18 U.S.C. § 1962(c) and (d), the United States must prove each of the following elements.

1. The existence of an enterprise;
2. That the enterprise was engaged in, or its activities affected, interstate or foreign commerce; and
3. That each defendant knowingly agreed to the commission of a violation of 18 U.S.C. 1962(c).[62]

See, e.g., Salinas v. United States, 522 U.S. 52, 62-65 (1997); United States v. Philip Morris Inc., 130 F. Supp. 2d 96, 100 (D.D.C. 2001). Accord United States v. Posada-Rios, 158 F.3d 832, 857 (5th Cir. 1998); United States v. To, 144 F.3d 737, 744 (11th Cir. 1998); Jones v. Meridian Towers Apartments, Inc., 816 F. Supp. 762, 772-73 (D.D.C. 1993).

Although a substantive RICO offense requires proof that each defendant committed at least two racketeering acts, it is settled law that to establish a RICO conspiracy charge, the plaintiff is not required to prove that any defendant committed any racketeering act[63] or any overt

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[62] The first two elements are the same as for the substantive RICO count, which has been addressed supra, in Section I.

[63] See, e.g., Salinas, 522 U.S. at 61; United States v. Zauber, 857 F.2d 137, 148 (3d Cir. 1988); United States v. Caporale, 806 F.2d 1487, 1515 (11th Cir. 1986); United States v. Teitler, 802 F.2d 606, 612-13 (2d Cir. 1986)(collecting cases); United States v. Neapolitan, 791 F.2d 489, 498 (7th Cir. 1986); United States v. Adams, 759 F.2d 1099, 1116 (3d Cir. 1985); United (continued...)

act.[64] "The RICO conspiracy provision, then, is more comprehensive than the general conspiracy offense in [18 U.S.C.] § 371". Salinas, 522 U.S. at 63. Moreover, as in the case of conventional conspiracy offenses, each co-conspirator is liable for the acts of all other conspirators undertaken in furtherance of the conspiracy both prior to and subsequent to the co-conspirator's joining the conspiracy.[65] Furthermore, to establish a RICO conspiracy charge, the plaintiff is not required to prove that the defendant participated in the operation or management of the enterprise. See infra, Section II. C.

B. Each Defendant is Liable for the RICO Conspiracy Charge Under Each of Two Alternative Methods of Establishing the Requisite Conspiratorial Agreement

1. There Are Two Alternative Methods of Establishing a Conspiratorial Agreement to Violate RICO

As the Court in United States v. Nguyen, 255 F.3d 1335, 1341 (11th Cir. 2001), succinctly stated:

> In order to be guilty of a RICO conspiracy, a defendant must either agree to [personally] commit two predicate acts or agree to participate in the conduct of the enterprise with the knowledge and intent that other members of the conspiracy

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[63](...continued)
States v. Brooklier, 685 F.2d 1208, 1222-23 (9th Cir. 1982); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981).

[64] See, e.g., Salinas, 522 U.S. at 63; United States v. Corrado, 286 F.3d 934, 937 (6th Cir. 2002); United States v. Glecier, 923 F.2d 496, 500 (7th Cir. 1991); United States v. Gonzalez, 921 F.2d 1530, 1547-48 (11th Cir. 1991); United States v. Torres Lopez, 851 F.2d 520, 525 (1st Cir. 1988); United States v. Persico, 832 F.2d 705, 713 (2d Cir. 1987).

[65] See, e.g., Salinas, 522 U.S. at 63-64; Aetna Cas. Surety Co. v. P & B Autobody, 43 F.3d 1546, 1562 (1st Cir. 1994); United States v. Pungitore, 910 F. 2d 1084, 1145-48 (3d Cir. 1990); United States v. Bridgeman, 523 F.2d 1099, 1108 (D.C. Cir. 1975).

would commit at least two predicate acts in furtherance of the enterprise.[66]

"If the government can prove an agreement on an overall objective, it need not prove a defendant personally agreed to commit two predicate acts." United States v. Abbell, 271 F.3d 1286, 1299 (11th Cir. 2001). Accord To, 144 F.3d at 744; United States v. Starrett, 55 F.3d 1525, 1544 (11th Cir. 1995).

To prove the conspiratorial agreement under the first method, the plaintiff must prove that the defendant personally agreed to commit at least two racketeering acts in furtherance of the conduct of the affairs of the enterprise. See cases cited supra n. 63. In Salinas, 522 U.S. 52, the Supreme Court made clear that while evidence of such an agreement is sufficient to establish a RICO conspiracy, RICO does not require the plaintiff to prove that the defendant agreed to personally commit two predicate acts of racketeering. The Supreme Court explained:

> A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 253-254 (1940). The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other. See Pinkerton v. United States, 328 U.S. 640, 646 (1946)("And so long as the partnership in crime continues, the partners act for each other in carrying it forward"). If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators. As Justice Holmes observed: "[P]lainly a person may conspire for the commission of a crime by a third person." United States v. Holte, 236 U.S. 140, 144 (1915).
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> A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in

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[66] Accord United States v. Abbell, 271 F.3d 1286, 1299 (11th Cir. 2001); Brouwer v. Raffensperger, Hughes & Co., 199 F.3d 961, 964 (7th Cir. 2000); To, 144 F.3d at 744; United States v. Brazel, 102 F.3d 1120, 1138 (11th Cir. 1997); United States v. Shenberg, 89 F.3d 1461, 1471 (11th Cir. 1996).

> any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion. One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense. It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues.
>
> ***
>
> It makes no difference that the substantive offense under § 1962(c) requires two or more predicate acts. The interplay between subsections (c) and (d) does not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense.

Salinas, 522 U.S. at 63-65 (alteration in original).

Thus, to prove a RICO conspiracy under the Salinas alternative, "[t]he focus is on the agreement to participate in the enterprise through the pattern of racketeering activity, not on the agreement to commit the individual predicate acts. . . . The government can prove [such] an agreement on an overall objective by circumstantial evidence showing that each defendant must necessarily have known that others were also conspiring to participate in the same enterprise through a pattern of racketeering activity." Starrett, 55 F.3d at 1543-44 (internal quotations and citations omitted).[67] Hence, it is sufficient "that the defendant agree to the commission of [at least] two predicate acts [by any conspirator] on behalf of the conspiracy". MCM Partners, Inc. v. Andrews-Bartlett & Assocs., 62 F.3d 967, 980 (7th Cir. 1995), quoting United States v. Neapolitan, 791 F.2d 489, 498 (7th Cir. 1986). Accord Brouwer, 199 F.3d at 964; United States v. Quintanilla, 2 F.3d 1469, 1484 (7th Cir. 1993).[68]

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[67] Accord Posada - Rios, 158 F.3d at 857; To, 144 F.3d at 744; Brazel, 102 F.3d at 1138; Shenberg, 89 F.3d at 1471.

[68] Moreover, the indictment or complaint need not specify the predicate racketeering acts that the defendant agreed would be committed by some member of the conspiracy in furtherance (continued...)

Moreover, "[r]egardless of the method used to prove the agreement, the government does not have to establish that each conspirator explicitly agreed with every other conspirator to commit the substantive RICO crime described in the indictment, or knew his fellow conspirators, or was aware of all the details of the conspiracy. . . . That each conspirator may have contemplated participating in different and unrelated crimes is irrelevant." Starrett, 55 F.3d at 1544 (internal quotations and citations deleted).[69] Rather, to establish sufficient knowledge it is only required that the defendant "know the general nature of the conspiracy and that the conspiracy extends beyond his individual role." Rastelli, 870 F.2d at 828 (collecting cases).[70] Furthermore, "[b]ecause conspirators normally attempt to conceal their conduct, the elements of a conspiracy offense may be established solely by circumstantial evidence. . . . The agreement, a defendant's guilty knowledge and a defendant's participation in the conspiracy all may be inferred from the development and collocation of circumstances." Posada-Rios, 158 F.3d at 857

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[68](...continued)
of the conduct of the affairs of the enterprise. Rather, it is sufficient to allege that it was agreed that multiple violations of a specific statutory provision which qualifies as a RICO racketeering offense would be committed, and accordingly the fact finder is not limited to consideration of the specific racketeering acts, if any, specified in the charging instrument. See, e.g., United States v. Glecier, 923 F.2d 496, 499-500 (7th Cir. 1991); United States v. Crockett, 979 F.2d 1204, 1208-09 (7th Cir. 1992); United States v. Phillips, 874 F.2d 123, 125-28 (3d Cir. 1989). Therefore, the United States is not limited to the specific racketeering acts alleged. See also cases cited supra n.60 and accompanying text.

[69] Accord United States v. Zichettello, 208 F.3d 72, 100 (2d Cir. 2000); To, 144 F.3d at 744; United States v. Ruiz, 905 F.2d 499, 505 (1st Cir. 1990); Rastelli, 870 F.2d at 828 (collecting cases); United States v. Rosenthal, 793 F.2d 1214, 1228 (11th Cir. 1986); United States v. De Peri, 778 F.2d 963, 975 (3d Cir. 1985); United States v. Elliott, 571 F.2d 880, 902-903 (5th Cir. 1978).

[70] Accord Zichettello, 208 F.3d at 100; Brazel, 102 F.3d at 1138; Eufrasio, 935 F.2d at 577 n.29; Rosenthal, 793 F.2d at 1228; De Peri, 778 F.2d at 975; Elliott, 571 F.2d at 903-04.

(citations and internal quotations omitted). Accord cases cited supra, notes 67 and 70.

2. Each Defendant is Liable for the RICO Conspiracy Charge Under Both Alternative Methods of Proof Although Either Method Alone is Sufficient

Under the foregoing well established legal standards, the Court easily concludes that each Defendant conspired to violate RICO. See PFF § VII. Above all else, each Defendant personally committed numerous racketeering acts in furtherance of the affairs of the same Enterprise. See Section I, supra. "Where, as here, the evidence establishes that each defendant, over a period of years, committed several acts of racketeering activity in furtherance of the enterprise's affairs, the inference of an agreement to do so is unmistakable." Elliott, 571 F.2d at 903. Accord United States v. Ashman, 979 F.2d 469, 492 (7th Cir. 1992); Crockett, 979 F.2d at 1218; United States v. Carlock, 806 F.2d at 535, 547 (5th Cir. 1986); United States v. Melton, 689 F.2d 679, 683 (7th Cir. 1982); United States v. Sutherland, 656 F.2d 1181, 1187 n.4 (5th Cir. 1981).

Moreover, each Defendant agreed to facilitate the commission of a substantive RICO offense with the knowledge that others were also conspiring to participate in the same Enterprise through racketeering activity. In that regard, the evidence shows that all the Defendants coordinated significant aspects of their public relations, scientific, legal, and advertising activity in furtherance of the shared objective – to maximize industry profits by preserving and expanding the market for cigarettes through a scheme to deceive the public. Defendants executed the scheme in several different ways: (1) by making false, misleading, and deceptive public statements designed to maintain doubt about whether smoking caused disease; (2) by denying the addictiveness of smoking cigarettes and the role of nicotine therein; (3) by undertaking a publicly announced duty to conduct disinterested and independent research into the health effects of smoking, and to disseminate to the public the results of such research, a public commitment

which Defendants violated. Initially, Defendants American, Brown & Williamson, Lorillard, Philip Morris and Reynolds hatched this scheme to defraud at a conspiratorial meeting at the Plaza Hotel in 1953, and they and other Defendants subsequently reiterated and renewed their false promise at various times. See PFF § IV.

Moreover, the Cigarette Company Defendants jointly participated at various times in creating, funding, directing and controlling Defendants CTR and TI and other entities to further their shared unlawful objectives, see PFF § I. A - H; and the Cigarette Company Defendants (except for BATCo and Philip Morris Companies) jointly caused Defendants CTR and TI to commit numerous, specifically alleged racketeering acts to further their shared objective, while the Cigarette Company Defendants were also committing numerous parallel racketeering acts in furtherance of their unlawful objectives. See PFF § I. A-E, and §§ IV and VI, and supra Section I. F. 7. Furthermore, correspondence between and among the Defendants evidences their working together to pursue their shared primary objective. Significantly, the Defendants worked together to publicly disseminate their agreed upon deceptive party line denying the link between smoking cigarettes and adverse health effects, and denying that young people were the target of their marketing and the addictiveness of smoking. See PFF § I. A-E and § IV. A, B and E. The Cigarette Company Defendants (except Philip Morris Companies) also entered into a "Gentlemen's Agreement" to prevent and/or forestall the development and marketing of a potentially less-hazardous cigarette. See PFF § I. J and § IV. G.

Each Defendant also agreed to facilitate the substantive RICO violation by endeavoring to conceal or suppress information and documents which may have been detrimental to the interests of the members of the Enterprise, including information which could be discoverable in smoking

and health liability cases against the Defendants or in Congressional or other governmental proceedings and information that could constitute, or lead to, evidence of the link between smoking cigarettes and adverse health effects and addictiveness. See PFF § I. K, § IV. F.(4) and § VIII. A.(1).

The foregoing evidence establishes overwhelmingly that each Defendant knew the general nature of the conspiracy and that it extended beyond the Defendant's individual role. Indeed, each Defendant took substantial steps to facilitate the scheme to defraud that was the central purpose of the conspiracy, including committing numerous racketeering acts in furtherance of the Enterprise's affairs. Hence, each Defendant entered into the requisite conspiratorial agreement. Accord Salinas, 522 U.S. at 66 ("even if Salinas did not accept or agree to accept two bribes, there was ample evidence that he conspired to violate subsection (c). The evidence showed that [Salinas' conspirator] committed at least two acts of racketeering activity when he accepted numerous bribes and that Salinas knew about and agreed to facilitate the scheme. This is sufficient to support a conviction under § 1962(d).").[71]

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[71] See, e.g., Aetna Cas. Surety Co. v. P & B Autobody, 43 F.3d 1546, 1562-63 (1st Cir. 1994)(§ 1962(d) RICO conspiracy relating to scheme to defraud insurance company by submitting false claims from defendant body shops through co-conspirator appraisers; "the jury reasonably could have found that, although each defendant may not have known the entire sweep of the conspiracy, each defendant knew that he or she was a part of a larger fraudulent scheme," and where the appraisers, as the "hub" of the RICO conspiracy: "Through evidence of each individual Arsenal defendant's actions, the jury could infer that each defendant had the requisite state of mind for a RICO conspiracy violation--knowing participation." Despite the fact that the defendants disclaimed knowledge of the other body shop owners' fraudulent claims, the court noted that the defendants' racketeering activities were "unusually similar": "The body shops all defrauded Aetna, they reported nearly identical types of fraudulent claims, and they obtained appraisals from the same appraisers. Evidence of these similarities, considered along with other evidence, was sufficient to support a jury finding that the owners of the body shops conspired directly with one another."); Gagan v. American Cablevision, 77 F.3d 951, 962 (7th Cir. 1996)
(continued...)

[71](...continued)
("From the substantial direct and circumstantial evidence introduced at trial regarding the use of interstate mails and wires to contact the limited partners, inform them of the condition of their limited partnerships, deceive them, and acquire their interests, the jury could reasonably find that the defendants agreed to conduct or participate in the conduct of the affairs of South Hesperia with respect to the Falcon sale through a pattern of mail and wire fraud by employing those modalities in a scheme to obtain money from the limited partners through false pretenses."); Atlas Pile Driving Co. v. DiCon Financial Co., 886 F.2d 986, 997 (8th Cir. 1989)(RICO conspiracy involving scheme to defraud housing subcontractors; where defendant (Conry) controlled entities involved in the sale and financing of the projects, and where defendant made misrepresentations in furtherance of fraudulent scheme, "it can be inferred that Conry was intimately involved in the scheme to defraud subcontractors of their labor and materials and that Conry agreed that the necessary predicate acts would be committed."); Hill v. Equitable Bank, 655 F. Supp. 631, 652-53 (D. Del. 1987), aff'd 851 F.2d 691 (3d Cir. 1988) (scheme to defraud investors in purchase of partnership interests: conspiracy conviction upheld where meetings between defendants "provide[d] sufficient evidence for a possible jury finding that an agreement existed."); see also United States v. Boylan, 898 F.2d 230, 242 (1st Cir. 1990) (RICO conspiracy conviction upheld where "the defendants and their activities were nothing short of striking: each defendant was a detective assigned to work nights in District 4 at some time during the indictment period; each received things of value, usually cash, from restaurant or nightclub owners in exchange for services not officially sanctioned; the targeted establishments were all in District 4 and all under the Board's aegis. The services themselves bore hallmarks of similarity. Moreover, there was a significant degree of interconnectedness. The defendants often cooperated with one another in collecting payments and in providing their specialized services. These common characteristics are precisely the kind of factors which can permissibly lead to the inference of a single conspiracy. "); Ashman, 979 F.2d at 492 (in investment scheme, evidence sufficient for RICO conspiracy where defendants served as "bag men" for each other, used similar procedures for covering losses, and "were well aware that they were part of an ongoing and flexible agreement to commit fraud as the need--or perhaps the opportunity--arose."); Church, 955 F.2d at 695 (defendant guilty of RICO conspiracy where government proved that he agreed personally to commit two predicate acts of selling cocaine, and defendant knew that a codefendant was a part of a group distributing cocaine, "thus proving agreement on an overall objective as well."); United States v. Hughes, 895 F.2d 1135, 1141-43 (6th Cir. 1990) (sufficient evidence for doctor's RICO conspiracy conviction in "blood-for-[illegal]-drugs" scheme where doctor's involvement with clinic, including assurances to pharmacists that prescriptions for controlled substances should be filled, "invites the inference drawn by the jury--he **agreed** to participate in the RICO enterprise") ; Phillips, 874 F.2d at 128 (evidence sufficient to support appellants' RICO conspiracy convictions where there was "not only knowledge but actual commission of four specific acts on the part of Phillips and two on the part of Brown"); Rastelli, 870 F.2d at 828-30 (RICO conspiracy convictions upheld where evidence demonstrated each defendant knew of general nature of the enterprise, involving a group of employees, union

(continued...)

C. A Defendant May Be Liable for a RICO Conspiracy Offense Even if the Defendant Did Not Participate In the Operation or Management of the Enterprise

1. As noted above in Section I. E., in Reves v. Ernst & Young, 507 U.S. 170, 185 (1993), the Supreme Court held that a defendant is not liable for a **substantive RICO violation** under 18 U.S.C. § 1962(c) unless the defendant "participates in the operation or management of the enterprise itself." Reves did not involve a RICO conspiracy offense and its "operation or management" test does not apply to a RICO conspiracy offense because it is well settled that a defendant may be liable for a conspiracy to violate a law even if he may not be liable for a substantive violation of the law because he does not fall within the category of persons who could commit the substantive offense directly.[72]

In Salinas, 522 U.S. 52 (1997), the Supreme Court squarely applied this principle to RICO cases. As explained supra Section II. B.1., in Salinas, the Supreme Court held that even

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[71](...continued)
officials and organized crime figures, and knew that the enterprise extended beyond the individual role of each defendant, even if the defendant was not aware of each component of the enterprise).

[72] For example, the Hobbs Act, 18 U.S.C. § 1951, makes it a crime for public officials to extort property under "color of official right." Nevertheless, private citizens have been convicted of Hobbs Act conspiracy, i.e., extortion under "color of official right," where they have conspired with public officials to violate the Hobbs Act even though they are not within the class of persons who may be liable for the substantive Hobbs Act violation. See, e.g., United States v. Collins, 78 F.3d 1021, 1031-32 (6th Cir. 1992); United States v. Torcasio, 959 F.2d 503, 505-06 (4th Cir. 1992); United States v. Marcy, 777 F. Supp. 1393, 1396-97 (N.D. Ill. 1991). See also United States v. Jones, 938 F.2d 737, 741-42 (7th Cir. 1991) (conspiracy charge legally sufficient against defendant who was not a financial institution, although underlying substantive statutes, 31 U.S.C. §§ 5313, 5322, proscribe the failure to file Currency Transaction Reports with the Internal Revenue Service only by financial institutions); United States v. Hayes, 827 F.2d 469, 472-73 (9th Cir. 1987)(same); United States v. Sans, 731 F.2d 1521, 1531-32 (11th Cir. 1984) (defendant could be convicted of conspiracy to defraud United States, in violation of Currency and Foreign Transactions Reporting Act, 31 U.S.C. §§ 1058, 1081, although he was not a specified party required to file reports under the Act).

though a defendant may not be liable for a substantive RICO violation under 18 U.S.C. § 1962(c) unless he himself committed at least two racketeering acts, a defendant, nevertheless, may be liable for a RICO conspiracy offense even if he did not himself commit or agree to commit at least two racketeering acts. Id. at 61-65. In reaching this conclusion, the Supreme Court relied upon two well-established tenets of conspiracy law which govern Section 1962(d) and are applicable here. The Supreme Court first observed that "a person may conspire for the commission of a crime by a third person." Id. at 64, citing United States v. Holte, 236 U.S. 140, 144 (1915). The Salinas Court also recognized the that "[a] person . . . may be liable for conspiracy even though he was incapable of committing the substantive offense." Id. at 64, citing United States v. Rabinowich, 238 U.S. 78, 86 (1915).

Thus, the rationale of Salinas and the long-standing tenets of conspiracy law which it relied upon compel the conclusion that a defendant may be liable for a conspiracy to violate RICO even if he is not among the class of persons who could commit the substantive RICO offense (i.e., a defendant who participates in the operation or management of the enterprise). Rather, it is sufficient that the defendant knowingly agree to facilitate a scheme that would, if completed, constitute a substantive violation of RICO involving at least one other conspirator who would participate in the operation or management of the enterprise.

2. Consistent with Salinas, the Second, Third, Fifth, Seventh and Eleventh Circuits have held that a defendant may be liable for a RICO conspiracy offense under 18 U.S.C. § 1962(d) even if that defendant did not personally operate or manage the RICO enterprise himself, or conspire to personally do so. See Napoli v. United States, 45 F.3d 680, 683-84 (2d Cir. 1995) (Reves does not apply to section 1962(d) RICO conspiracy conviction); United States v. Viola,

35 F.3d 37, 42-43 (2d Cir. 1994)("A defendant can be guilty of [violation of section 1962(d) for] conspiring to violate a law [section 1962(c)], **even if he is not among the class of persons who could commit the crime directly**.")(emphasis added); Smith v. Berg, 247 F.3d 532, 537-38 (3d Cir. 2001)(holding that "Salinas makes 'clear that § 1962(c) liability is not a prerequisite to § 1962(d) liability'", and therefore "a defendant may be held liable for conspiracy to violate Section 1962(c) if he knowingly agrees to facilitate a scheme which includes the operation or management of a RICO enterprise" by another person); United States v. Posada-Rios, 158 F.3d 832, 857 (5th Cir. 1998) ("We conclude that the better-reasoned rule is the one adopted by the Second, Seventh, and Eleventh Circuits, especially in light of the Supreme Court's recent decision in Salinas" that the Reves operation or management test does not apply to RICO conspiracy charges); MCM Partners, Inc. v. Andrews-Bartlett & Assocs., 62 F.3d 967, 979 (7th Cir. 1995)("A defendant may conspire to violate section 1962(c) **even if that defendant could not be characterized as an operator or manager of a RICO enterprise under Reves**."); United States v. Quintanilla, 2 F.3d 1469, 1484-85 (7th Cir. 1993)(same); United States v. Castro, 89 F.3d 1443, 1452 (11th Cir. 1996)("The Reves 'operation or management' test does not apply to section 1962(d) convictions."); United States v. Starrett, 55 F.3d 1525, 1547-48 (11th Cir. 1995)("[W]e agree with the Second and Seventh Circuits that the Supreme Court's Reves test does not apply to a conviction for RICO conspiracy.").[73]

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[73] Only the Ninth Circuit has ruled that Reves' "operation or management" test applies to RICO conspiracy charges. See Neibel v. Trans World Assurance Co., 108 F.3d 1123, 1128-29 (9th Cir. 1997). However, Neibel was decided **before** Salinas was decided, and the Ninth Circuit has not yet revisited its ruling in Neibel since Salinas was decided. As other federal circuits have noted, Neibel is inconsistent with the rationale of Salinas and well established tenets of conspiracy law. See, e.g., United States v. Warneke, 310 F.3d 542, 547-48, (7th Cir. 2002)(listing cases disagreeing with (continued...)

The majority position regarding the proper scope of Section 1962(d) with respect to the Reves "operation or management" test is succinctly stated by Seventh Circuit in United States v. Quintanilla:

> [Section] 1962(d) liability is not coterminous with liability under section 1962(c). It follows that the Supreme Court's decision in Reves does not disturb [the defendant's] conviction for RICO conspiracy. Reves addressed only the extent of conduct or participation necessary to violate a substantive provision of the statute; the holding in that case did not address the principles of conspiracy law undergirding section 1962(d).
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> . . . [T]o hold that under section 1962(d) the government must show that an alleged coconspirator was capable of violating the substantive offense under section 1962(c), that is, that he participated to the extent required by Reves, would add an element to RICO conspiracy that Congress did not direct.

2 F.3d at 1485 (internal quotations and citations omitted).

In sum, although the Court has found (supra Section I.E.) that each Defendant participated in the operation or management of the Enterprise, even assuming arguendo that a Defendant did not itself participate, or agree to participate personally, in the operation or management of the Enterprise, each Defendant is liable for the RICO conspiracy charge because

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(...continued)
Neibel's holding) ; Posada-Rios, 158 F.3d at 857-58. Moreover, Neibel, 108 F.3d at 1128, explicitly relied upon United States v. Antar, 53 F.3d 568, 581 (3d Cir. 1995), another pre-Salinas decision, which the Third Circuit subsequently ruled was no longer good law in light of Salinas. See Smith v. Berg, 247 F.3d at 534.

In Thomas, 114 F.3d at 242-43, which was decided before Salinas, the District of Columbia Circuit noted the conflict between the Ninth Circuit and other circuits on this issue, but found it unnecessary to resolve the dispute because the evidence established the defendant's guilt on the RICO conspiracy charge "[r]egardless of which approach this circuit adopts." Significantly, in Jones v. Meridian Towers Apartments, Inc., 816 F. Supp. 762, 772-73 (D.D.C. 1993), the District Court for the District of Columbia held that to establish a RICO conspiracy it is not necessary to prove that the defendant personally participated, or agreed to participate personally, in the operation or management of the enterprise. No court has held to the contrary after Salinas.

each Defendant knowingly agreed to facilitate a scheme which, if completed, would constitute a RICO violation involving at least one other conspirator who participated in the operation or management of the Enterprise.

III

THE UNITED STATES HAS ESTABLISHED THAT THERE IS A REASONABLE LIKELIHOOD THAT THE DEFENDANTS WILL VIOLATE THE LAW IN THE FUTURE

A. Defendants' Past Intentional Unlawful Conduct Over A 45-Year Period Sufficiently Establishes A Reasonable Likelihood of Future Violations. Mere Cessation of Unlawful Conduct is Not Sufficient to Prevent Injunctive and Other Equitable Relief

1. Earlier in this litigation, the Court explicitly ruled that:

> To obtain injunctive relief in this Circuit, a plaintiff must show that the defendant's past unlawful conduct indicates a "'reasonable likelihood of further violation(s) in the future.'" SEC v. Kenton Capital, Ltd., 69 F. Supp. 2d 1, 15 (D.D.C. 1998) (Kollar-Kotelly, J.) (quoting SEC v. Savoy Ind., Inc., 587 F.2d 1149, 1168 (D.C. Cir. 1978)); SEC v. Bilzerian, 29 F.3d 689, 695 (D.C. Cir. 1994).
>
> To determine whether there is a "reasonable likelihood" of future violations, the following factors must be considered: "[1] whether a defendant's violation was isolated or part of a pattern, [2] whether the violation was flagrant and deliberate or merely technical in nature, and [3] whether the defendant's business will present opportunities to violate the law in the future." First City, 890 F.2d at 1228 (citing Savoy Indus., 587 F.2d at 1168); Bilzerian, 29 F.3d at 695. None of these three factors is determinative; rather, "the district court should determine the propensity for future violations based on the totality of circumstances." First City, 890 F. 2d at 1228 (citing SEC v. Youmans, 729 F.2d 413, 415 (6th Cir. 1984).

Philip Morris Inc., 116 F. Supp. 2d at 148.

Applying these three factors, this Court found that the Complaint's allegations

"overwhelmingly satisfied each of the three First City factors," stating:

> First, Defendants cannot possibly claim that their alleged conspiratorial actions were "isolated." On the contrary, the Complaint describes more than 100 predicate acts spanning more than a half-century. Second, Defendants cannot contend that the alleged RICO violations are "technical in nature." The Government alleges that Defendants' numerous misstatements and acts of concealment were made intentionally and deliberately, rather than accidentally or negligently, as part of a far-ranging, multi-faceted, sophisticated conspiracy. Third, Defendants' business of manufacturing, selling and marketing tobacco products clearly "present[s] opportunities to violate the law in the future." First City, 890 F.2d at 1228. As the Government points out, as long as Defendants are in the business of selling and marketing tobacco products, they will have countless "opportunities" and temptations to take unlawful actions, just as it is alleged they have done since 1953. Govt's Opp'n at 87.

Id. at 149 (alteration in original).

Since this Court has found that the evidence establishes the above-referenced allegations (see supra Sections I and II and PFF §§ I , IV, V and VI), the United States is entitled to injunctive relief and other equitable relief on the basis of Defendants' past wrongdoing alone, without any need to establish any Defendant's continuing unlawful conduct after the filing of the Complaint. Indeed, the District of Columbia Circuit and other courts have repeatedly held, under less compelling circumstances than those found here, that a plaintiff is entitled to injunctive relief upon evidence of a defendant's intentional pattern of past unlawful activities standing alone.[74]

2. The Defendants' contention that the United States is not entitled to injunctive relief

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[74] See, e.g., SEC v. Bilzerian, 29 F.3d 689, 695 (D.C. Cir. 1994); SEC v. Gruenberg, 989 F.2d 977, 978 (8th Cir. 1993); SEC v. First City Financial Corp., 890 F.2d 1215, 1228-29 (D.C. Cir. 1989); Commodity Futures Trading Comm'n. v. Hunt, 591 F.2d 1211, 1220-21 (7th Cir. 1979); SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1168 (D.C. Cir. 1978); SEC v. Commonwealth Chemical Secs., Inc., 574., 574 F.2d 90, 98-100 (2d Cir. 1978); SEC v. Management Dyn., Inc., 515 F.2d 801, 807-08 (2d Cir. 1975); SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1100-01 (2d Cir. 1972); Pullum v. Greene, 396 F.2d 251, 256-57 (5th Cir. 1968); SEC v. Kenton Capital, Ltd., 69 F. Supp. 2d 1, 15 (D.D.C. 1998).

because they have ceased their alleged unlawful conduct and they settled, in a Master Settlement Agreement ("MSA") in 1998, claims that had been brought by 46 state Attorneys General is unavailing. As the Supreme Court, the District of Columbia Circuit and other federal courts have repeatedly ruled, mere "cessation of violations . . . is no bar to the issuance of an injunction", Hecht Co. v. Bowles, 321 U.S. 321, 327 (1944), because past violations are "highly suggestive of the likelihood of future violations." Management Dyn., Inc., 515 F.2d at 807.[75]

Such cessation of unlawful activity is particularly suspect where, as here, the wrongdoers' alleged cessation is designed to escape or minimize its liability in the face of various lawsuits. See, e.g., United States v. Parke, Davis & Co., 362 U.S. 29, 48 (1960)("A trial court's wide discretion in fashioning remedies is not to be exercised to deny relief altogether by lightly inferring an abandonment of the unlawful activities from a cessation which seems timed to anticipate suit."). Accord United States v. Odessa Union Warehouse Co-Op, 833 F.2d 172, 176 (9th Cir. 1987); Manor Nursing Ctrs., Inc., 458 F.2d at 1101.

Moreover, the MSA does not preclude the United States from obtaining injunctive relief because as this Court previously observed, there is no basis to believe "that the MSA will be fully enforced or otherwise accomplish its intended objectives." Philip Morris Inc., 116 F. Supp. 2d at 149. Furthermore, it is evident that the United States seeks significant equitable relief that is not covered by the MSA. Among other matters, the United States seeks: an injunction against the commission of any act of racketeering, as defined in 18 U.S.C. § 1961(1), and the knowing

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[75] Accord City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 & n.10 (1982); United States v. Parke, Davis & Co., 362 U.S. 29, 47-49 (1960); United States v. Odessa Union Warehouse Co-Op, 833 F.2d 172, 176 (9th Cir. 1987); Campbell v. McGruder, 580 F.2d 521, 540 (D.C. Cir. 1978); Manor Nursing Ctrs., Inc., 458 F.2d at 1101; Commonwealth Chemical Secs., Inc., 574 F.2d at 98-99; Pullum, 396 F.2d at 256-57.

association with any other person who is engaged in such acts of racketeering; an order requiring each Defendant to "make corrective statements regarding the health risks of cigarette smoking and the addictive properties of nicotine" in its future advertising and marketing of cigarettes; an order to fund programs for medically approved nicotine replacement therapy for smokers; and the appointment of court officers to monitor and implement the relief granted. See Compl. § VII, B(2). The United States also seeks disgorgement of Defendants' past ill-gotten gains, which is distinct from the payments from future profits that Defendants will make to the States under the terms of the MSA. See id. § VII, B(1). This disgorgement serves as a deterrent to future wrongdoing and cannot be frustrated by Defendants' agreements with other parties. Moreover, Defendants Philip Morris Companies, Inc., and BATCo are not signatories to the MSA.

Thus, the United States seeks distinct relief designed to vindicate highly significant sovereign interests that cannot be thwarted by the Defendants' settlement with other parties. As the Supreme Court explained in a closely analogous context:

> [T]he Government's right and duty to seek an injunction to protect the public interest exist without regard to any private suit or decree.
>
> To hold that a private decree renders unnecessary an injunction to which the Government is otherwise entitled is to ignore the prime object of civil decrees secured by the Government - the continuing protection of the public, by means of contempt proceedings, against a recurrence of antitrust violations. Should a private decree be violated, the Government would have no right to bring contempt proceedings to enforce compliance; it might succeed in intervening in the private action but only at the court's discretion. The private plaintiff might find it to his advantage to refrain from seeking enforcement of a violated decree. . . .
>
> Or the plaintiff might agree to modification of the decree, again looking only to his own interest. In any of these events it is likely that the public interest would not be adequately protected by the mere existence of the private decree. It is also clear that Congress did not intend that the efforts of a private litigant should supersede the duties of the Department of Justice in policing an industry.

United States v. Borden Co., 347 U.S. 514, 519 (1954). Cf. SEC v. Commonwealth Chem. Secs., Inc., 574 F.2d 90, 98-99 (2d Cir. 1978)(prior consent to an SEC order to stay out of the securities industry did not preclude SEC from seeking stronger injunctive relief).

In sum, the United States is entitled to injunctive relief and disgorgement based upon the extensive pattern of Defendants' past, deliberate unlawful conduct standing alone.

B. The Defendants' Continuing Unlawful, Fraudulent Conduct Further Supports the Need For Injunctive and Other Equitable Relief

The Court concludes that Defendants not only have engaged in a scheme to defraud that spanned nearly fifty years, but that they continue to do so. Defendants remain in the cigarette business, and have countless opportunities and temptations to violate the law in the future. As noted in the Court's Findings of Fact, the evidence shows that Defendants have taken many of these opportunities. See PFF § VIII.

Defendants continue to publicly state that not only do they oppose youth smoking, but in fact state that they have **never** targeted the youth market despite the extensive evidence to the contrary, including evidence that Defendants have tracked smokers as young as twelve. See PFF § IV.E, ¶¶ 1402, 1409, 1410, 1413, 1422, 1431, 1532, 1607, 1761. Similarly, the Cigarette Company Defendants continue to advertise in youth-oriented publications, employ imagery and messages that they know are appealing to teenagers, and increasingly concentrate their marketing in places where they know youths will frequent. In fact, at least one Court has fined Defendant R.J. Reynolds $20 million for targeting youths in advertising campaigns between 1998 and 2001, in violation of the Master Settlement Agreement. People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., 2002 WL 1292994 (Cal. Super. Ct. Jun. 06, 2002). See PFF § VIII, ¶ 85.

Similarly, Defendants continue to make false and fraudulent statements regarding the

adverse health effects of smoking. Despite the fact that public health authorities universally accept that smoking causes lung cancer, emphysema, heart disease, and other diseases–and despite the internal research in their own files – various Defendants continue to equivocate and qualify their statements regarding causation. Indeed, most Defendants now claim that they have never publicly disputed the link between smoking and disease. See PFF § IV.A, § VIII. Likewise, Defendants Philip Morris, B&W, BATCo, Lorillard, and Reynolds still deny that secondhand smoke or environmental tobacco smoke ("ETS") causes disease in nonsmokers, despite the scientific conclusions of the various public health and medical authorities, including the United States Surgeon General; the National Cancer Institute; the Environmental Protection Agency; the Department of Health & Human Services National Toxicology Program; the National Heart, Lung and Blood Institute of the National Institutes of Health; the World Health Organization; the American Cancer Society; the American Medical Association; the American Heart Association; the American Lung Association; and the American Academy of Pediatrics. See PFF § VIII, ¶ 25.

In furtherance of their scheme to defraud, Defendants employ the same misrepresentations, half-truths, and equivocations when discussing nicotine manipulation and addiction. See PFF § IV.B, § VIII. Except Liggett, no Cigarette Company Defendant admitted that the term "addictive" is properly applied to smoking until this litigation was filed. In 1999, Philip Morris purchased three Liggett brands: Lark, L&M, and Chesterfield. As manufactured and packaged by Liggett, the brands had included the statement "Smoking is addictive" on the package; when Philip Morris took over the brands, this statement was quickly removed. Even today, no Cigarette Company Defendant (except Liggett) includes information about addiction or

nicotine's role therein on its cigarette packs; and in public statements, Defendants fail to mention the role of nicotine in smoking addiction, and instead attempt to distinguish nicotine from other highly addictive substances. See PFF § VIII. A. (3). Moreover, Defendants continue to flatly deny that they manipulate nicotine in their products, instead insisting that nicotine and delivery-enhancing additives exist for "taste" instead of their true purpose, to create and sustain addiction. See PFF § IV.C, § VIII. A. (3).

Likewise, Defendants' agreement to not develop or market potentially less-hazardous cigarettes continues. See PFF § IV.G, § VIII. C. (2). Various Defendants, such as Philip Morris, Liggett, and Reynolds, publicly announce that they seek to develop such products, but the evidence shows that, as in the past, Defendants' efforts are half-hearted at best, and, at worst, only intended to keep smokers from quitting. See PFF § IV.G, § VIII. C. (2). Simultaneously, however, Defendants continue to manufacture and market "light" and "low tar" cigarette products, knowing full well that smokers consider them to be less hazardous than full flavor cigarettes, and also knowing that such products are by no means safer than regular cigarettes. Defendants' advertising, marketing, and other public statements exploit smokers' misperceptions about these "health reassurance" products, and many of them still make direct representations that such products are safer. See PFF § IV.D, § VIII. C. (1).

As Defendants stated in 1954 with the publication of the Frank Statement to Cigarette Smokers, the Cigarette Companies today reassert their promise to be "responsible" manufacturers and to "[c]ommunicate openly, honestly and effectively about the health effects of [their] products." Instead, much of Defendants' research efforts are undertaken by overseas entities, organizations and committees, or are conducted under the auspices of law firms and shielded by

improper assertions of privilege and confidentiality. Most disturbingly, and despite these promises, various Defendants have suppressed, concealed, and destroyed documents and other material information relating to smoking and health and addiction. As noted supra PFF § I.K ¶¶ 492-500, at least seven courts have made findings of crime-fraud, abuse of privilege, and improper concealment and/or destruction of documents by these very Defendants. Several courts have ruled that the Defendants have attempted to designate documents as privileged despite a complete lack of privilege, that the privilege does not exist under the crime-fraud exception, or that the privilege has been lost as a result of the abuse of the privilege. These include the following:

> • State of Minnesota v. Philip Morris Inc. et al., No. C1-94-8565, 1998 WL 257214, at *9 (Minn. Dist. Ct. Mar. 7, 1998), mandamus denied sub nom., State of Minnesota v. Philip Morris, Inc. et al., No. CX-98-414 (Minn. App. Mar. 17, 1998), petitions for further review denied sub nom., State of Minnesota v. Philip Morris Inc. et al., Nos. CX-98-414, CX-98-431, 1998 WL 154543 (Minn. Mar. 27, 1998), stay denied, 523 U.S. 1056 (1998) (finding that Defendants Philip Morris, R.J. Reynolds, Brown & Williamson, BATCo, American, Lorillard, CTR and the Tobacco Institute "claimed privilege for documents which are clearly and inarguably not entitled to protections of privilege;" "that many documents examined contained nothing of a privileged nature, establishing a pattern of abuse;" and that these Defendants "have been found to have committed numerous abuses of privilege." Based upon the "intentional and repeated misuse of claims of privilege [which are] intolerable in a court of law," the court found that "an appropriate sanction for such abuse is release of all documents for which privilege is improperly claimed." The court also adopted the special master's findings that for several categories of documents, including scientific reports, the crime-fraud exception to the attorney-client privilege applied);
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> • State of Florida v. American Tobacco Co., Civ. Action No. CL 95-1466 AH (Palm Beach Cty., Fla., filed Feb. 21, 1995) (upholding findings that lawyers for Defendants American, R.J. Reynolds, Brown & Williamson, BATCo, Philip Morris, Liggett, Lorillard, CTR, and the Tobacco Institute, "undertook to misuse the attorney/client relationship to keep secret research and other activities related to the true health dangers of smoking.");
>
> • State of Minnesota v. Philip Morris, et al., No. C1-94-8565 (Minn. Dist. Ct. Dec. 30, 1997) (among other sanctions, striking claims of attorney-client privilege as a result of

Brown & Williamson's and American's continued and blatant disregard of court orders relating to thousands of pages of missing documents from American Tobacco, including orders "to provide complete, full, and unevasive answers to specific questions regarding the existence and location of smoking and health research documents and documents regarding the advertising, marketing, and promotion of cigarettes, and, further, ordering B&W and American to produce the documents so identified");

• State of Washington v. American Tobacco Co., Inc., et al., No. 96-2-15056-8 SEA (King Cty. Sup. Ct. 1998) (several rulings in which the court determined that numerous documents for which Defendants American, Brown & Williamson, Liggett, Lorillard, Philip Morris, R.J. Reynolds, CTR, and the Tobacco Institute had asserted privilege were subject to the crime-fraud exception and were therefore "de-privileged." The bases for the findings included "that defendants attempted to misuse legal privileges to hide research documents;" "that attorneys controlled corporate research and/or supported the results of research regarding smoking and health;" "that the industry, contrary to its public statements, was suppressing information about smoking and health;" "that CTR was neither created nor used to discover and disseminate the 'truth,' contrary to defendants' representations to the public;" "that Special Account #4 was used to conceal problematic research;" and "that CTR and the SAB [Scientific Advisory Board] were not independent and that the industry's use of CTR was misleading to the public.");

• Sackman v. Liggett Group, Inc., 173 F.R.D. 358, 362-364 (E.D.N.Y. 1997) (attempts by Defendant, Liggett, and intervenors – Philip Morris, Brown & Williamson, R.J. Reynolds, Lorillard, and CTR – to designate CTR Special Projects documents as privileged was inappropriate);

• Burton v. R.J.Reynolds Tobacco Co., 167 F.R.D. 134, 142 (D. Kan. 1996) (plaintiffs had made a prima facie showing of crime-fraud with respect to Defendants R.J. Reynolds and American); and 170 F.R.D. 481, 490 (D. Kan. 1997) (numerous documents identified as privileged by Defendants R.J. Reynolds and American were in fact not privileged including memoranda relating to research and development on smoking and health and nicotine, letters from outside counsel on scientific research, literature reviews prepared by scientists at the direction of counsel, minutes of research-related meeting, and notes made by employees at industry meetings on smoking and health research);

• Carter v. Brown & Williamson, Case No. 95-00934 CA (Duval Cty. Cir. Ct., Fla., Transcript July 26, 1996 pp. 1329-1332) (court found that even if a privilege existed, an issue which the court did not reach, the crime-fraud exception applied to certain Brown & Williamson documents relating to smoking and health and nicotine and addiction); and

• Haines v. Liggett Group, Inc., et al. 140 F.R.D. 681, 689-695 (D.N.J. 1992) (following an *in camera* review of 1,500 documents, the court confirmed "plaintiff's contentions of the explicit and pervasive nature of the alleged fraud by defendants [Liggett, Lorillard, R.J. Reynolds, Philip Morris, and the Tobacco Institute] and defendants' abuse of the

> attorney-client privilege as a means of effectuating that fraud [to misrepresent the adverse health effects of smoking, to fraudulently promise to conduct independent research, and to conceal and suppress information relating to the adverse health effects of smoking]". Specifically, the court found "that the attorney-client privilege was intentionally employed to guard against [ ] unwanted disclosure,"and that defendants and their lawyers "abused the attorney-client privilege in their efforts to effectuate their allegedly fraudulent schemes."), vacated on procedural grounds, 975 F.2d 81 (3rd Cir. 1992).

Furthermore, in this litigation, various deponents from Brown & Williamson, BATCo, and its affiliates have testified that in the mid-1990s, those companies concealed documents, including scientific research relating to smoking and health, by secreting documents outside the United States at foreign affiliates to prevent their disclosure in U.S. litigation and federal regulatory proceedings. Other deponents testified that the companies employed a "mental copy rule" to prevent generation of documents which might be discoverable, and that, in fact, they destroyed several documents to keep them out of the courts and the press. See PFF § I.K ¶ 471.

Despite all of these findings and this evidence, Defendants continue to deny that they have ever concealed or destroyed documents, and still publicly maintain that "we haven't concealed, we do not conceal and we will never conceal. We have no internal research which proves that smoking causes lung cancer or other diseases or, indeed, that smoking is addictive." See, e.g., Racketeering Act 101; see also PFF § IV. F. (1).

In sum, though not legally necessary to the conclusion that there is a reasonable likelihood of continuing unlawful activity, the Court concludes that Defendants' scheme to defraud in furtherance of the affairs of the Enterprise, and their efforts to suppress, conceal, and destroy material information to avoid liability in smoking and health litigations, continue to the present day.

C. The United States Is Entitled To Disgorgement Independent Of Its Entitlement To A Permanent Injunction

The Court has found that the United States is entitled to a permanent injunction. Even if the United States were not entitled to a permanent injunction, the United States, nonetheless, is entitled to disgorgement of the Defendants' ill-gotten gains derived from their past unlawful conduct because disgorgement vindicates significant public interests independent from those served by an injunction against the Defendants at hand. In that respect, the District of Columbia Circuit and other courts have repeatedly held that the primary purposes of disgorgement are "to deprive a wrongdoer of his unjust enrichment and to deter **others** from violating the . . . laws." First City Financial Corp., 890 F.2d at 1230 (emphasis added). See also infra Section IV. A. & C.

As the court explained in ABC International Traders, Inc. v. Matsushita Electric Corp. of America, 931 P. 2d 290 (Cal. 1997):

> [O]ften, no logical connection exists between an order of restitution or disgorgement of **past** illicit gains and an injunction addressing **future** conduct. Sometimes, a court may find that an injunction is moot as a practical matter, for example because of the age, illness, disability or even death of the defendant. In other circumstances, a court may find that an injunction is unwise or impractical because of the difficulty of enforcement, for example when the defendant is located out of state. Occasionally, a court is disinclined to issue an injunction because of the technical expertise needed for proper enforcement. . . . In other situations, a court may find that an injunction may not be the most appropriate remedy to redress unfair practices committed only during a brief and unique circumstance involving a change in business circumstance, such as the acquisition or spin off of another company. In all of these cases, however, the offender is not entitled to keep the fruits of its unfair, deceptive, or unlawful conduct. The defendant's victims may be entitled to restitution, and the court may also conclude that deterrence is more effectively accomplished through restitution than through an injunction of little practical significance. [Defendant's arguments]. . .would frustrate the deterrent purposes of restitution by allowing a defendant who successfully opposed an injunction to retain its illicit profit.

931 P.2d at 304 (internal quotation marks omitted). The Court concluded, therefore, that

disgorgement of ill-gotten gains was appropriate "whether or not the court also enjoins future violations." Id.

Similarly, in Interstate Commerce Comm'n v. B&T Transp. Co., 613 F.2d 1182, 1183 (1st Cir. 1980), the court held that restitution of a defendant's ill-gotten gains was appropriate even though "there is no reasonable expectation that [the defendant's] alleged illegal conduct will recur."

The logic of Defendants' position dictates a rule of law that a wrongdoer may keep hundreds of billions of dollars that it unlawfully obtained through fraud merely by providing assurances that he would not defraud others in the future. That rule of law would not deprive a wrongdoer of unjust enrichment and would hardly constitute effective deterrence of "others"; rather it would be an invitation to commit crime, because it would allow the wrongdoer to keep vast sums of ill-gotten gains. It cannot be overemphasized that a wrongdoer does not have, and never had, a cognizable legal interest in the proceeds of his unlawful conduct. (See infra Section IV. A.). Therefore, a wrongdoer is not entitled to keep his ill-gotten gains even if there are adequate assurances that he will not commit crimes in the future. To rule otherwise would eviscerate the deterrent effect of disgorgement and would permit unjust enrichment, and hence would vitiate the primary purposes of disgorgement. (See infra, Section IV. C. 2). Consequently, the United States' right to disgorgement of the Defendants' proceeds of unlawful conduct is not defeated even if the MSA provides adequate assurances that the Defendants will not commit similar fraud in the future, or there is no reasonable likelihood that the Defendants' unlawful conduct will recur.

IV

THE UNITED STATES IS ENTITLED TO DISGORGEMENT OF AT LEAST 289 BILLION DOLLARS OF THE DEFENDANTS' ILL-GOTTEN PROCEEDS TO WHICH THEY NEVER HAD A RIGHT IN THE FIRST PLACE

A. The United States' Request for Disgorgement of Approximately 289 Billion Dollars in Ill-Gotten Gains is Appropriate, Especially Since it is Legally Entitled to Disgorgement of A Considerably Higher Amount and the Defendants Lack a Cognizable Interest in Such Proceeds

1. The United States Is Entitled To Disgorgement of All Ill-Gotten Gains

Earlier in this litigation, this Court ruled that disgorgement was an available remedy under RICO, but deferred deciding the proceeds which were subject to disgorgement. See Philip Morris Inc., 116 F. Supp. 2d at 150-52. Turning to that issue, the District of Columbia Circuit has repeatedly ruled that "[d]isgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the . . . laws." First City Financial Corp., 890 F.2d at 1230.[76]

To effectuate disgorgement's primary purposes, courts have held in a variety of contexts that the courts are empowered to order disgorgement of **all** of a defendant's ill-gotten proceeds. For example, in Pierce v. Amaral, 938 F.2d 94, 95-96 (8th Cir. 1991), the circuit court upheld an

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[76] Accord Bilzerian, 29 F.3d at 697 ("The primary purpose of disgorgement is not to refund others for losses suffered but rather 'to deprive the wrongdoer of his ill-gotten gain.'" (quoting Blatt, 583 F.2d at 1335)); SEC v. Banner Fund Int'l, 211 F.3d 602, 617 (D.C. Cir. 2000); Savoy Industries, 587 F.2d at 1168. See also SEC v. First Pacific Bancorp, 142 F.3d 1186, 1191 (9th Cir. 1998); SEC v. Palmisano, 135 F.3d 860, 865-66 (2d Cir. 1998); SEC v. Hughes Capital Corp., 124 F.3d 449, 455 (3d Cir. 1997); SEC v. First Jersey Securities, Inc., 101 F.3d 1450, 1475 (2d Cir. 1996); FTC v. Gem Merchandising Corp., 87 F.3d 466, 470 (11th Cir. 1996); SEC v. Tome, 833 F.2d 1086, 1096 (2d Cir. 1987); SEC v. Blavin, 760 F.2d 706, 713 (6th Cir. 1985); Hunt, 591 F.2d at 1222; SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978); Manor Nursing Centers, Inc., 458 F.2d at 1104; SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1308 (2d Cir. 1971); Kenton Capital, Ltd., 69 F. Supp. 2d at 15.

order disgorging all sales proceeds in violation of the Interstate Land Sales Act, noting that the district court's equity powers are "unrestricted" in government enforcement actions brought under the Act. Likewise, in the SEC insider trading context, violators are required to disgorge all profits made from the unlawful trade. See First City Financial Corp., 890 F.2d at 1231-32; SEC v. Texas Gulf Sulfur Co., 446 F.2d 1301, 1307 (2d Cir. 1971).

Similarly, in the antitrust context, the Supreme Court directed "complete divestiture" of the defendant's stock in another company to remedy its antitrust violations, because "it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." United States v. E.I. du Pont De Nemours & Co., 366 U.S. 316, 334 (1961). Likewise, in Truck Equip. Serv. Co. v. Fruehauf Corp., 536 F.2d 1210, 1222 (8th Cir. 1976), a trademark infringement case, the court cited the important deterrence principles behind disgorgement, noting that "equity requires that Freuhauf relinquish **all** of its profits." Id. at 1222 (emphasis added); see also W.E. Bassett Co. v. Revlon, Inc., 435 F.2d 656, 662 (2d Cir. 1970) (ordering full accounting by defendant). In short, it "is simple equity that a wrongdoer should disgorge his fraudulent enrichment." Janigan v. Taylor, 344 F.2d 781, 786 (1st Cir. 1965). (See also cases cited infra sections IV.B and C.).

2. Disgorgement of Unlawful Proceeds The Defendants Obtained Prior To The Effective Date of RICO Does Not Violate Retroactivity Principles

Here, "all" of the ill-gotten proceeds include the unlawful proceeds the Defendants obtained after the inception of their RICO violations from 1954 to the present, even though RICO did not become effective until October 15, 1970. Because the RICO offenses involved here are classic continuing offenses which began in December, 1953 and continued well past the effective date of the RICO statute, **the RICO offenses were not "completed" before RICO**

became effective, and therefore disgorgement of proceeds obtained from such RICO offenses from 1954 to October 15, 1970 does not constitute a retroactive application of law.

In Landgraf v. USI Film Products, 511 U.S. 244, 268-270 (1994), the Supreme Court made clear that the starting point in retroactivity analysis is to determine whether a statute operates retroactively, stating: "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, ... **Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment.**" Id. at 269-70 (emphasis added). Accord Miller v. Florida, 482 U.S. 432, 430 (1987); Sturges v. Carter, 114 U.S. 511, 519 (1885).[77]

Indeed, it has long been the law that a statute neither constitutes retroactive application nor violates the Ex Post Facto Clause of the Constitution by imposing criminal and civil liability for a course of conduct that was lawful when it began, but which continued after a statute made such conduct unlawful. See, e.g., United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 342 (1897); Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 100-102, 107-108 (1909).[78] This principle applies with even greater force here because the Defendants' fraudulent conduct from its inception violated the then-existing mail and wire fraud statutes even though RICO had not been in effect until October 15, 1970.

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[77] See also Reynolds v. United States, 292 U.S. 443, 449 (1934)("A statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment"). Accord Cox v. Hart, 260 U.S. 427, 435 (1922).

[78] Although the Ex Post Facto Clause applies only to penal legislation, the Clause protects the "antiretroactivity principle" and "interests in fair notice and repose", similar to the protections afforded by the Due Process Clause. See Landgraf, 511 U.S. at 266 & n.19.

Congress was well aware of the foregoing Ex Post Facto and retroactivity principles when it enacted RICO and explicitly provided that a RICO offense may include predicate acts committed before RICO's effective date, October 15, 1970. In that regard, RICO's definition of "pattern of racketeering activity" provides (18 U.S.C. § 1961(5)):

> "pattern of racketeering activity" requires at least two acts of racketeering activity, **one of which occurred after the effective date of this chapter** and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity; (emphasis added).

In explaining this RICO provision, the Senate Judiciary Committee Report stated:

> One act in the pattern must be engaged in after the effective date of the legislation. This avoids the prohibition against ex post facto laws, and bills of attainder. Anyone who has engaged in the prohibited activities before the effective date of the [RICO] legislation is on prior notice that only one further act may trigger the increased penalties and new remedies of this chapter.

S. Rep. 91-617, 91st Congress, 1st Sess. p. 158. Thus, in enacting RICO, Congress explicitly provided that predicate offenses that were committed prior to RICO's effective date [i.e., October 15, 1970] may be included in the charged pattern of racketeering activity, provided that at least one racketeering act was committed after RICO's effective date. In short, RICO offenses may "straddle" the effective date of RICO.

In accordance with Congress' intent in enacting RICO and with well-settled Ex Post Facto and retroactivity principles, every court that has considered the question has held that it does not violate the Ex Post Facto Clause to include racketeering acts committed before RICO's effective date, provided that in the case of a RICO substantive charge, at least one racketeering act was committed after RICO's effective date, and in the case of a RICO conspiracy charge, the

conspiracy and the defendant's membership in it continued after RICO's effective date.[79]

As the court explained in Campanale, 518 F.2d at 365:

> [A]ppellants were not convicted of conspiracy under 18 U.S.C. § 1962(d) for acts committed prior to October 15, 1970 [RICO's effective date]; rather they were convicted for having performed post-October 15, 1970, acts in furtherance of their continued racketeering conspiracy after being put on notice that these subsequent acts would combine with prior racketeering acts to produce the racketeering pattern against which this section is directed.[80]

Accordingly, since imprisonment, forfeiture, fines and other criminal penalties may be lawfully imposed for racketeering activity occurring before RICO's effective date, less severe civil remedies, including disgorgement, may also be imposed for such racketeering activity.

3. Disgorgement of Unlawful Proceeds is Not Punishment

It is also particularly significant to bear in mind that because "proceeds" obtained from such unlawful conduct, in effect, constitute "contraband", the Defendants do not, and cannot,

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[79] See United States v. Caporale, 806 F.2d 1487, 1516 (11th Cir. 1986); United States v. Boffa, 688 F.2d 919, 937 (3d Cir. 1982); United States v. Brown, 555 F.2d 407, 417 (5th Cir. 1977); United States v. Ohlson, 552 F.2d 1347, 1348 (9th Cir. 1977); United States v. Campanale, 518 F.2d 352, 364-65 (9th Cir. 1975); United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), aff'd, 578 F.2d 1371 (2d Cir. 1978) (Table); United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976), aff'd, 591 F.2d 1347 (4th Cir. 1979).

[80] In the same vein, the Ex Post Facto Clause is not violated by charging a racketeering act where the underlying conduct began before the racketeering act was added to RICO, but continued after the racketeering act was added to RICO. See, e.g., United States v. Alkins, 925 F. 2d 541, 548-49 (2d Cir. 1991). Likewise, the courts have held that the Ex Post Facto Clause is not violated by application of a revised sentencing guideline to a RICO violation that disadvantages a defendant where the RICO offense began prior to the effective date of the guideline revision but continued after its effective date. See United States v. Hurley, 63 F.3d 1, 19 (1st Cir. 1995); United States v. Korando, 29 F.3d 1114, 1119-20 (7th Cir. 1994); United States v. Eisen, 974 F.2d 246, 268 (2d Cir. 1992); United States v. Minicone, 960 F.2d 1099, 1111 (2d Cir. 1992); United States v. Moscony, 927 F.2d 742, 755 (3d Cir. 1991).

have any cognizable legitimate interest in their unlawfully obtained proceeds. The District of Columbia Circuit has analogized disgorgement of unlawful proceeds to the seizure of proceeds "'from a bank robber [which] merely places that party in the lawfully protected financial status quo that he enjoyed prior to launching his illegal scheme'". Bilzerian, 29 F.3d at 696 (quoting United States v. Tilley, 18 F.3d 295, 300 (5th Cir. 1994)). Accordingly, the District of Columbia Circuit and other courts have recognized that because disgorgement of unlawful proceeds merely requires the wrongdoer to "give up only his ill-gotten gains" to which he has no right, such disgorgement is entirely remedial and "is not punishment." Bilzerian, 29 F.3d at 696. Accord First City Financial Corp., 890 F. 2d at 1230-31; SEC v. Tome, 833 F.2d 1086, 1096 (2d Cir. 1987); CFTC v. Hunt, 591 F.2d 1211, 1222 (7th Cir. 1979); see also Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288, 293 (1960)(equitable remedy of restitution of lost wages for violation of statute is not "punitive").[81]

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[81] This same rationale underlies numerous federal courts' decisions that forfeiture of crime proceeds (as distinguished from forfeiture of lawfully obtained property used in, or to facilitate, a crime) merely deprives the wrongdoer of his unlawful gains to which he has no right, and therefore such forfeiture can never constitute punishment or an excessive fine within the meaning of the Eighth Amendment. See, e.g., United States v. Real Prop. Located at 22 Santa Barbara Dr., 264 F.3d 860, 874-75 (9th Cir. 2001)("'[f]orfeiture of proceeds. . . . simply parts the owner from the fruits of the criminal activity' [and hence]. . .criminal proceeds represent the paradigmatic example of 'guilty property', the forfeiture of which has been traditionally regarded as non-punitive, we follow the Seventh, Eighth, and Tenth Circuits and hold that the excessive fines clause of the Eighth Amendment does not apply to [such forfeiture of crime proceeds]") (first alteration in original; citations omitted). Accord United States v. Candelaria - Silva, 166 F.3d 19, 44 (1st Cir. 1999); United States v. One Parcel of Real Property Described as Lot 41, Berryhill Farm Estates, 128 F.3d 1386, 1395 (10th Cir. 1997); United States v. Alexander, 108 F.3d 853, 855, 858 (8th Cir. 1997); Smith v. United States, 76 F.3d 879, 882 (7th Cir. 1996); United States v. $21,282.00 in U.S. Currency, 47 F.3d 972, 973 (8th Cir. 1995); United States v. Wild, 47 F.3d 669, 674 n. 11 (4th Cir. 1995); United States v. Alexander, 32 F.3d 1231, 1236 (8th Cir. 1994); United States v. Tilley, 18 F.3d 295, 300 (5th Cir. 1994); United States v. Horak, 833 F.2d 1235, 1246 n.4 (7th Cir. 1987)(dictum); United States v. $288,930.00 In U.S. Currency, 838

(continued...)

Under the foregoing well-established principles, therefore, it is clear that the United States is entitled to disgorgement of all the unlawful proceeds the Defendants obtained during the entire period of their RICO offenses, i.e., from late 1953 to 2001, which includes approximately $742 billion obtained from the Youth-Addicted Population, approximately 49 million persons who started smoking more than five cigarettes daily before reaching the age of 21. See PFF § IX. B and infra n.82. Despite its entitlement to the larger amount, the United States, in its discretion, seeks only the proceeds the Defendants unlawfully obtained during the period from 1971 (after RICO's effective date) to 2001 from approximately 33 million Youth-Addicted smokers who were smoking more than 5 cigarettes a day when they became age 21, which is approximately $289 billion. See PFF § IX. B.[82]

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[81](...continued)
F. Supp. 367, 370 (N.D. Ill. 1993). Cf. United States v. Loe, 248 F.3d 449, 464 (5th Cir. 2001) ("The court ordered [the defendant] to forfeit only so much of the property as was purchased with illegally obtained funds – money that she had no right to in the first place").

[82] The United States' experts set forth a range of potential proceeds for disgorgement of unlawful gains from approximately $108 billion to approximately $742 billion, which includes the following:

Time Period	**Age Began Smoking**	**Number of Cigarettes Smoked Daily**	**Youth-Addicted Population in Millions**	**Approximate Proceeds in Billions of Dollars**
1. 1954 to 2001	under 21	more than 5	49	$742
2. 1954 to 2001	under 21	more than 10	33	$562
3. 1954 to 2001	under 18	more than 5	30	$421
4. 1954 to 2001	under 18	more than 10	17	$249
5. 1971 to 2001	under 21	more than 5	33	$289
6. 1971 to 2001	under 21	more than 10	22	$227
7. 1971 to 2001	under 18	more than 5	21	$170
8. 1971 to 2001	under 18	more than 10	13	$108

(continued...)

The evidence establishes that Defendants fraudulently represented that they did not market cigarettes to youths under age 21; the evidence also establishes and that smoking one to five cigarettes daily is a predictor of continued smoking and nicotine dependence. Such dependence increases significantly when the quantity smoked increases from less than one cigarette per day to one to five cigarettes per day. Hence, smoking more than five cigarettes daily, the criteria underlying the sought disgorgement, indicates even greater nicotine dependence. See PFF § IX.B, ¶ 97. Therefore, the focus of disgorgement on the class of Youth-Addicted Smokers who were smoking more than five cigarettes per day before reaching age 21 is reasonable. Moreover, the government's self-imposed limitations on the scope of disgorgement, seeking only the proceeds the Defendants obtained after RICO's effective date from the Youth-Addicted Population, eliminates entirely any conceivable due process concerns and focuses upon an especially vulnerable class which the law has long recognized warrants special protections. See infra Section IV. B. 4. e. Furthermore, in light of the revenues the Defendants have received and are projected to receive, the Defendants have sufficient assets and projected earnings to be able to disgorge $289 billion which they unlawfully obtained. Indeed, the amount to be disgorged is comparable to the $245 billion Defendants have agreed to pay under the MSA settlement. Therefore, it is clear that the sought disgorgement is a "reasonable approximation" of the profits causally connected to the Defendants' massive RICO violations. See infra Section IV.B.1. At bottom, the Defendants never had any right to such proceeds of their unlawful conduct in the first place, and hence the disgorgement sought by the United States is entirely

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[82](...continued)
Generally, the "Youth-Addicted Population" consists of every smoker (regardless of age) who was addicted to smoking while in their youth. See PFF § IX.B.

appropriate as explained more fully below.[83]

B. The Requested Disgorgement of 289 Billion Dollars In Proceeds Is Causally Related To The Defendants' Massive RICO Violations

As demonstrated above, the Court may appropriately disgorge all of Defendants' profits causally related to Defendants' misconduct. The Court concludes that such a connection has been established. First, as set forth in Section IV. B.1, the United States need only show such "causation" by reasonable approximation, not by scientific precision. Moreover, as demonstrated in Section IV. B.2, given the systematic and pervasive nature of Defendants' fraud, it is reasonable to infer that **all** of Defendants' profits from 1954 onward are, in fact, causally related to the fraud; accordingly, the United States is well entitled to recover such an amount, although, as explained above, it does not seek it. Furthermore, as explained in Section IV. B.3, the notion of "causation" must not be confused with reliance–a creature of common law actions and private civil RICO suits brought under 18 U.S.C. § 1964(c), which demands a showing of "injury to business or property" proximately caused by the violation. As a result, the Court may (and does) find a causal nexus between Defendants' misconduct and their proceeds, even absent a showing of reliance.

In Section IV. B.4, the Court concludes that even though reliance is unnecessary, the Court finds that reliance has been proven by both direct and circumstantial evidence, including: (1) Defendants' intentional conduct to induce smokers and potential smokers to rely on their representations (Part B.4.a); (2) the vast expenditures and other resources that Defendants spent

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[83] Of course, the Court has the discretion to determine the manner and payment schedule for the Defendants' payment of the disgorged proceeds. Moreover, the Court is not limited to the disgorgement amount requested by the United States and has discretion to decide the appropriate amount of proceeds subject to disgorgement.

on advertising and other public statements, as well as Defendants' resulting profits (B.4.b); (3) expert reports and testimony demonstrating the causal connection between Defendants' deceptive statements and consumer reliance (B.4.c); and (4) Defendants' own statements–which constitute admissions--touting the success of their public relations and advertising campaigns (B.4.d). Additionally, in Part B.5, the Court notes that any consideration of "reliance" must reflect the fact that the principal targets of Defendants' campaign to defraud were youths, a protected class under the law.

Finally, in Section IV. C, the Court analyzes the Second Circuit's opinion in United States v. Carson, 52 F.3d 1173 (2d Cir. 1995), concluding that it was neither correctly decided nor applicable to the facts of this case.

1. Disgorgement Need Only Be A Reasonable Approximation of Profits Causally Related to the Violation

The District of Columbia Circuit has explained that because "[r]ules for calculating disgorgement must recognize that separating legal from illegal profits exactly may at times be a near - impossible task . . . . disgorgement need only be a reasonable approximation of profits causally connected to the violation," and that once the plaintiff establishes such a "reasonable approximation," the burden shifts to the defendants "clearly to demonstrate that the disgorgement figure was not a reasonable approximation." First City Financial Corp., 890 F.2d at 1231-32.[84]

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[84] Accord Bilzerian, 29 F.3d at 697 ("Calculations of [the causal nexus] are often imprecise – it is impossible to say with certainty what portion of [the defendant's] profits is attributable to his securities violations. [The Defendant], however, bears the burden of establishing" that the approximation of his unlawful profits was not reasonable). See also First Jersey Securities, 101 F.3d at 1475; United States Dep't of Housing & Urban Dev. v. Cost Control Mktg. & Sales Mgt. of Va., Inc., 64 F.3d 920, 927 (4th Cir. 1995); SEC v. Patel, 61 F.3d 137, 140 (2d Cir. 1995); Kenton Capital, 69 F. Supp. 2d at 15.

Moreover, "the causal connection required is between the amount by which the defendant was unjustly enriched and the amount he can be required to disgorge," not merely the actual money that he wrongfully obtained. SEC v. Banner Fund Int'l, 211 F.3d 602, 617 (D.C. Cir. 2000). Significantly, the District of Columbia Circuit emphasized that "the risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." First City Financial Corp., 890 F.2d at 1232.[85] Furthermore, all the Defendants are jointly and severally liable for the total amount of unlawful proceeds obtained by all the Defendants through their joint scheme to defraud and RICO violations.[86]

As set forth below, the Court finds that the 289 billion dollars in proceeds the Defendants obtained through their RICO violations are causally related to their unlawful conduct. It is

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[85] Accord SEC v. Hughes Capital Corp., 124 F.3d 449, 455 (3d Cir. 1997); First Jersey Securities, 101 F.3d 1475; SEC v. Lorin, 76 F.3d 458, 462 (2d Cir. 1996); Patel, 61 F.3d at 140. See also Bigelow v. RKO Radio Pictures, 327 U.S. 251, 265 (1946) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.").

[86] See, e.g., Hughes Capital Corp., 124 F.3d at 455; First Jersey Securities, 101 F.3d at 1475; Lorin, 76 F.3d at 461-62; Hateley v. SEC, 8 F.3d 653, 656 (9th Cir. 1993); SEC v. First Pacific Bancorp, 142 F.3d 1186, 1191 (9th Cir. 1998) ("where two or more individuals or entities collaborate or have a close relationship in engaging in the violations of the securities laws, they have been held jointly and severally liable for the disgorgement of illegally obtained proceeds.").

Similarly, every court that has considered the issue has held that each defendant convicted on a RICO charge is jointly and severally liable for the forfeiture of all the proceeds obtained by all the RICO violators that was reasonably foreseeable to the defendant. See United States v. Corrado, 286 F.3d 934, 937-38 (6th Cir. 2002); United States v. Infelise, 159 F.3d 300, 301 (7th Cir. 1998); United States v. Simmons, 154 F.3d 765, 769-70 (8th Cir. 1998); United States v. Hurley, 63 F.3d 1, 22 (1st Cir. 1995); United States v. Saccoccia, 58 F.3d 754, 785 (1st Cir. 1995); United States v. Masters, 924 F.2d 1362, 1369-70 (7th Cir. 1991); Fleischhauer v. Feltner, 879 F.2d 1290, 1301 (6th Cir. 1989); United States v. Benevento, 836 F.2d 129, 130 (2d Cir. 1988); United States v. Caporale, 806 F.2d 1487, 1506-09 (11th Cir. 1986); United States v. Bloome, 777 F. Supp. 208, 211 (E.D.N.Y. 1991); United States v. Wilson, 742 F. Supp. 905, 909 (E.D. Pa. 1989), aff'd, 909 F.2d 1478 (3d Cir. 1990).

significant to note that the only calculation of the amount of proceeds subject to disgorgement before the Court has been submitted by the United States, and the evidence supporting the requested disgorgement is substantial and compelling. It bears repeating that the United States does not seek **all** of the Defendants' profits from their fraudulent conduct to which it is legally entitled, but it seeks only their ill-gotten gains from an especially protected class: Youth-Addicted persons and then only for the period from 1971 to 2001.

As noted supra, this Court concludes that although the United States is entitled to at least $742 billion in disgorgement, the Court will award $289 billion, consistent with the United States' request. This figure is derived from the testimony and calculations of the United States' experts, who calculated cigarette sales from the "Youth Addicted Population" (i.e., those who began smoking more than five cigarettes daily when under the age of 21). Though the calculations are complex, the formula is fairly straightforward: calculate the number of cigarettes sold to the Youth Addicted Population by the amount of proceeds generated by the sale of a cigarette. See PFF § IX. B.

The Court finds useful guidance in 18 U.S.C. § 981(a)(2)(B), the civil forfeiture statute (though it is not bound by it), which is invoked in those cases where lawful goods and services are sold or provided in an illegal manner. That statute provides that the proceeds to be forfeited means "the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services." Notably, the statute excludes from the definition of direct costs "any part of the overhead expenses," as well as "any part of the income taxes paid by the entity." In other words, the Defendants' overhead and income tax are not to be deducted from the proceeds figure. Moreover, where a Defendant's expenditure is not

directly traceable to the "Youth Addicted Population," it is to be considered a part of the Defendant's general overhead, not a direct cost in providing the goods or services.

The Court further notes, and appreciates, that the United States' experts were conservative in their estimates, effectively "rounding down" in several instances where the calculations or raw data were ambiguous. Cf. First City Financial Corp., 890 F.2d at 1232 (noting that "the risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty."); see also cases cited supra note 85. A similar prudence was exercised in its request for disgorgement: though the experts were able to reasonably calculate the "youth addicted proceeds" from 1954 (the beginnings of the scheme to defraud) to 2050 (projecting outward from youths who begin smoking today and who will, in likelihood, continue smoking), the United States seeks only to disgorge proceeds obtained from 1971 to 2001. It is also important to note that the "end date" of December 31, 2000 (i.e., 1971 to 2001) for calculation of proceeds was for logistical reasons (in that the United States' experts have calculated proceeds up to that point), and marks neither the cessation of Defendants' unlawful activities, see infra Section III and PFF § VIII, nor the legal limit of disgorgement. In light of these factors, the Court concludes that the request for $289 billion in disgorgement is both reasonable and appropriate.

2. Because of the Systematic and Pervasive Nature of Defendants' Scheme to Defraud, and the Equitable Principles Governing Disgorgement, the United States is Entitled to Disgorge All of Defendants' Profits

Courts have held in a variety of contexts that where the defendant's fraud is so pervasive, it is reasonable to infer that **all** of the defendant's profits were unlawfully obtained, and a court is justified in disgorging the entirety of the defendant's profits. See, e.g., CFTC v. British Am.

Commodity Options Corp., 788 F.2d 92 (2d Cir. 1986) (concluding that a nexus between the unlawful conduct and the disgorgement figure need not be shown because of the pervasiveness of the fraud); SEC v. Graystone Nash, Inc. 820 F. Supp. 863, 875-76 (D.N.J. 1993) ("If benefits result from both lawful and unlawful conduct, plaintiff must distinguish these legal and illegal profits, ... unless the fraud was systematic and pervasive." (citation omitted)), rev'd on other grounds, 25 F.3d 187 (3d Cir. 1994); SEC v. Inorganic Recycling Corp., 2002 WL 1968341, *2 (S.D.N.Y. 2002) ("Where the fraud is 'pervasive,' courts will order all profits stemming from the scheme to be disgorged."); SEC v. Hasho, 784 F. Supp. 1059, 1111-12 (S.D.N.Y. 1992) ("When a defendant engages in a pervasive pattern of fraudulent conduct as opposed to isolated instances, it is unnecessary to prove a direct nexus between each instance of unlawful conduct and the disgorgement amount due."); SEC v. Interlink Data Network of Los Angeles, Inc., 1993 WL 603274 , *14 n.118 (C.D. Cal. 1993) ("Even if the defendants had accounted for what they did with these funds, because their fraud was pervasive the Commission need not distinguish between profits arising from legal or illegal conduct."); see also SEC v. Kenton Capital, Ltd., 69 F. Supp. 2d 1, 16 (D.D.C. 1998) ("The SEC has provided ample evidence that all the funds collected by Kenton were obtained fraudulently, and Defendants may not escape disgorgement by asserting that expenses associated with this fraud were legitimate. . . . Disgorgement, therefore, is a proper remedy.").[87]

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[87] Similarly, even in those securities cases where reliance is an element, courts have distinguished "between cases involving affirmative misrepresentations and those involving nondisclosure." Wilson v. Comtech Telecommunications Corp., 648 F.2d 88, 92 n.6 (2d Cir. 1981). In the latter category of cases, "the task of positively proving reliance may become impossible to perform, and although the courts still refer to the element of causation in fact, the question really becomes one of materiality." Id. (citing cases); accord Burke v. Jacoby, 981 F.2d (continued...)

In this case, the Defendants engaged in a massive scheme to defraud for over 45 years, whereby they marketed cigarettes to the public through false, misleading, and deceptive advertising, and other marketing practices and representations. See PFF § I. A - D and § IV. The Court finds that Defendants' decades-long campaign to defraud the public, especially children, was so systematic and pervasive that, as in British American Commodity, "[t]he problem in this case is finding **any** activity that was lawful." 788 F.2d at 94.

3. "Causality" Does Not Require a Showing of Reliance. Reliance is a Creature of Compensatory Damages Actions, Including Private Civil RICO Actions Under § 1964(c)

It is important to note at the outset that, in order to determine the amount of profits unlawfully obtained, the United States need not show–and the Court need not find–the element of "reliance" that is required in a fraud suit for damages at common law or in a private civil RICO action brought under 18 U.S.C. § 1964(c).

Indeed, in this Court's decision denying Defendants' request for a trial by jury,[88] the Court underscored the distinction between such equitable and legal actions, and concluded that "the disgorgement the Government seeks in this case is restitutionary," and explained that "[u]nlike damages, the purpose of which is to compensate the victims of a defendant's unlawful conduct, the purpose of disgorgement is to deprive the wrongdoer of his ill-gotten gains." Jury

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[87](...continued)
1372, 1378 (2d Cir. 1992); Manela v. Garantia Banking Ltd., 5 F. Supp. 2d 165, 172 (S.D.N.Y. 1998). In the instant case, the Defendants' scheme involved not only multiple affirmative misrepresentations and other misleading statements, but a pervasive series of nondisclosures, suppression of information, including smoking and health research, document destruction and other concealment of critical information. See PFF § ¶ I. K and § IV.

[88] United States v. Philip Morris, Inc., No. Civ.A. 99-2496, 2002 WL 1925881 (D.D.C. July 1, 2002) (hereinafter "Jury Demand Order").

Demand Order, Slip Op. at 14, 2002 WL 1925881 at *4-5; see also Slip Op. at 13 n.9, 2002 WL 1925881 at *5 n.9 ("Here, it is clear that the disgorgement the Government seeks is measured by Joint Defendants' gain and therefore meets the Crocker definition of restitution.").[89]

Generally, to demonstrate a right to relief in a damages action, the plaintiff must show that he or she was injured by the tortfeasor. See, e.g., Kitt v. Capital Concerts, Inc., 742 A.2d 856, 860-61 (D.C. 1999) (common law fraud action); Restatement (Second) of Torts § 525 (reliance an element of common-law fraud). The purpose of such compensatory relief is to make the plaintiff–the victim of the injury–whole. See Restatement (Second) of Torts § 901 (describing role of compensatory relief).[90] "Reliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury." Basic Inc. v. Levinson, 485 U.S. 224, 243 (1988) (private securities 10b-5 action); Associated Randall Bank v. Griffin, Kubik, Stephens & Thompson, Inc., 3 F.3d 208, 214 (7th Cir. 1993) ("Sometimes this principle comes under the name 'loss causation': the plaintiff must establish that the misstatement caused him to incur the loss of which he complains; it is not enough to establish that the

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[89] In addition, the Court rejected Defendants' attempt to conflate compensatory damages actions, which require proof of reliance, and the instant action under 18 U.S.C. § 1962(a), which does not. For the predicate offenses, the Court recognized that "[u]nlike common-law fraud, the mail and wire fraud statutes, whose violation constitute the predicate acts for the Government's RICO claim**, do not require proof of reliance or damages or completion of the scheme to defraud**," (Slip Op. at 6; 2002 WL 1925881 at *2; emphasis added), and for the United States' RICO conspiracy count, the United States need not "prove that it suffered any injury as a result of Joint Defendants' conduct. Neither is the Government required to sue for damages." Jury Demand Order, Slip Op. at 7, 2002 WL 1925881 at *2. In other words, such common law damages claims depend upon a connection between "causation-in-fact" and the plaintiff's claimed injury.

[90] See also Restatement (Second) of Torts § 548A: "A fraudulent misrepresentation is a legal cause of a pecuniary loss resulting from action or inaction in reliance upon it if, but only if, the loss might reasonably be expected to result from the reliance."

misrepresentation caused him to buy or sell the securities.").

The same interests are involved in **private** civil RICO actions brought pursuant to 18 U.S.C. § 1964(c), which, unlike 18 U.S.C. § 1964(a), expressly incorporates the requirement that the plaintiff be "injured in his business or property by reason of a violation of section 1962" and provides that a private plaintiff may recover "threefold the damages he sustains."[91] See also First American Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1122 (D.D.C. 1996) (holding that § 1964(c) action survives the death of the defendant because the purpose of civil RICO's treble-damages provision is compensatory); cf. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985) (purpose of treble damages provisions in Clayton Act is primarily compensatory).

Equitable disgorgement, on the other hand, serves different objectives. "The primary purpose of disgorgement is not to refund others for losses suffered but rather 'to deprive the wrongdoer of his ill-gotten gain.'" See, e.g., SEC v. Bilzerian, 29 F.3d 689, 697 (D.C. Cir. 1994) (quoting SEC v. Blatt, 583 F.2d at 1335); SEC v. First Jersey Securities, Inc., 101 F.3d 1450, 1475 (2d Cir.1996) ("Since disgorgement is a method of forcing a defendant to give up the amount by which he was unjustly enriched, it is unlike an award of damages ... and is neither

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[91] "The phrase 'by reason of' in Section 1964(c) imposes a proximate cause requirement on the [private] plaintiffs." Masnik v. Bolar Pharmaceutical Co., Inc., 1991 WL 138331, *6 (E.D. Pa. 1991) (citing cases); see also Nodine v. Textron, Inc., 819 F.2d 347, 348-49 (1st Cir. 1987).

Indeed, some courts have held that, even in private civil RICO cases, although the plaintiff must prove an injury to business or property, this does not necessarily require a showing of reliance. See, e.g., Systems Management, Inc. v. Loiselle, 303 F.3d 100, 104 (1st Cir. 2002) ("reliance is a specialized condition that happens to have grown up with common law fraud. Reliance is doubtless the most obvious way in which fraud can cause harm, but it is not the only way. . . . There is no good reason here to depart from RICO's literal language by importing a reliance requirement into RICO.").

foreclosed nor confined by an amount for which injured parties were willing to settle.") (citation omitted).[92] Tull v. United States, 481 U.S. 412, 424 (1987) (purpose of disgorgement is restitution); SEC v. Alliance Leasing Corp., 28 Fed. Appx. 648, 652 (9th Cir. 2002) ("Disgorgement prevents unjust enrichment, requires return of ill-gotten gains and is independent of other remedies. The theory behind disgorgement is deterrence, not compensation." (citing cases)); FTC v. Gem Merchandising Corp., 87 F.3d 466 (11th Cir. 1996) (purpose of disgorgement is not to compensate the victim, but to deter the offense); SEC v. Rind, 991 F.2d 1486, 1490 (9th Cir. 1993) ("The [SEC] seeks disgorgement in order to deprive the wrongdoer of his or her unlawful profits and thereby eliminate the incentive for violating the securities laws. The theory behind the remedy is deterrence and not compensation. . . . Indeed, a district court may grant the Commission's request for disgorgement even where no injured investors can be identified.") (citations omitted); Blavin, 760 F.2d at 7136. See also cases cited supra note 76.

As the Supreme Court explained in the securities law context, profits can be disgorged to prevent unjust enrichment, which "clearly does more than simply make the plaintiff whole for the economic loss proximately caused by the buyer's fraud." Randall v. Loftsgaarden, 478 U.S. 647, 663 (1986); 1 Dan B. Dobbs, Law of Remedies, § 3.1, at 278-280; Janigan v. Taylor, 344 F.2d

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[92] The Restatement of Restitution also provides the distinction between the animating principles of restitution, as opposed to tort. Whereas tort law attaches liability "for pecuniary loss caused ... by ... justifiable reliance upon the misrepresentation," see Restatement (Second) of Torts § 525, restitution has no such requirement of injury. See Restatement (Third) of Restitution (Tentative Draft No. 1, 2001) § 13 cmt. e ("By contrast to the rule in tort, where a misrepresentation is actionable only if it results in pecuniary loss to the plaintiff, the rule of this section allows rescission without any showing that the transferor has suffered economic injury.").

781, 786 (1st Cir. 1965).[93] In light of the distinctive deterrence purposes served by disgorgement, it is immaterial whether a victim relied to his detriment on a wrongdoer's conduct.

4. Even Assuming That Reliance Were Required, the Court Finds Reliance

Even if reliance were a required element of proof to obtain disgorgement in a civil RICO action brought pursuant to § 1964(a), the Court concludes that there is sufficient evidence to demonstrate this reliance. It is particularly significant to note that the United States is not required to provide **individualized** proof that each consumer relied upon the Defendants' misleading and fraudulent conduct. Rather, there are a variety of ways in which a court may find (and in which courts have found) reliance. Thus, courts are entitled to find reliance based upon circumstantial evidence, reasonable inferences, expert testimony, and various other types of evidence. See, e.g., Group Health Plan v. Philip Morris Inc., 621 N.W.2d 2, 1 (Minn. 2001) ("where the plaintiffs' damages are alleged to be caused by a lengthy course of prohibited conduct that affected a large number of consumers, the showing of reliance that must be made to prove a causal nexus need not include direct evidence of reliance by individual consumers of

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[93] In ALPO Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958 (D.C. Cir. 1990) the circuit court noted the difference between "actual damages" (such as those awarded in a Section 35(a) action), which "requires some showing of actual loss," and a profits award, as in trademark infringement actions, where "[a]wards of profits are justified under the theory because they deter infringement in general and thereby vindicate consumers' interests." Id. at 968. Importantly, the court of appeals stressed the distinction between such cases and the problems with confusing damages awards and disgorgement awards, noting that in compensatory "actual damages" cases, "deterrence alone cannot justify such an award." 913 F.2d 968-69; see also Aetna U.S. Healthcare, Inc. v. Hoechst Aktiengesellschaft, 48 F. Supp. 2d 37, 40-43 (D.D.C. 1999) ("Plaintiff's claim for disgorgement does not depend upon the vindication of individual class members' rights, but instead upon the disgorgement of money alleged to be unlawfully and inequitably held by defendants, ..."); Group Health Plan, Inc. v. Philip Morris Inc., 621 N.W.2d 2, 15 (Minn. 2001) ("To impose a requirement of proof of individual reliance in the guise of causation would reinstate the strict common law reliance standard . . . .").

Defendants' products. Rather, the causal nexus and its reliance component may be established by other direct or circumstantial evidence that the district court determines is relevant and probative as to the relationship between the claimed damages and the alleged prohibited conduct."); see also American Home Products Corp. v. Johnson & Johnson, 577 F.2d 160, 167 (2d Cir. 1978). Indeed, even in private civil actions in the securities context, the Supreme Court has emphasized "[t]here is, however, more than one way to demonstrate the causal connection." Basic Inc. v. Levinson, 485 U.S. 224, 243 (1988).

Finally, the Court is entitled to rely on its own common sense and experience, including its "own experience and understanding of human nature in drawing reasonable inferences about the reactions of consumers" to the Defendants' advertising and other misrepresentations. FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 41-42 (D.C. Cir. 1985) (quoting McNeilab, 501 F. Supp. at 525); see also Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 652-53 (1985) (noting that, in the context of contingency-fee advertisements regarding legal fees and costs, "it is a commonplace that members of the public are often unaware of the technical meanings of such terms as 'fees' and 'costs'" and that, where advertisements deception is "self-evident," it will not require survey evidence to conclude that a statement is misleading) (citing FTC v. Colgate-Palmolive Co., 380 U.S. 374, 391-392 (1965) (refusing to require consumer survey evidence in deceptive advertising case, because of reasonable inference that once the deceptiveness is proven, "the deception will constitute a material factor in a purchaser's decision to buy.")).

Based on the foregoing permissible categories of evidence, the Court concludes that consumer reliance upon the Defendants' fraudulent misconduct, though not required, has been

established.

a. Evidence that Defendants Intended Reliance Constitutes Evidence That Defendants, In Fact, Caused Reliance

As discussed in the Court's Findings of Fact, the Defendants intended the public, including and especially youths, to rely upon their false, fraudulent, and misleading statements, and to be influenced by their marketing and advertising. See PFF §§ IV. E. (3)-(5); IX. B. (5), ¶¶ 30-72. The Cigarette Company Defendants spent billions of dollars, directly and through others (including Defendants TI and CTR), to publicize their "party line" regarding smoking and health, about addiction, and concerning the other aspects of the scheme to defraud. Individually and collectively, Defendants employed numerous consultants, including advertising agencies and public relations firms, to perfect the efficacy of their message. These facts allow the Court to make the entirely reasonable inference that, in fact, the public relied on Defendants' false, fraudulent, and misleading statements. See also FTC v. Brown & Williamson, 778 F.2d at 41-43 (defendant's "vast expenditure of advertising dollars on tar ratings strongly supports public reliance because advertising expenditures presumptively have the effect intended.")[94]

Moreover, where the deceptive and false statements were intentional, as here, a court may conclude that Defendants' profits were causally related to the fraud. See, e.g., U-Haul Inat'l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1040-42 (9th Cir. 1986) ("'[p]ublication of deliberately false

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[94] Indeed, one Defendant in this litigation has asked another court, in a commercial dispute, to find reliance based on the intent of its competitor. Philip Morris Inc. v. Star Tobacco Corp., 879 F. Supp. 379, 386-87 (S.D.N.Y. 1995) (evidence that defendant intentionally copied Philip Morris' "Marlboro" with defendant's "Gunsmoke" cigarettes, "justifies a presumption of confusion, even in the absence of actual proof"); accord McNeilab, Inc. v. American Home Products Corp., 501 F. Supp. 517, 529-30 (S.D.N.Y. 1980), modified on other grounds, 501 F. Supp. 540 (S.D.N.Y. 1980), aff'd, 938 F.2d 1544 (2d Cir. 1991) ; Polo Fashions, Inc. v. Extra Special Products, Inc., 451 F.Supp. 555, 562 (S.D.N.Y. 1978).

comparative claims gives rise to a presumption of actual deception and reliance'" (quoting the district court); accordingly, "[t]he amount to be awarded is [not limited to defendant's profits, but is] the financial benefit [the defendant] received because of the advertising"); PPX Enterprises, Inc. v. Audiofidelity Enterprises, Inc., 818 F.2d 266, 272-73 (2d Cir. 1987) ("Having established falsity [of advertising], the plaintiff should be entitled to both injunctive and monetary relief, regardless of the extent of impact on consumer purchasing decisions" (citation and internal quotation marks omitted)); McNeilab, Inc. v. American Home Products Corp., 501 F. Supp. 517, 529-30 (S.D.N.Y. 1980) (false advertising case), modified on other grounds, 501 F. Supp. 540 (S.D.N.Y. 1980), aff'd, 938 F.2d 1544 (2d Cir. 1991); Polo Fashions, Inc. v. Extra Special Products, Inc., 451 F. Supp. 555, 562 (S.D.N.Y. 1978) (trade dress/consumer confusion case); Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 543 n.3 (2d Cir. 1956) ("Evidence of the alleged infringer's intent to cause confusion, though not essential to a trade-mark or unfair competition action is relevant as an opinion by one familiar with market conditions, the alleged infringer himself, that there is likelihood of confusion.").[95]

When a non-false but allegedly misleading advertisement or representation is at issue, a

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[95] Cf. Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp., 799 F.2d 6, 15 (1st Cir. 1986) ("a court may grant [injunctive] relief on the basis of its own findings without reference to consumer reaction to the product when the defendant's representations are actually false.") Accord Coca-Cola Co. v. Tropicana Products, Inc., 690 F.2d 312, 317 (2d Cir. 1982) (collecting cases); Harold F. Ritchie, Inc. v. Chesebrough-Pond's Inc., 281 F.2d 755, 761 (2d Cir. 1960) ("Actual confusion or deception of purchasers is not essential to a finding of trademark infringement or unfair competition, it being recognized that 'reliable evidence of actual instances of confusion is practically almost impossible to secure'") (citations omitted); see also Vasquez v. Superior Court, 484 P.2d 964, 972 (Cal. 1971) (reliance "may be inferred from the circumstances attending the transactions which oftentimes afford much stronger and more satisfactory evidence of the inducement which prompted the party defrauded to enter into the contract than his direct testimony to the same effect." (internal quotation marks omitted; citing cases)).

court may infer consumer reliance or confusion when the plaintiff demonstrates that the defendant acted with intent to deceive the public. Riggs Inv. Mgt. Corp. v. Columbia Partners, 966 F. Supp. 1250, 1269 (D.D.C. 1997) (injunction); Resource Dev., Inc. v. Statue of Liberty-Ellis Island Found., Inc., 926 F.2d 134, 140 (2d Cir. 1991) (damages).[96] Some courts have also indicated that deliberately deceptive conduct is of such "egregious nature" that a presumption of reliance is warranted. PPX, 818 F.2d at 272; Resource Developers, 926 F.2d at 140.

Similarly, in advertising cases, courts regularly assume that advertisements have at least some effect on their targeted market. See, e.g., McNeilab, 501 F. Supp. at 529-30 (collecting cases; "in a false advertising case such as this one, proof that the advertiser intended to communicate a false or misleading claim is evidence that that claim was communicated, since it must be assumed that more often than not advertisements successfully project the messages they are intended to project, especially when they are professionally designed, as the ones involved here were."); accord Polo Fashions, 451 F.Supp. at 562 ("Once the intent to cause confusion is established, the Court will presume that the infringer accomplished his purpose. The presumption is supported on the theory that the infringer, as an expert in the market he has chosen to enter, is correct in his assessment that public confusion will result."); see also Philip Morris Inc. v. Star Tobacco Corp., 879 F. Supp. 379, 387 (S.D.N.Y. 1995) (granting preliminary injunction despite lack of any evidence of actual consumer confusion, where products were similar, and where evidence that defendant's conduct in copying Marlboro cigarettes was intentional) (citing

[96] Resource Developers, Inc. v. Statue of Liberty-Ellis Island Found., Inc., 926 F.2d 134, 140 (2d Cir. 1991) ("Once it is shown that a defendant deliberately engaged in a deceptive commercial practice, we agree that a powerful inference may be drawn that the defendant has succeeded in confusing the public. Therefore, upon a proper showing of such deliberate conduct, the burden shifts to the defendant to demonstrate the absence of consumer confusion.").

Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203, 204 (1942)).

Defendants' intention that consumers would rely on their statements and advertising is evinced in both their documents and in testimony. For instance, Philip Morris executives in 1964 emphasized how "we must in the near future provide some answers which will give smokers a psychological crutch and a self-rationale to continue smoking." Along similar lines, BATCo concluded in 1979 that many smokers do not accept that smoking is dangerous and that "smokers are more ready to deny the validity of the evidence, or consciously suppress their awareness of overt propaganda." See PFF § IX. B ¶ 75.

In particular, Defendants' promotion and public statements regarding "light" cigarettes shows this intent to "intercept" smokers to prevent them from quitting. For example, a Brown & Williamson document from 1986 states "Quitters may be discouraged from quitting, or a least kept in the market longer. . . . A less irritating cigarette is one route (indeed, the practice of switching to lower tar cigarettes and sometimes menthol in the quitting process tacitly recognises this)." PFF § IV.D, ¶ 1104. Likewise, a BATCo report from a conference in the mid-1980s describes low-tar cigarettes "more as a third alternative to quitting and cutting down – a branded hybrid of smokers' unsuccessful attempts to modify their habit on their own." PFF § IV.D, ¶ 1107.

As described in the Court's Findings of Fact, see PFF §§ IV.E, IX. B. (5), Defendants' intent to target the youth market was a central focus of their fraudulent scheme. As Diane Burrows of Reynolds wrote in February of 1984, "Younger adult smokers are the only source of replacement smokers. . . . If younger adults turn away from smoking, the industry must decline, just as a population which does not give birth will eventually dwindle." See PFF § IX.B, ¶ 49.

In September of 1974, Mr. C. A. Tucker, Reynolds' vice president of marketing, wrote as follows in a presentation to the Board of Directors: "this young adult market, the 14-24 age group, ... 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." See PFF § IX.B, ¶ 50. A document produced by B&W, entitled the "The 'New' Smoker" concludes in a section entitled "Summing Up" that "the younger smoker is of pre-eminent importance." See PFF § IX.B, ¶ 51. As Lorillard put it quite bluntly, "the base of our business is the high school student." See PFF § IX. B, ¶52.

In sworn testimony, Defendants' own representatives corroborate their intent to induce reliance on their public statements. Joseph Cullman, who was vice-president of Philip Morris in 1954 and ultimately became its President and CEO, admitted in the State of Minnesota litigation that the industry intended that smokers rely upon the Frank Statement, one genesis of the Defendants' deception of the public:

Q. . . . The cigarette companies intended consumers to read this Frank Statement; correct?
A. Yes.

Q. And you hoped people would believe them; right?
A. Yes.

Q: Conduct their affairs with the belief that what is asserted herein is true and accurate.
A. I believe it was true and accurate.

Q. And you wanted the people who read this to believe that it was true and accurate; correct?
A. I would expect that was the reason, yes.

Q: Okay. And you wanted them, in conducting their affairs, to rely on the facts asserted herein as being true and accurate; right?
A. They were true and accurate.

Q. And you wanted people to believe and rely on that; right?
A. I see no reason why they shouldn't . . . . We hoped they would.

Q. . . . And that's what you wanted then; right?
A. Yes.

See PFF § IX. B, ¶ 70.

Likewise, Lorillard's former CEO, Alexander Spears, testified that he believes smokers should rely upon statements by the Tobacco Institute that smoking does not cause cancer:

Q. And to the extent that Tobacco Institute has made that statement [smoking not proved to cause lung cancer] publicly in the past, do you believe that smokers have the right to rely upon that statement?
A. I believe they should have -- they should rely on information that's provided along with other information that they have.

See PFF § IX. B, ¶ 71.

Walker Merryman, former spokesperson for the Tobacco Institute, explained how the Defendants intended that smokers rely upon the industry's public statements that no scientific proof showed cigarette smoking to be hazardous:

Q. . . . And it is true, isn't it, that the Tobacco Institute has consistently in its public statements on smoking and health taken the position that no scientific proof had been found to convince -- to convict smoking as a hazard to health?
A. We have said that from time to time.

Q. And in fact you intended people who received this publication and read it to believe what was being said; correct?
A. Correct.

Q. . . . And sir, the sentence -- the paragraph goes on to say, quote, "The statistical, clinical and experimental findings have not established smoking as a couse of any disease," close quote.
A. That -- that is correct.

Q. And in fact The Tobacco Institute intended the people who received this publication and read it to believe what the Tobacco Institute was saying.
A. Yes.

See PFF § IX. B, ¶ 72.

b. Defendants' Vast Expenditures in Furtherance of Their Fraudulent Scheme, and Their Resulting Profits, Demonstrate Reliance

Additionally, reliance may be presumed where, as here, Defendants spend billions of dollars in promulgating the fraud. In FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 42 (D.C. Cir. 1985), the Court noted that the defendant's "vast expenditure of advertising dollars on tar ratings strongly supports public reliance because advertising expenditures presumptively have the effect intended." See also U-Haul Int'l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1041 (9th Cir. 1986) ("[t]he expenditure by a competitor of substantial funds in an effort to deceive consumers and influence their purchasing decisions justifies the existence of a presumption that consumers are, in fact, being deceived. He who has attempted to deceive should not complain when required to bear the burden of rebutting a presumption that he succeeded"); Resource Developers, 926 F.2d at 140; Riggs Investment, 966 F. Supp. at 1269 n.12.

Here, given the efforts Defendants have made and expended in furtherance of their scheme, such an inference is justified. In furtherance of their scheme to defraud, Defendants have employed high-profile public relations firms; marketing and advertising experts; psychologists and behavioral scientists; they have created entire departments related to marketing and public relations; and they have spent **billions** of dollars annually in advertising and promoting their products, and over a billion dollars in funding TI and CTR to promulgate false and misleading public statements and fictitious research. See PFF § I.B, ¶¶ 26-28; § I.C, ¶ 75; § IV.E, ¶¶ 1214, 1367, 1811, 1852; § VIII, ¶¶ 113-114; § IX.A, ¶¶ 4-6; Appendices A-D. In 2000 alone, Defendants spent over $9 billion in advertising, marketing, and promoting cigarettes. See PFF § IX.B, ¶ 5. No person–let alone a Fortune 500 company–does so without the prospect

of a return on their investment. The Court concludes that such efforts in themselves evince reliance.[97]

Furthermore, the profitability of Defendants' misconduct also allows for a fair inference of reliance. See Burton v. R.J. Reynolds Tobacco Co., 205 F. Supp. 2d 1253, 1257 (D. Kan. 2002):

> Reynolds is hugely profitable. . . . [T]here is no question that Reynolds reaped enormous profits from the sale of its cigarettes. The court infers from the evidence that but for Reynold's misconduct, fewer people would have begun to smoke and those who had begun but desired to quit would have realized that the task might involve professional help. Knowledge that a product is not only risky to your health but also is addictive would seem to be a severe deterrent to consumption. The evidence does not permit a precise estimate of how many fewer cigarettes Reynolds would have sold had it been honest about the choice its potential consumers were asked to make. But, the vigor with which Reynolds pursued its campaign of concealment and obfuscation leads this court to the conclusion that the profitability of the misconduct was high.

Id. at 1257 (emphasis added). As in Burton, the Court concludes that Defendants' extensive scheme to defraud, well-funded and staffed and generating billions of dollars of profits, provides additional circumstantial evidence that these profits were causally derived from the fraud.[98]

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[97] Despite Defendants' representations to the contrary, brand switching between companies could not possibly justify over $9 billion in advertising and promotion expenditures since only 6.7% of adult smokers switch companies. See also PFF § IX.B ¶ 7 (discussing role of advertising and marketing in smoking initiation, rather than "brand-switching"). Defendants' internal admissions corroborate this finding. See, e.g., id. (1990 R.J. Reynolds document noting that "much of switching tends to be random noise").

[98] Additionally, where the alleged misrepresentation may impact public health, the burden of proving reliance should be relaxed. For instance, in McNeilab, the court considered the defendant's "insensitivity [to intimations that its commercials were misleading] irresponsible" in part because "those commercials have a bearing on matters of public health." 501 F. Supp. at 531. The court stated: "Here we are concerned primarily with public health, not profits. . . . There is thus a public interest in avoiding confusion . . . above and beyond the economic interest normally present in infringement cases. With the consequences of confusion so much more

(continued...)

c. Expert Testimony Demonstrates Reliance

Furthermore, the United States' expert reports and testimony, which the Court is entitled to credit, demonstrates the causal connection between Defendants' fraud and their improper profits. See FTC v. Brown & Williamson, 778 F.2d at 441; SEC v. First City Financial, 890 F.2d at 1231-32; Silver v. United States Postal Service, 951 F.2d 1033, 1042 (9th Cir. 1991) (expert testimony that the average reader would be deceived by advertisements); Resorts International, Inc. v. Greater Bay Hotel & Casino, Inc., 830 F. Supp. 826, 838 (D.N.J. 1992) (expert testimony regarding "subliminal" or "unconscious" consumer confusion); Playboy Enterps., Inc. v. Chuckleberry Publishing, Inc., 486 F. Supp. 414, 428 (S.D.N.Y. 1980) (expert testimony that consumers would act in a particular way to find an inference of confusion between magazine titles), aff'd 687 F. 2d 563 (2d Cir. 1982).

As set forth in the Court's Findings of Fact, See PFF § IV. E. (3) and § IX. B-C, the United States' experts reasonably and credibly demonstrate how Defendants' decades-long campaign of fraud could, and did, attract and maintain smokers. For example, the United States' marketing experts showed how cigarette marketing stimulates demand for cigarettes and, contrary to Defendants' explanation, is not solely (or even primarily), used for "brand switching" purposes. Those experts also demonstrated how such advertising is primarily marketed to youths, which Defendants recognize are the primary source of (in the words of one Defendant) "replacement" smokers–new consumers, frequently children, who substitute for those who have quit or died off as a result of smoking. The vast majority of new smokers begin as youths, and

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[98](...continued)
serious, relief should be granted upon lesser proof of confusing similarity in a prescription drug case than in other areas of infringement litigation." Id. at 540 (internal citations omitted).

Defendants depend on youths for the survival of their business. See PFF §§ IV. E. (3), IX. B. ¶¶ 49-67.

The expert witnesses further explained how youths underestimate the health hazards of smoking, as well as their failure to appreciate the risk of addiction. See PFF § IX. B, ¶¶ 12-24. Defendants' advertising messages, images, and merchandise used in cigarette advertising have corresponded to adolescent aspirations, and appeal to those themes and imagery most attractive to youths. Defendants exploit this vulnerability to imagery and selects advertising themes of independence, liberation, attractiveness, adventurousness, sophistication, glamour, athleticism, social inclusion, sexual attractiveness, thinness, popularity, rebelliousness, and being "cool." See PFF § IV. B. (4); § IX. B. ¶¶ 11-13.

While encouraging a theme, Defendants also target their advertising in forae where they are very likely to reach a youth audience. For instance, as explained by the United States' experts, Defendants place certain advertisements in magazines and other venues that historically and currently reach millions of teenagers. Defendants' recent expenditures show a dramatically increased attention to trade promotions, including "slotting fees," rebates, free products, display cases, and other point-of-sale benefits for retailers. These payments and promotions reduce prices and create tobacco-friendly environments that stimulate a lift in sales, particularly among new or occasional smokers. Youths are also tempted to smoke by the ubiquity of these tobacco-friendly environments in retail outlets, such as convenience stores, gas stations, and groceries, and payments to retailers encourage stores to be lax about youth pilferage and underage sales of cigarettes. See PFF § IV. E. (5)-(6); § IX. B, ¶¶ 4, 24-27.

Moreover, expert testimony establishes that advertising has been and continues to be

quite effective in influencing young people to smoke. The data indicates that young people who are more familiar with cigarette advertising are more likely to begin smoking; that increased expenditures on cigarette marketing campaigns have been associated with increases in the incidence of smoking among adolescents; adolescents who are exposed to more cigarette advertising are more likely to begin smoking; and the brands that are most popular with young people are the ones where ads are designed to appeal to their needs and the most money has been spent on advertising and promotional activities. See PFF § IV. E. (3); § IX. B, ¶ 29.

Over the past ten years, at least six comprehensive reviews have been conducted of the scientific evidence concerning the effects of advertising on smoking decisions by youths. Each review has come to the same conclusion: the weight of all available evidence, including survey data, scientific studies and experiments, and behavioral and econometric studies, supports the conclusion that advertising and promotion is a substantial contributing factor in the smoking decisions of young people, including the decision to initiate and to discontinue smoking. See PFF § IV. E, ¶¶ 1213-1224; § IX. B. (1). Analysis by economists and public health specialists support the conclusion that the initiation rates of young people are enhanced by pro-smoking advertising and depressed by anti-smoking information. For example, the rise in the rate of initiation among twelve to eighteen year-old girls during the late-1960s and early 1970s paralleled the marketing of cigarette brands specifically targeted to women. PFF § IV.D, ¶¶ 1208-09.

Similarly, Defendants recognize the importance of price-based marketing efforts, particularly to attract and maintain young people. Typically, youths are two to three times more price-sensitive than adults. Likewise, price-related marketing efforts, such as coupons, multi-

pack discounts, and other retail value-added promotions, have partially offset the impact of higher list prices for cigarettes, particularly with regard to young people. See PFF § IV. E. (5) and § IX. B. (3).

Additionally, the United States' experts explained how Defendants' false and misleading statements not only attract new consumers, but also allow smokers to "rationalize" their continued smoking, and to encourage them not to quit. For instance, Defendants' maintenance of an "open controversy" allowed smokers to believe that, because the case for causation had not yet been scientifically proven, they were allowed to continue smoking. Certain experts pointed out that "light" or "low-tar" cigarettes, though no less hazardous than "full flavor" or regular cigarettes, are believed to be safer by smokers. Through their advertising and marketing, Defendants themselves exploit this belief by implying such comparative safety, and that smoking "light" cigarettes is an acceptable alternative to quitting. Indeed, Defendants themselves referred to such products as "health reassurance" cigarettes, while also knowing that they were just as dangerous as regular cigarettes. See PFF § IV. D and § IX. B. (2), (5) ¶¶ 33-42, and (6) ¶¶ 78-86.

The United States also presented extensive evidence, both in expert testimony and from Defendants' own documents, on addiction and the role of nicotine. As explained more fully in the Court's Findings of Fact, see PFF § IV.B.(1), nicotine is a dependence-producing drug that meets all widely-accepted criteria for determining that a drug is dependence producing. Although nicotine naturally occurs in the tobacco plant, the modern cigarette is a highly-engineered and sophisticated product in both manufacture and design. In addition to engineering a product that contains an optimum dose of nicotine, pharmacologically sufficient to maintain addiction, Defendants manipulate the cigarette to optimize the delivery of the nicotine itself so

that it efficiently delivers the drug to the brain. See PFF § IV.C.(1),(2). Nicotine addiction alters brain chemistry and affects the way a person feels, behaves, and functions–including a person's propensity and difficulty in quitting smoking. Nicotine thus reinforces Defendants' public statements.

Finally, economic theory as well as other scientific evidence demonstrate that American consumers have reduced their use of cigarettes in response to accurate information concerning the health hazards of smoking. For instance, there was a 20% reduction in teenage smoking prevalence during 1968-1970 Fairness Doctrine when Public Service Announcements concerning the health hazards of smoking ran in one to four ratio with cigarette advertising, see PFF § IV.D, ¶ 1200, and then per capita consumption rebounded during the years 1971-1974, after anti-smoking commercials were removed from the airways. Id. ¶ 1203. Dr. Jeffrey Harris's analysis of surveys performed during 1964-1975, which appeared in the 1979 Surgeon General's Report, strongly suggested that quitting smoking was a major factor in the decline in per capita consumption during 1968 to 1970, when anti-smoking advertisements aired on prime time television. PFF § IV.D, ¶ 1205. A recent recalculation of historical quit rates by Dr. Burns, another expert, has confirmed the marked rise in quit rates during the prime-time anti-smoking advertisements and a decline in quitting after the barrage of public service ads disappeared from the airways . Id. at ¶ 1207. Likewise, expert testimony establishes that had Defendants not engaged in a concerted campaign of misinformation and concealment, smoking rates would have been higher and the rate of smoking initiation would have been lower. Therefore, absent Defendants' misconduct, the total consumption of cigarettes would have declined more rapidly over time. See PFF § IX. B.

Accordingly, the Court credits the United States' proffered expert testimony that Defendants' actions substantially contributed to, and continue to contribute to, widespread initiation of smoking behavior among young people and others and to the persistence of smoking among adolescents and adults in the United States.

d. Defendants' Own Admissions Demonstrate Reliance

Finally, Defendants themselves have admitted, directly and indirectly, that not only did they intend reliance, but in fact members of the public did, in fact, rely on their false, misleading, and fraudulent statements. As noted in the Court's Findings of Fact, (PFF § I.A, § IV.E, § IX), Defendants intended that their scheme to defraud would enhance and preserve the market for cigarettes.

Defendants' own documents show that such plans were successful. For instance, in 1955, the scientific director of TIRC stated that "the phase of uncontrolled fear ... created by the original premature and overbalanced statement of the American Cancer Society is rapidly passing," and noted the "general trust which the American people had begun to place in our efforts." Another industry response also lauded the success of TIRC in inspiring this trust: "There is absolutely no question in my mind that if this committee [TIRC] had not been formed, the industry by now would have been in a deplorable position. . . . In other words, the TIRC has been a successful defensive operation." See PFF § IX. B, ¶ 74.

One defendant's executive, Mr. Eric Gesell of the American Tobacco Company, admitted in a deposition in the State of Minnesota litigation that sales are one of the best measures of reliance.

Q: You expect people to be able to rely on the advertising that you place on behalf of the American Tobacco Company; correct?

DEFENSE COUNSEL: Object to the form.
A. Sure.
Q. And you know, in fact, people will rely?
A. Yes.
Q. And one of the best measures of reliance would be sales; correct?
DEFENSE COUNSEL: Object to the form.
A. Correct.

See PFF § IX. B, ¶ 94.

A 1989 tobacco industry document created by Ronald Tully of INFOTAB stressed the import of using manufacturers' organizations, such as TI and INFOTAB, as well as industry networks. Tully noted that

> [a]s an industry we must be pre-emptive by developing and fostering coalitions with long-established and well respected trade, political and freedom associations. . . . We need to frame the advertising issue at a very basic level and present the case to the public. The way to influence opinion former is to take your case to the public and obtain their participation in the fight against advertising restrictions.

Tully's point was made evident in his conclusion: "Just remember, we lose more to the bottom line each year in markets as a direct result of the policies pushed by the anti-smoking fraternity. Can we afford to let these groups continue their propaganda unabated.??" PFF § IX. B, ¶ 31.

Similarly, various Defendants' internal documents show Defendants' efforts to capitalize upon smokers' "rationalization" of smoking. For instance, high level Philip Morris Inc. executives described how "we must in the near future provide some answers which we give smokers a psychological crutch and a self-rationale to continue smoking." A 1979 study by BATCo found that many smokers do not accept that smoking is dangerous and "smokers are more ready to deny the validity of the evidence, or to consciously suppress their awareness of overt propaganda." See PFF § IX. B, ¶ 75. Defendants knew that their maintenance of an "open controversy" enabled smokers to justify their continued smoking. For instance, Reynolds

commissioned a "smoking environment" study and discovered that smokers rationalized the risks of smoking and "discounted the 'statistical risks' of smoking . . . .". See PFF § IX. B, ¶ 76.

Similarly, a 1989 market plan for R.J. Reynolds' Salem brand cigarettes promotion "Salem Soundwaves," showed both the nature of the target market, as well as the reason why the company should plan its success. The document describes the target demographic as:

> less educated than others . . . . into escapism because they have no intellectual diversions . . . . more immature in some cases than college kids . . . . They're less formed intellectually . . . more malleable. . . . These kids see themselves as grownups . . . . There are lots of young people at Rolling Stones concerts . . . . Should we be more involved with skin events? . . . with kids trying to meet each other?

See PFF § IX. B, ¶ 61.

Likewise, in the area of "light" or "low tar" cigarettes, Defendants not only intended consumers to rely on their implied (and false) statements that such cigarettes were somehow healthier, but they remarked upon the success of these statements in reassuring consumers and in discouraging them from quitting smoking. For instance, Philip Morris Inc. referred to such "light" cigarettes as the company's "traditional response to anti-smoking publicity," See PFF § IX. B, ¶ 78. Moreover, a November 13, 1973 presentation by A.W. Spears, a Lorillard scientist and later CEO, stated: "Clearly, the consumer is concerned about smoking and health, and is convinced in varying degrees that smoking is a possible detriment to his health. Presently, this factor is of active interest to R & D, since it has been used to an advantage in marketing both the KENT and TRUE brands." " PFF § IX. B, ¶ 79. Brown & Williamson conducted a focus group survey of smokers in 1977, discovering that "almost all smokers agree that the primary reason for the increasing acceptance of low tar brands is based on the health reassurance they seem to offer." See PFF § IX. B, ¶ 83. Brown & Williamson concluded that such reassurances were

indeed effective, and noted that its Viceroy longer, "high-filtration" cigarettes, touted as "double-barreled health protection" in fact "attracted smokers in droves," and "could not begin to supply the demand . . . ." See PFF § IV.D, ¶¶ 1084-85. The presence of what was perceived, in reliance on industry action, to be a safer cigarette was a substantial cause of continued smoking. BAT knew, for example, that the ventilated cigarette (low tar) "is emerging as an important health reassurance mechanism for many smokers" and that such a mechanism would prevent smoking rates from declining. See PFF § IV. D, ¶ 1108.

Finally, Defendants' internal documents indicate that Defendants knew that, because most "starter smokers" are youths, their marketing efforts should be directed to this important demographic. While publicly denying that they targeted their products to youth, internal documents reveal that the Defendants understood the import of their marketing to youths, and documented their success in doing so. In 1978, Lorillard's president indicated the "success" one of his brands, Newport: "**the base of our business is the high school student.**" See PFF § IX. B, ¶ 89 (emphasis added). Philip Morris also boasted of its success rate in attracting youths: "It has been well established . . . [by studies] that Marlboro has for many years had its highest market penetration among younger smokers. Most of these studies have been restricted to people age 18 and over, but my own data, which includes younger teenagers, shows even higher Marlboro market penetration among 15-17 year-olds." See PFF § IX. B, ¶ 88. Indeed, Philip Morris marketing documents show that the company knew that "Marlboro dominates in the 17 and younger age category, capturing over 50% of this market." Id.

e. Youth Targeting

The Court's consideration of reliance is also informed by the fact that the principal target

of Defendants' fraudulent campaign was minors. As recognized in both judicial decisions and positive enactments, "[c]hildren have a very special place in life which law should reflect." May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). The law provides that minors are a "protected class" subject to the state's *parens patriae* authority and protection. Prince v. Massachusetts, 321 U.S. 158 (1944); Ginsberg v. New York, 390 U.S. 629, 631 (1968); Chesapeake & O. Ry. Co. v. Stapleton, 279 U.S. 587 (1929) (state has power to forbid employment of children of tender age in dangerous work); (Santosky v. Kramer, 455 U.S. 745, 766 (1982) (discussing *parens patriae* powers and interests regarding children and parental fitness determination)); Lassiter v. Department of Social Servs. of Durham Cty., 452 U.S. 18, 27 (1981) (upholding involuntary termination of parental rights and noting state's "urgent interest in the welfare of the child").

Moreover, the law recognizes that minors are not held to the same standards of responsibility and cannot be held to the same standards of care as adults. "Because of their youth and inexperience, minors are subject to different rules with respect to contractual responsibilities, criminal law, voter rights, and driver's license requirements." In re welfare of C.P.K., 615 N.W.2d 832, 836 (Minn. App. 2000). At common law, minors cannot appoint an agent,[99]

[99] See, e.g., Restatement (Second) of Agency § 10; Schmidgall v. Engelke, 224 N.E.2d 590 (Ill. App. 1967); Appel v. Smith, 63 F. Supp. 173 (N.D. Ind. 1945); Bell v. Green, 423 S.W.2d 724 (Mo. 1968); Siegelstein v. Fenner & Beane, 17 S.E.2d 907 (Ga. App. 1941); Wilson v. Moudy, 123 S.W.2d 828 (Tenn. App. 1938); Hodge v. Feiner, 78 S.W.2d 478 (Mo. App. 1935); Potter v. Fla. Motor Lines, 57 F.2d 313 (S.D. Fla. 1932); Blomquist v. Jennings, 250 P. 1101 (Or. 1926); Curtis v. Alexander, 257 S.W. 432 (Mo. 1923); Sims v. Gunter, 78 So. 62 (Ala. 1918); Weidenhammer v. McAdams, 98 N.E. 883 (Ind. App. 1912); Holden v. Curry, 55 N.W. 965 (Wis. 1893); Trueblood v. Trueblood, 8 Ind. 195 (Ind. 1856); Ware v. Cartledge, 24 Ala. 622 (Ala. 1854); Palmer v. Miller, 43 N.E.2d 973 (Ill. 1942).

including a power of attorney.[100] Nor can (subject to narrow exceptions) minors be bound by contract,[101] and special rules govern them in tort.[102]

The purpose of this heightened protection for minors is because, as Justice Stewart rightly observed, a child "is not possessed of that full capacity for individual choice . . . ." Ginsberg v. New York, 390 U.S. at 649-50 (Stewart, J., concurring). As the Supreme Court emphasized in Schall v. Martin, 467 U.S. 253, 265 (1984), "[c]hildren, by definition, are not assumed to have the capacity to take care of themselves," and the law accordingly reflects "the desirability of protecting the juvenile from his own folly." Id. (quoting People ex rel. Wayburn v. Schupf, 385 N.Y.S.2d 518, 520-521 (N.Y. 1976)); see also Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) (minority "is a time and condition of life when a person may be most susceptible to influence and

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[100] See, e.g., McDonald v. City of Spring Valley, 120 N.E. 476 (Ill. 1918); Glass v. Glass, 76 Ala. 368 (1884); Philpot v. Bingham, 55 Ala. 435 (1876); Fuller v. Smith, 49 Vt. 253 (1875); Lutes v. Thompson, 5 Pa. C.C. 451 (Pa. Com. Pl. 1874); Pickler v. State, 18 Ind. 266 (1862); Knox v. Flack, 22 Pa. 337 (1853); Semple v. Morrison, 23 Ky. 298 (1828); Siegelston v. Fenner & Beane, 17 S.E.2d 907 (Ga. App. 1941).

[101] See, e.g., Sims v. Everhardt, 102 U.S. 300 (12 Otto 300) (1880); Bonner v. Moran, 126 F.2d 121, 122 (D.C. Cir. 1941) ("The universal law ... is that a minor cannot be held liable on his personal contracts or contracts for the disposition of his property."); Restatement (Second) of Contracts § 12(2)(b) (infants lack capacity to contract); Restatement (Second) of Contracts § 14 & cmt. a (noting that most states, by statute, have changed the age of majority to 18); Palmer v. Miller, 43 N.E.2d 973 (Ill. 1942); Johnson v. Turner, 49 N.E.2d 297 (Ill. App.2.Dist. 1943); In various states, a contract by a minor is voidable, not void. See, e.g., Simmons v. Parkette Nat. Gymnastic Training Center, 670 F. Supp. 140, 142 (E.D. Pa. 1987); Towle v. Dresser, 73 Me. 252 (1882); Feagles v. Sullivan, 32 Pa. D&C 47 (Pa. Com. Pl. 1938); Scott v. Schisler, 153 A. 395 (N.J. Sup. 1931); Benson v. Tucker, 98 N.E. 589 (Mass. 1912).

[102] In most torts actions, minors are not held to the same standards of care as are adults. See Restatement (Second) of Torts § 283A ("If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under the circumstances."). It should be reiterated that, despite Defendants' protestations to the contrary, none of the United States' claims for relief involve a "contributory negligence" or "assumption of the risk" analysis on the part of individual smokers.

to psychological damage.")[103].

Indeed, the Supreme Court has on several occasions remarked about the "recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," Bellotti v. Baird, 443 U.S. 622, 635 (1979), and note the "Court's concern for the vulnerability of children" as a premise for its authority and protection. Id. at 634; see also Schall, 467 U.S. at 265-66 n.15 ("Our society recognizes that juveniles in general are in the earlier stages of their emotional growth, that their intellectual development is incomplete, that they have had only limited practical experience, and that their value systems have not yet been clearly identified or firmly adopted . . . ." (citation and internal quotation marks omitted)); Bonner v. Moran, 126 F.2d 121, 122 (D.C. Cir. 1941) (surgeon may not perform nonemergency surgery on fifteen year old child without parents' consent, even where child consents; "In deference to common experience, there is general recognition of the fact that many persons by reason of their youth are incapable of intelligent decision, as the result of which public policy demands legal protection of their personal as well as their property rights.")[104]

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[103] Of course, these legal principles are not mere legal fictions, but rather are grounded on fact. As reflected in this Court's Findings of Fact, this is particularly true of minors in appreciating the health hazards, and addictiveness, of smoking. Adolescents, moreso than adults, underestimate the harmful consequences of smoking and substantially underestimate their risks of becoming addicted, long-term smokers. See PFF §§ IV.E, IX. B, ¶¶ 11-14.

[104] Accord City of New York v. Stringfellow's of New York, Ltd., 684 N.Y.S.2d 544, 550-51 (N.Y. App. Div. 1999) ("Infancy, since common law times and most likely long before, is a legal disability and an infant, in the absence of evidence to the contrary, is universally considered to be lacking in judgment, since his or her normal condition is that of incompetency. In addition, an infant is deemed to lack the adult's knowledge of the probable consequences of his or her acts or omissions and the capacity to make effective use of such knowledge as he or she

(continued...)

The Court finds that Defendants chose to exploit this vulnerability. Accordingly, even if the Court were to assume–contrary to the evidence presented by the United States--that the majority of the American public were **fully** aware of the actual hazards of smoking (despite Defendants' concealment and fraud); **and** assuming that the defendant's believability or unbelievability were somehow a defense in an action brought under § 1964(a) based on mail and wire fraud; **and** assuming that reliance were a required element of the United States' claims; because the Defendants' fraudulent scheme targeted minors, any assessment of "reliance" must account for children's greater vulnerability to Defendants' fraudulent representations, their greater susceptibility to addiction, their decreased ability to fully appreciate the hazards of smoking and the risk of addiction, and their lack of legal capacity in a variety of areas.

C. United States v. Carson Was Wrongly Decided and in Any Event Is Distinguishable and Does Not Bind This Court

This Court finds that the Defendants' reliance upon the limitations on RICO disgorgement imposed by United States v. Carson, 52 F. 3d 1173 (2d Cir. 1995) is misplaced because that aspect of Carson was wrongly decided. In any event, Carson is distinguishable from this case and does not bind this Court.

1. The Carson Decision

In 1990, the United States brought a civil RICO lawsuit against several local unions of the International Longshoreman's Association ("ILA"), various union officials, including defendants Carson, employers in the maritime industry, and organized crime figures. The

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[104](...continued)
has. It is the policy of the law to look after the interests of infants, who are considered incapable of looking after their own affairs, to protect them from their own folly and improvidence, and to prevent adults from taking advantage of them.")

evidence established that Carson, who served from 1972-1988 as the Secretary-Treasurer of two ILA Locals, accepted $16,100 in unlawful kickbacks from an employer from June 1981 through September 1982 and embezzled approximately $60,000 in salary payments from 1982 through 1988 when he collected a full-time salary while only working part-time for a union local. The district court ordered Carson to disgorge the above referenced proceeds, totaling $76,100. Carson, 52 F.3d at 1177-81.

The Second Circuit vacated the order of disgorgement and remanded "to the district court for a determination as to which disgorgement amounts, if any, were intended solely to 'prevent and restrain' future RICO violations." Id. at 1182. The court stated that its decision was grounded in Section 1964(a) of RICO which vests the courts with jurisdiction "to prevent and restrain violations of [RICO]", on the theory that those terms imply that RICO disgorgement is "forward looking", and hence limited to the amount of disgorgement necessary to "prevent and restrain" future violations. Id. at 1181. The court added:

> Ordinarily, the disgorgement of gains ill-gotten long in the past will not serve the goal of "prevent[ing] and restrain[ing]" future violations unless there is a finding that the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose. The disgorgement of gains ill-gotten relatively recently is more easily justifiable on the basis of the same analysis.

Id. at 1182. The court also noted that "[c]ategorical disgorgement of all ill-gotten gains may not be justified simply on the ground that whatever hurts a civil RICO violator necessarily serves to 'prevent and restrain' future RICO violations. If this were adequate justification, the phrase 'prevent and restrain' would read 'prevent, restrain and discourage,' and would allow any remedy that inflicts pain." Id. at 1182.

2. Carson is Inconsistent With the Purposes of RICO Disgorgement

Carson's conclusion that RICO disgorgement is limited to the amount of proceeds "that are being used to fund or promote the illegal conduct, or constitute capital available for that purpose" is not found anywhere in the RICO statute, and is flatly inconsistent with well-established authority that the primary purposes of disgorgement are "to deprive a wrongdoer of his unjust enrichment and to deter others from violating the . . . laws." First City Financial Corp., 890 F.2d at 1230. Accord cases cited supra n.76. In that regard, the Supreme Court has squarely ruled that the "aim" of RICO's equitable remedies "is to divest the [enterprise] of the fruits of its ill-gotten gains." United States v. Turkette, 452 U.S. 576, 585 (1981). Accord United States v. International Brotherhood of Teamsters, 708 F. Supp. 1388, 1408 (S.D.N.Y. 1989)(RICO disgorgement "is aimed at preventing unjust enrichment of the defendants").

Moreover, in the Senate Report to the RICO statute, Congress emphasized the expansive and flexible nature of the available equitable relief, noting that "[a]lthough certain remedies are set out, the list is not exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provisions for the rights of innocent persons." S. Rep. No. 91-617, at 160 (1969); Accord H.R. Rep. No. 91-1549, at 57 (1970). As the Senate Report explained, RICO provided the courts with authority to craft "equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity" and to "prohibit[]" persons who committed a pattern of racketeering activity "from continuing to engage in this type of activity in any capacity." S. Rep. No. 91-617 at 79, 82. The Supreme Court has similarly characterized Section 1964 as a "far-reaching civil enforcement scheme," Sedima, S.P.R.L., 473 U.S. at 483, and has explained that "if Congress' liberal-construction

mandate [that RICO be "liberally construed to effectuate its remedial purpose"] is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident," Id. at 492 n. 10.

However, the Second Circuit's strained and restrictive interpretation, in Carson, of Section 1964(a) contravenes Congress' mandate that RICO's equitable remedies be expansively construed to effectuate its remedial purposes and undermines the central aims of RICO disgorgement. The rationale of Carson would allow a wrongdoer to keep vast amounts of ill-gotten gains, contrary to the central purposes of RICO disgorgement to divest a defendant of these proceeds, if the wrongdoer did not use his ill-gotten gains "to fund or promote the illegal conduct", or make his ill-gotten gains available for that purpose,[105] and also would eviscerate the intended deterrent effect of disgorgement.[106]

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[105] For example, if a defendant obtained a million dollars from bank robberies in violation of RICO and immediately lost that million dollars lawfully gambling at a casino, Carson's rationale would not require the defendant to disgorge a million dollars even if he had other assets to satisfy the disgorgement order merely because the defendant did not use the million dollars that he stole to fund or promote illegal conduct. But see SEC v. Banner Fund Int'l, 211 F.3d 602, 617 (D.C. Cir. 2000)(holding that "disgorgement is an equitable obligation to return a sum equal to the amount wrongfully obtained, rather than a requirement to replevy a specific asset," and therefore a wrongdoer may not escape his obligation merely because he no longer has the specific asset which was unlawfully obtained.).

[106] See, e.g., Manor Nursing Ctrs. Inc., 458 F. 2d at 1104 ("The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits"); SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1308 (2d Cir. 1971) ("It would severely defeat the purposes of the [Securities] Act if a violator of Rule 10b-5 were allowed to retain the profits from his violation."); Fletcher v. Security Pacific Nat'l Bank, 591 P.2d 51, 57 (Cal. 1979)("We do not deter indulgence in fraudulent practices if we permit wrongdoers to retain the considerable benefits of their unlawful conduct"). Cf. United States v. Paramount Pictures, 334 U.S. 131, 171 (1948)(noting that unless a wrongdoer is required to divest property unlawfully obtained "there would be reward from the conspiracy through retention of its fruits."). See also cases cited supra n.76.

Moreover, the rationale of Carson is at odds with the authority that disgorgement of ill-

(continued...)

3. Carson's Limitations on The Scope of Disgorgement Is Not Supported By The Text of RICO and Conflicts With Interpretations of Similarly Worded Equitable Relief Provisions By The Supreme Court and Other Federal Courts

a. 18 U.S.C. § 1964(a) vests the district courts with jurisdiction "to prevent and restrain" violations of RICO by issuing appropriate orders. This provision does not even remotely imply, as the Second Circuit erroneously concluded, that disgorgement must be limited to "the gains [that] are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." Carson, 52 F.3d at 1182. Rather, the Carson court incorrectly read that requirement into RICO. Furthermore, the Carson court did not attempt to explain why jurisdiction to "prevent and restrain" RICO violations does not authorize equitable relief designed to **deter** the defendant and **others** from committing future unlawful acts. Indeed, both specific and general deterrence are classic methods of "preventing" or "restraining" unlawful conduct from recurring. See Webster's New International Dictionary Second Edition (unabridged) at 711 (1956)("deter" means " to turn aside, **restrain**, or **discourage** through fear; hence, to hinder or **prevent** from action by fear of consequences. . . ")(emphasis added). Therefore, RICO's "prevent and restrain" language plainly authorizes courts to issue appropriate orders to "deter" or "discourage" unlawful conduct, contrary to Carson. See cases cited supra n.76. Moreover, if Congress wanted to include a "plowback" provision in Section 1964, requiring that the wrongdoer use his unlawfully obtained proceeds "to fund or promote the illegal conduct" before it may be disgorged, as Carson

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[106](...continued)
gotten gains is appropriate regardless of whether the court finds a nexus warranting enjoining future unlawful conduct (see supra, Section III. C) and cannot be reconciled with the overwhelming authority that a wrongdoer does not have a cognizable legal interest in unlawfully obtained proceeds. See supra Section IV. A.3.

ruled, Congress knew how to do so. For example, Congress provided in Section 1962(a) of RICO that it was unlawful "for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise . . . ." That Congress did not explicitly include such a "plowback" requirement in Section 1964, as it did in Section 1962(a), tellingly indicates that Congress did not intend to impose such a requirement under Section 1964. See, e.g., Russello v. United States, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting United States v. Wong Kim Bo, 472 F. 2d 720, 722 (5th Cir. 1972)).

b. Furthermore, Carson's restriction on the scope of disgorgement cannot be reconciled with the Supreme Court's mandate that "the comprehensiveness" of the court's exercise of equitable jurisdiction in cases involving the government's protection of the "public interest", as involved here,

> **is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.** 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.'

Porter v. Warner Co., 328 U.S. 395, 398 (1946)(emphasis added) (quoting Brown v. Swann, 10 Pet. 497, 503, 35 U.S. 497 (1836)). Accordingly, the Porter Court held that a statute explicitly authorizing the issuance of a "permanent or temporary injunction, restraining order, or other order" for a violation of the Emergency Price Control Act of 1942 authorized an order for

restitution of rents collected in violation of the Act, without regard to whether the proceeds were being used to promote the unlawful activity and even though the Act did not specifically include "restitution" orders.[107]

RICO's Section 1964(a) does not contain such "a clear and valid legislative command" restricting the scope of disgorgement to ill-gotten gains that "are being used to fund or promote the illegal conduct"; hence, the full scope of disgorgement may not be "denied or limited", as the Carson court did contrary to the dictates of Porter and its progeny.

Likewise, Carson's narrow interpretation of RICO's language "to prevent and restrain" is not compatible with federal courts' interpretations of similarly worded equitable relief provisions. For example, the Securities and Exchange Act of 1934, 15 U.S.C. § 78u(d), provides, in relevant part, that whenever "any person is engaged or is about to engage in acts or practices constituting a violation of [the Securities Act]", courts have jurisdiction "**to enjoin** such acts or practices, and upon a proper showing a permanent or temporary injunction or **restraining order** shall be granted . . . ." (emphasis added). Although the above referenced provision, like RICO's Section 1964, seeks to "enjoin" and "restrain" future unlawful violations and does not explicitly provide for "disgorgement", the District of Columbia Circuit and other courts have held that courts have jurisdiction under the Securities Act to order disgorgement of proceeds

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[107] Similarly, in Mitchell v. De Mario Jewelry, Inc., 361 U.S. 288, 289 (1960), the Supreme Court held that a statute which explicitly authorized the courts to issue orders "to restrain violations" of the Fair Labor Standards Act of 1938 empowered the courts to order "reimbursement" for loss of wages caused by a violation of the Act because "'[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.'" Id. at 291 (quoting Porter, 328 U.S. at 398). Significantly, the Court did not interpret the statute's purpose "to restrain violations" to imply a "forward looking" limitation on the scope of restitution.

obtained from a wrongdoer's **past** unlawful acts.[108] None of those decisions ruled that such disgorgement must be limited to proceeds that "are being used to fund or promote the illegal conduct, or constitute capital available for that purpose". Rather, those courts recognized, as Carson did not, that unrestricted disgorgement of ill-gotten gains is essential to achieve the remedial purposes of disgorgement "to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws". First City Financial Corp., 890 F.2d at 1230.

Similarly, the Commodity Exchange Act, 7 U.S.C. § 13a-1, authorizes courts "to enjoin" and issue a "restraining order" when a "person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of [the Act or any rule or regulation thereunder]". Courts have held this forward looking provision, which does not explicitly provide for disgorgement, authorizes disgorgement of ill-gotten gains from past violations because such disgorgement "may serve to deter future violations" since "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains," and "it would frustrate the regulatory purposes of the Act to allow a violator to retain his ill-gotten gains". Commodity Fut. Trad. Comm'n. v. Co Petro Marketing Group, Inc., 680 F.2d 575, 583-84 (9th Cir. 1982)(citation and internal quotations omitted).[109] See also FTC v. Gem Merchandising Corp., 87 F.3d 466, 468-70 (11th Cir. 1996) (holding that the Federal Trade Commission Act, 15 U.S.C. § 53(b),

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[108] See e.g., First City Financial Corp., 890 F.2d at 1229-31; SEC v. Materia, 745 F.2d 197, 200-201 (2d Cir. 1984); Manor Nursing Ctrs., 458 F.2d at 1103-05; Texas Gulf Sulphur Co., 446 F.2d at 1307-08.

[109] Accord Commod. Futures Trad. Comm'n v. British Amer. Commod. Opt. Corp., 788 F.2d 92, 94 (2d Cir. 1986)("disgorgement [pursuant to the Commodities Exchange Act] serves the purpose of depriving the wrongdoer of his ill-gotten gains and deterring violations of law"); Commod. Futures Trad. Comm'n v. Hunt, 591 F.2d 1211, 1222-23 (7th Cir. 1979).

which authorizes district courts to issue "a temporary restraining order or a preliminary injunction" when "any person . . . is violating, or is about to violate, any provision of [the FTC Act]", empowers courts to order disgorgement of a wrongdoer's ill-gotten gains from past acts because "[t]o hold otherwise would permit a defendant to retain such funds. . . [and] would permit unjust enrichment and undermine the deterrence functions of [Section 53(b)]."); Pierce v. Amaral, 938 F.2d 94, 95 (8th Cir. 1991)(holding that although the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1714, by its terms only explicitly authorized injunctions or restraining orders to enjoin future violations of the Act, and not disgorgement, under the principles of Porter and DeMario the Act empowers courts to disgorge the funds the defendants received from sales made in violation of the Act); Interstate Commerce Comm'n v. B&T Transp. Co., 613 F.2d 1182, 1183-86 (1st Cir. 1980)(holding that although Section 322(b)(1)of the Motor Carrier Act "[b]y its terms . . . empowers the I.C.C. to seek only prospective injunctions to restrain future conduct, not restitution", under "the principles of Porter and DeMario", courts are authorized to order "equitable restitution" of ill-gotten gains).

At bottom, Carson stands alone in its view that the terms "to prevent and restrain" in an equitable relief provision to prevent and restrain future violations implies that disgorgement must be limited to a wrongdoer's ill-gotten "gains [that] are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." Carson's decision in that regard not only is inconsistent with the central remedial purposes of RICO disgorgement, but also leads to the untenable conclusion that RICO may not preclude a RICO violator from retaining billions of dollars of ill-gotten gains simply because the violator did not use the fruits of his unlawful conduct to fund or promote additional illegal activity, or have it available for that purpose.

Surely, the law does not require such an incongruous result.[110]

4. Carson is Distinguishable From This Case

In any event, Carson rested on several factors that are not present here, and is distinguishable. The Carson court stated that it did "not see how it serves any civil RICO purpose to order disgorgement of gains ill-gotten long ago by a retiree", who was no longer was in a position to use his union office to continue his unlawful acts. The court added that "ordinarily", disgorgement of such proceeds "will not serve the goal of 'prevent[ing] and restrain[ing] future violations." Carson, 52 F.3d at 1182.

Here, as this Court previously found, "as long as" the Cigarette Company Defendants "are in the business of selling and marketing tobacco products, they will have countless 'opportunities' and temptations to take unlawful actions." Philip Morris Inc., 116 F. Supp. 2d at 149. More fundamentally, this is no "ordinary" case like Carson involving disgorgement of a relatively small amount of proceeds derived from a few discrete unlawful acts "long ago", but rather involves a massive, ongoing scheme over 45 years to defraud millions of consumers of billions of dollars. In such circumstances, disgorgement manifestly serves the central aims of civil RICO – to deter future violations by the Defendants and others and to prevent unjust enrichment by depriving the wrongdoers of their ill-gotten gains. At bottom, Carson bears no resemblance to the facts of this case and does not bind this Court.[111]

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[110] Moreover, removing Carson's limitations on the scope of disgorgement of proceeds would not render disgorgement of proceeds "punitive" for the reasons stated supra Section IV.A.3.

[111] In any event, even under Carson, the United States is entitled to the requested disgorgement of the Defendants' unlawfully obtained proceeds because these proceeds

(continued...)

CONCLUSION

As set forth above, the Court concludes that the United States has established, by a preponderance of the evidence, that the Defendants established and conducted the affairs of an association-in-fact enterprise, which was and is engaged in, and its activities affected and continue to affect, interstate and foreign commerce. That Enterprise was formed in late 1953, in response to growing evidence of the link between smoking and adverse health effects, and for the purposes of executing a scheme to defraud to deprive the public of money, as well as to avoid the possible disclosure of harmful information that might be used against Defendants in smoking-and-health liability suits. Through the Enterprise, the Defendants worked together and coordinated their activities, including through Defendants the Tobacco Institute and the Council for Tobacco Research, to disseminate thousands of fraudulent public statements in furtherance of their scheme. Defendants devised a "united front" to deny that cigarettes caused disease, to fraudulently state that nicotine is not addictive, and to exploit and target the youth market, while publicly claiming that they did not target individuals under the age of 21. Moreover, both through the Enterprise and on its behalf, Defendants suppressed, destroyed and concealed material information that might be disclosed to the public or in the courts in product liability suits.

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[111](...continued)
"constitute capital available" for the purpose of funding or promoting the Defendants' illegal conduct, even if they did not actually use those proceeds for such purpose. See e.g., United States v. Private Sanitation Industry Ass'n, 914 F. Supp. 895, 901 (E.D.N.Y. 1986) (holding that under Carson, the United States was entitled to disgorgement of all defendants' corporate unlawful proceeds; "[b]ecause the corporate defendants in this case will continue to be involved in the Long Island carting industry even if the government's requested relief is granted, the monies these corporations gained illegally obviously constitute capital available for the purpose of funding or promoting illegal conduct.").

Beginning in late 1953 and continuing to the present, and in furtherance of the affairs of the Enterprise, Defendants engaged in (and aided and abetted the commission of) numerous acts of mail and wire fraud, which included: misrepresentations regarding the adverse health effects of smoking, including Defendants' maintenance of an "open controversy" as to the link between smoking and cancer; misrepresentations and other false statements regarding the addictiveness of cigarettes and Defendants' manipulation of nicotine to establish and sustain addiction; false and misleading statements regarding Defendants' targeting of the youth market; Defendants' fraudulent promises–including their initial promise in January 1954 with the issuance of the Frank Statement – to conduct independent, honest research; and Defendants' concerted efforts to avoid and suppress development of a potentially less hazardous cigarette, coupled with Defendants' fraudulent promotion of "light" cigarettes, which Defendants fraudulently claimed were "safer" despite their own internal research which proved otherwise.

Especially troubling to the Court is a particular aspect of Defendants' scheme to defraud–Defendants' extensive targeting of the youth market. As discussed supra, various courts have acknowledged that "[o]ur society recognizes that juveniles in general are in the earlier stages of their emotional growth, that their intellectual development is incomplete, that they have had only limited practical experience, and that their value systems have not yet been clearly identified or firmly adopted . . . ." Schall v. Martin, 467 U.S. 253, 265 n.15 (1984) (citation and internal quotation marks omitted). Indeed, "children have a very special place in life which law should reflect." May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring); see also Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) (minority "is a time and condition of life when a person may be most susceptible to influence and to psychological damage."). Indeed,

youths are a "protected class" under the law.

Despite the law's respect and protection of youths and appreciation of the susceptibility of youths, Defendants chose to exploit this vulnerability. As described in the Court's Findings of Fact, Defendants were well aware of the import of the youth market to the viability of their businesses. Defendants realized that, because very few individuals begin smoking after their teenage years, Defendants needed to attract these smokers to the market. As one Defendant, R.J. Reynolds, stated: "[y]ounger adult smokers are the only source of replacement smokers. . . . If younger adults turn away from smoking, the industry must decline, just as a population which does not give birth will eventually dwindle." PFF § IX. B, ¶ 49. That same company internally acknowledged that "this young adult market, the 14-24 age group, ... 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." PFF § IX. B, ¶ 50. A document entitled "The 'New' Smoker," produced by from the files of another Brown & Williamson, concludes that "the younger smoker is of pre-eminent importance." PFF § IX. B, ¶ 51.

Realizing this, Defendants tracked the attitudes, behavior, and smoking patterns of individuals as young as twelve, and were well aware that youths often are not fully aware of the health risks of smoking, and failed to appreciate their susceptibility to the addictiveness of nicotine. Defendants not only were and are aware of the ability of advertising to draw adolescents to their products, but in fact exploited this knowledge to attract children as their new "replacement smokers." Defendants noted the success of their efforts to acquire youths. For instance, one Defendant, Philip Morris, favorably remarked about how the Marlboro brand "shows even higher market penetration among 15-17 year-olds. The teenage years are also

important because those are the years during which most smokers begin to smoke, the years in which initial brand selections are made, and the period in the life-cycle in which conformity to peer-group norms is greatest," PFF § IX. B, ¶ 53, while Lorillard stated with regards to its Newport brand, "the base of our business is the high school student." PFF § IX. B, ¶¶ 52, 89. All the while, including at present, Defendants continued to publicly state that they had no interest in the youth market, and that they did not target youths in their advertising.

The United States has overwhelmingly established that there is a reasonable likelihood that the Defendants will continue their unlawful and fraudulent activities in the future. First, Defendants' past unlawful conduct–a forty-five year scheme to defraud involving thousands of violations of the mail and wire fraud acts–alone establishes a reasonable likelihood of future violations, even if Defendants' unlawful activities had momentarily ceased. Furthermore, the Court finds more than ample evidence that Defendants continue to commit acts of fraud, concealment, and suppression of material information. In addition to extensive fraudulent representations regarding smoking and health and environmental tobacco smoke, and continued unlawful activities and fraudulent statements concerning addiction, nicotine manipulation, and "light" cigarettes as "health reassurance" products, Defendants continue to target the youth market, and make numerous public statements denying that they do so.

As set forth in the Court's Findings of Fact, Defendants continue to advertise in youth-oriented publications; employ imagery and messages that they know are appealing to teenagers; increasingly concentrate their marketing in places where they know youths will frequent; engage in strategic pricing to attract youths; increase their marketing at point-of-sale locations with promotions, self-service displays, and other materials; sponsor sporting and entertainment events,

many of which are televised or otherwise broadcast and draw large youth audiences; and engage in a host of other activities which are designed to attract youths to begin and continue smoking. In at least three instances, other courts have found that a Defendant has violated the youth smoking and advertising provisions of the Master Settlement Agreement. PFF § VIII, ¶¶ 85-86.

The United States has established its entitlement to significant equitable relief, including equitable disgorgement of Defendants' unlawfully-obtained proceeds. Despite its entitlement to a greater amount, the United States, in its discretion, seeks 289 billion dollars: a reasonable approximation of the profits that Defendants obtained from the "Youth-Addicted Population" (those who began smoking more than five cigarettes daily before age 21) from 1971 (the effective date of the RICO statute) to 2001 throughout their smoking lives. The evidence establishes that smoking one to five cigarettes per day is a predictor of continued smoking and nicotine dependence, and that such dependence increases significantly when this amount exceeds more than five cigarettes daily. Therefore, the United States' disgorgement model–focusing on the class of Youth-Addicted Smokers who were smoking more than five cigarettes per day before reaching the age 21, is reasonable and appropriate.

Moreover, and consistent with the Court's earlier analysis regarding Defendants' jury demand, the United States need not show "reliance," as might be required in a damages action, including private civil RICO lawsuits under § 1964(c). Nevertheless, even assuming, arguendo, that the law demanded a showing of reliance, the Court finds extensive evidence that the public relied on Defendants' false and fraudulent statements, including their press releases and advertising. Such evidence comes not only from the United States' expert testimony, which the Court finds both reliable and convincing, but also by the evidence found in Defendants' own

files, which shows, among other things, their successes in attracting and maintaining smokers, especially youths.

Additionally, the Court notes that even if there were absolutely no entitlement to injunctive relief, the United States would nevertheless be entitled to disgorgement of Defendants' unlawfully-obtained profits, because such profits were never rightfully owned by the Defendants to begin with, and because such disgorgement serves important deterrent purposes.

Therefore, given the evidence of Defendants' unlawful conduct that began in 1953, and threatens to continue into the future, the Court concludes that each Defendant is liable under Counts III and IV, and awards appropriate equitable relief including disgorgement and a permanent injunction.

Respectfully submitted,

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