UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

UNITED STATES' REPLY TO JOINT DEFENDANTS' PRELIMINARY PROPOSED CONCLUSIONS OF LAW REGARDING AFFIRMATIVE DEFENSES

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THE RICO CLAIMS ARE NOT PRE-EMPTED BY CONGRESS' REGULATORY REGIME REGARDING TOBACCO AND DO NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE

A. The RICO Claims Are Not Pre-Empted By Congress' Regulatory Regime Regarding Tobacco

Joint Defendants contend that the claims and requested relief under the Racketeer Influenced and Corrupt Organizations Act ("RICO") involved here conflict with, and are pre-empted by, Congress' regulatory regime regarding tobacco, particularly the Federal Trade Commission Act ("FTC Act"), the 1965 Federal Cigarette Labeling and Advertising Act (the "FCLAA" or "1965 Act") and the 1969 amendments to the FCLAA (the "1969 FCLAA" or "1969 Act"), and related statutes and regulations. See Joint Defendants' Preliminary Proposed Findings of Fact and Conclusions of Law Regarding Affirmative Defenses ("JD. PFF"), pp. 48-92, 124-140, 802-05, 831-36, 888-94.

This assertion essentially repeats Joint Defendants' arguments in support of their Motion for Partial Summary Judgment on Advertising, Marketing, Promotion and Warning Claims. The United States has responded to these pre-emption related claims in its Memorandum of Points and Authorities in Opposition to Joint Defendants' Motion for Partial Summary Judgment on Advertising, Marketing, Promotion and Warning Claims and in Support of Plaintiff's Cross-Motion for Partial Summary Judgment (filed on July 25, 2002) ("U.S. Pre-emption Br."), in its accompanying Rule 7.1 Statement in Support of its Memorandum ("U.S. 7.1 Statement"), and in the United States' Reply Memorandum of Points and Authorities in Support of Plaintiff's Cross-Motion for Partial Summary Judgment (filed on August 30, 2002) ("U.S. Reply Pre-emption

Br."), which the United States incorporates herein by reference. The United States provides the following summary of its pre-emption submissions.

First, as the Supreme Court decided in Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992), the FCLAA-FTC regulatory regime does **not** pre-empt or preclude causes of action based upon, among other matters, "fraudulent misrepresentations . . . with respect to advertising and promotions [of cigarettes]", "sale of cigarettes to minors", fraudulent statements made in advertisements, and "conspiracy . . . to misrepresent or conceal material facts concerning the health hazards of smoking." See 504 U.S. at 528-30. Because all of the predicate acts of mail and wire fraud involved here are based upon such claims not pre-empted in Cipollone, none of them is pre-empted. See U.S. Pre-emption Brief, pp. 8-22. Second, under long-standing pre-emption principles, the FCLAA-FTC regulatory scheme does not pre-empt or preclude application of the RICO, mail and wire fraud statutes to Defendants' alleged misconduct even if their misconduct also fall within the purview of the FTC's regulatory authority. See U.S. Pre-emption Br., pp. 22-31. As the U.S. Court of Appeals for the D.C. Circuit, sitting en banc, stated in FTC v. Texaco, 555 F.2d 862 (D.C. Cir. 1977) (en banc), "a court should approach gingerly a claim that one agency has conclusively determined an issue later analyzed from another perspective by an agency with different substantive jurisdiction." 555 F.2d at 881. See also U.S. Pre-emption Reply Br., pp. 21-22 & nn.19-20.

Defendants argue in their Preliminary Proposed Findings of Fact and Conclusions of Law, as they had in their summary judgment pleadings, that in light of the scope and history of federal regulation of tobacco, Congress could not have intended to apply the RICO, mail and wire fraud statutes to advertising or marketing practices which fall within the scope of the FTC

Act. See D. Pre-emption Reply Br., pp. 6-8, 12-14, 16; JD. PFF, pp. 831-836. As detailed in the earlier briefings before this Court, Defendants' arguments fail on several fronts.

First, various courts, including the Supreme Court, have flatly rejected Defendants' proposed approach, ruling that whether a regulatory scheme precludes application of another remedial statute is determined by Congress' intent in each particular case, and not "by reference to . . . the 'comprehensive' nature of federal regulation". See Head v. New Mexico Board, 374 U.S. 424, 429-30 (1963). See U.S. Pre-emption Br., pp. 5-6. This very same issue of the alleged "comprehensive" FTC regulatory scheme was presented by two Defendants (Philip Morris and Liggett), and rejected, by the Supreme Court in Cipollone. See U.S. Pre-emption Br., pp. 8-9.

Likewise, in Holloway v. Bristol-Myers Corporation, 485 F.2d 986 (D.C. Cir. 1973), the District of Columbia Circuit held that although private litigants do not have a right to bring a private action to enforce the FTC Act's prohibitions of "unfair or deceptive acts or practices in commerce", nevertheless litigants injured by false advertising had adequate alternative remedies at common law. Id. at 999. Thus, the District of Columbia Circuit recognized a fundamental distinction between a cause of action to directly enforce the FTC Act, which may be pre-empted, and any other cause of action to obtain relief from injury caused by false advertising that is premised on "fraud or deceit", which is not pre-empted even though both causes of action may rest on the same misconduct.[1] Resolution of the RICO causes of action at issue here does not require the Court to enforce the FTC Act or FCLAA and does not require the Court to determine

[1] See also Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 303 (1976) (citing Holloway and holding that the comprehensive regulatory scheme under the Federal Aviation Act of 1958 did not pre-empt petitioner's common law tort action based on the alleged fraudulent misrepresentation by the respondent air carrier).

the correctness of any decision of the FTC regarding a matter within its jurisdiction, or to determine whether the FTC Act or FCLAA was violated. Rather, the Court is required to determine whether the altogether different mail fraud, wire fraud, and RICO statutes were violated – issues completely beyond the jurisdiction of the FTC, and explicitly delegated to Article III district courts by statute. To make that determination, the Court must consider the totality of the evidence of the scheme to defraud under well-established law that existed long before the FTC Act was adopted. See U.S. Pre-emption Br., pp. 3-4 n.2, pp. 32-33, and p. 36 n.30. Therefore, Holloway **refutes** Joint Defendants' claim, see JD. Pre-emption Br., p. 25, that the FTC regulatory scheme "left 'no room'" for courts to adjudicate any cause of action based upon false or deceptive advertising, as are part of the RICO causes of action involved here. See also JD. PFF, pp. 833-835.

In addition to Cipollone and Holloway, the United States identified several other decisions in this Circuit and other federal Courts of Appeals and lower court rulings that Congress did not intend the FTC regulatory scheme to "occupy the field" and hence the FTC does not have exclusive jurisdiction over all conduct that falls within the scope of its regulatory authority. See U.S. Pre-emption Br., pp. 3-5, and n.3.[2] Indeed, at least five decisions applying

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[2] See Motor Vehicle Mfrs. Ass'n v. Abrams, 899 F.2d 1315, 1321-24 (2d Cir. 1990) (Magnuson-Moss Warranty Act, 15 U.S.C. § 2302, under which the FTC issued regulations promoting informal dispute resolution of consumer claims, does not preempt New York's Lemon Law, also regulating informal dispute resolution because the New York law advanced the FTC's objective of protecting consumers); General Motors Corp. v. Abrams, 897 F.2d 34, 38-44 (2d Cir. 1990) (FTC consent order requiring General Motors to operate an informal arbitration program to resolve customer complaints does not preempt New York's Lemon Law); Automobile Importers of America v. Minnesota, 871 F.2d 717, 720-22 (8th Cir. 1989)(same as to Minnesota's Lemon-Law); Chrysler Corp. v. Texas Motor Vehicle Comm'n, 755 F.2d 1192, 1203-07 (5th Cir. 1985)(same as to Texas' Lemon Law); National Funeral Servs., Inc. v.

(continued...)

the federal RICO statute to Defendants' fraudulent misconduct involved advertising and marketing of cigarettes, which conduct also falls within the purview of the FTC regulatory scheme. See U.S. Pre-emption Br., pp. 15-18 and nn. 12, 13.

The United States' briefs establish that, when conduct violates more than one statute, the government has discretion to proceed under either statute, or both. This general principle also holds true for conduct prosecuted under the mail and wire fraud statutes, even though more specific statutes might also apply to the same conduct. See U.S. Pre-emption Br., pp. 39-40 &

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[2](...continued)
Rockefeller, 870 F.2d 136, 138-40 (4th Cir. 1989) (FTC's Funeral Rule, 16 C.F.R. §§ 453, regulating "fraudulent sales practices and price disclosure" within the funeral industry, does not preempt West Virginia's regulation of fraudulent funeral contracts); National State Bank v. Long, 630 F.2d 981, 989 (3d Cir. 1980) (regulations issued pursuant to the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, prohibiting unfair and deceptive acts or practices by banks, does not preempt New Jersey's mortgage redlining act); Katharine Gibbs School Inc. v. FTC, 612 F.2d 658, 666-68 (2d Cir. 1979) (FTC's Trade Regulation Rule concerning Proprietary Vocational and Home Study Schools cannot preempt all state law concerning the matter); Texas v. Synchronal Corp., 800 F. Supp. 1456, 1459 (W.D. Tex. 1992) (FTC and FCC do not preempt Texas' Deceptive Trade Practices-Consumer Protection Act and the Texas Food, Drug and Cosmetic Act, statutes prohibiting false or misleading advertising); Kellogg Co. v. Mattox, 763 F. Supp. 1369, 1380-81 (N.D. Tex. 1991), aff'd, 940 F.2d 1530 (5th Cir. 1991) (FTC Act does not preempt Texas' law "regulating false, misleading, or deceptive advertising by companies"); Friedlander v. United States Postal Serv., 658 F. Supp. 95, 103 (D.D.C. 1987) (Postal Reorganization Act, 39 U.S.C. § 101, is not pre-empted by FTC jurisdiction; **"In the instant action, the existence of FDA or FTC jurisdiction over this same matter does not prevent the Postal Service from initiating section 3005 proceedings against companies using the mails in furtherance of a fraudulent scheme."**) (emphasis added); Mon-Shore Mgt., Inc. v. Family Media, Inc., 584 F. Supp. 186, 191 (S.D.N.Y. 1984) (FTC franchise disclosure regulations do not preempt New York's Franchise Sales Act); Patterson Drug Co. v. Kingery, 305 F. Supp. 821, 825 (W.D. Va. 1969) (FTC Act does not preempt Virginia's regulation of drug advertisements); Double-Eagle Lubricants, Inc. v. Texas, 248 F. Supp. 515, 518 (N.D. Tex. 1965) (**"Neither in [the FTC Act's] text nor in its legislative history is there anything to indicate an intention by the Congress to confer exclusive jurisdiction on the Federal Trade Commission. . . [over] regulation of unfair or deceptive practices in commerce . . . ."**) (emphasis added).

These courts explained that although the disputed laws applied to matters within the jurisdiction of the FTC, Congress did not intend to pre-empt the field and the challenged laws permissibly promoted the protections afforded by the FTC Act.

n.34. Indeed, dozens of other cases have applied the mail and wire fraud statutes to schemes to defraud involving false or deceptive advertising and promotion, schemes that were also within the purview of the FTC regulatory regime. See U.S. Pre-emption Br., pp. 3-4 and n.2.

Moreover, the legislative history to FCLAA and Cipollone establish that FCLAA's pre-emption provision is limited to a narrow category of state action, and does not pre-empt causes of action derived from federal law. See U.S. Pre-emption Br., pp. 8-22. Indeed, examination of the relevant legislative history conclusively establishes that Congress intended the wire fraud and mail fraud statutes to apply to false or deceptive advertising **in addition to the FTC Act and FCLAA**. For example, 15 U.S.C. § 51 provides that nothing in the FTC Act shall "be construed to alter, modify, or repeal . . . Acts to regulate commerce or any part or parts thereof", which by definition (15 U.S.C. § 44) includes "the Communications Act of 1934 . . . and all Acts amendatory thereof and supplementary thereto." Thus, the FTC Act does not in any way pre-empt the wire fraud statute since it was enacted as an amendment to the Communications Act of 1934. See U.S. Pre-emption Br., pp. 23-24. Accordingly, the House Report underlying the wire fraud statute explained that it was designed to augment the remedies then available under the FTC Act and the mail fraud statutes to combat fraudulent advertising, stating:

> The rapid growth of interstate communications facilities, particularly those of radio and television, has given rise to a variety of fraudulent activities on the part of unscrupulous persons which are not within the reach of existing mail fraud laws . . . .
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> Even in those cases of radio fraud where the mails have played a role, it is sometimes difficult to prove the use of the mails . . . . While the Federal Trade Commission Act (15 U.S.C. 54) provides a criminal penalty for dissemination by radio of fraudulent advertising of foods, drugs, and medicines, we do not believe that this provision has a broad enough application to warrant a conclusion that the bill is not necessary. Nor does the Federal Trade Commission think so.

H.R. Rep. No. 388, 82nd Cong., 1st Sess. at 2 (1951). The Acting Chairman of the FTC submitted a letter to Congress stating that the proposed wire fraud statute was necessary to augment the FTC Act and mail fraud statutes in order to remedy and deter the growing problem of "fraudulent advertising". Id. at 4-5. See also S. Rep. No. 44, 82nd Cong., 1st Sess. at 2, 14 (1951). Thus, flatly contrary to Joint Defendants' pre-emption claims, Congress plainly intended the mail and wire fraud statutes to apply to fraudulent advertising which was also covered by the FTC Act.

The legislative history to RICO likewise firmly establishes that Congress adopted the civil and criminal remedies of RICO to add to, not subtract from, existing remedies. See United States v. Turkette, 452 U.S. 576, 589 (1981) (observing that Congress stated that it intended RICO to provide "enhanced sanctions and new remedies", which expressly denotes Congress' intent that RICO add remedies to existing ones, which would include the then-existing remedies under the FTC Act and FCLAA. See generally United States v. Sutton, 700 F.2d 1078, 1080-81 (6th Cir. 1983); United States v. Hartley, 678 F.2d 961, 992 (11th Cir. 1982), abrogated on other grounds sub nom. U.S. v. Goldin Industries, Inc., 219 F.3d 1268 (11th Cir. 2000). Moreover, Congress explicitly mandated that RICO "shall be liberally construed to effectuate its remedial purposes." Turkette, 452 U.S. at 587, (quoting 84 Stat. 947).[3] Thus, the relevant legislative

[3] See also United States v. Kragness, 830 F.2d 842, 864 (8th Cir. 1987) ("[n]othing in [RICO] shall supersede any provision of Federal . . . law imposing criminal penalties . . . in addition to those provided for in [RICO].") (quoting Pub. L. No. 91-452, §§ 904(b), 84 Stat. 947); United States v. Deshaw, 974 F.2d 667, 671-72 (5th Cir. 1992)("RICO's statutory language reflects congressional intent to supplement, rather than supplant, existing crimes and penalties."); National Asbestos Workers Med. Fund v. Philip Morris, 74 F. Supp. 2d 221, 235-36 (E.D.N.Y. 1999) ("There are alternative remedies for every injury caused by the predicate acts of racketeers. A victim whose window or arm was broken by racketeering has a number of alternative tort claims from which to choose. The purpose of RICO was to superimpose another layer of remedies in order to deter racketeering. As the statute's preface states, RICO is designed to 'seek (continued...)

history compels rejection of Joint Defendants' pre-emption claims and legally nonviable affirmative defenses relating to pre-emption and FTC preclusion.[4]

In sum, contrary to Defendants' assertions and mischaracterization of FDA v. Brown & Williamson, 529 U.S. 120 (2000), overwhelming authority establishes that the FTC does not have exclusive jurisdiction over all fraudulent conduct which falls within its purview. In the face of such authority, it is not surprising that Defendants fail to cite a single decision in any court endorsing the legal conclusion that Defendants urge upon this Court – that the RICO, mail and wire fraud statutes do not apply to fraudulent advertising and promotion activities which also fall within the scope of the FTC regulatory regime. Therefore, there is simply no foundation supporting Defendants' affirmative defenses that relate to the purported "exclusive" and "comprehensive" FCLAA-FTC regime, and accordingly such defenses must be rejected as a matter of law.

Defendants' proposed "harmonizing rule" that ostensibly "requires courts to avoid a conflict between a general remedial statute and a regulatory regime by harmonizing the two" (see

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[3](...continued)
the eradication of organized crime in the United States . . . by providing **enhanced sanctions and new remedies**.' Pub. L. No. 91-452, §§ 1, 84 Stat. 922, 923 (1970)") (emphasis added).

[4] The legislative history of FCLAA corroborates this conclusion. In enacting FCLAA Congress rejected several proposed bills which would have extended pre-emption beyond state laws. Although the RICO causes of actions here are based on federal law, and not state law as in Cipollone, there is even greater reason to reject the preclusion of RICO here. See U.S. Pre-emption Br., pp. 11-12 n.6; U.S. Pre-emption Reply Br. 4 n.1. Similarly, in the context of other statutes, such as the Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. § 4406, Congress provided for an explicit provision pre-empting federal law, despite the fact that it has not done so for cigarettes. See Philip Morris Inc. v. Harshbarger, 122 F.3d 58, 66 n.15 (1st Cir. 1997).

JD. Pre-emption Reply Br., pp. 1-2)[5] asks the Court to simply disregard the mail fraud, wire fraud, and RICO statutes, and is without any support in the text or legislative history of the statutes at issue and is contrary to well established principles and sound policy considerations. Moreover, Defendants' concern about potential conflict between the RICO statute and the FTC

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[5] In their opening pre-emption brief, Defendants expressly relied on pre-emption analysis and caselaw. See, e.g., JD. Pre-Emption Br., p. 22 (arguing that "RICO, in short was neither designed nor enacted to displace or effectively to repeal the FTC-FCLAA scheme"); id., pp. 2-3 (arguing that RICO "cannot be used to supplant highly specific and otherwise exclusive regulatory regimes); id., p. 21 (arguing that "RICO cannot displace the FTC scheme"); id., p. 25 (arguing that the FTC regulatory scheme "left 'no room' for RICO to replace FTC jurisdiction"). Defendants also relied on various pre-emption decisions, explicitly noting that they held that other regulatory schemes "preempt[] a RICO claim." See id., pp. 30-31.

Then, in their Pre-emption Reply Brief, Defendants claimed that their argument "do[es] not rely upon either preemption or implied repeal," see JD. Pre-emption Reply Br. at p. 1; see also id., pp. 1, 12 (characterizing pre-emption argument as "straw man"); id. at 1 (characterizing discussion of pre-emption as "a lengthy, academic, and utterly immaterial discussion"); id., p. 14 ("the Government's preemption argument is a red herring").

Now, in their Proposed Findings of Fact and Conclusions of Law, Defendants again rely on pre-emption analysis and caselaw. See, e.g., JD. PFF, p. 67 ¶ 128 ("Congress' preemptive intent in passing the 1965 Act [FCLAA] was unmistakable"); p. 69 ¶ 131 ("Congress' preemptive intent in passing the 1969 Act [FCLAA] was clear"); p. 73 ¶ 142 ("Congress re-affirmed its preemptive intent when it amended the FCLAA in 1984"); p. 81 ¶ 164 ("In the 1969 amendments to FCLAA, Congress reaffirmed the FTC's exclusive jurisdiction over cigarette advertising, ..."); p. 230 ¶ 472 ("short of usurping the FTC's authority and preempting the forthcoming recommendations of HHS, there is nothing for this Court to do by way of equitable relief with respect to marketing of lower tar and nicotine cigarettes"); p. 833 ¶2022 ("In view of the FTC's expert administrative role, and in light of Congress' judgment to deposit general authority over the fairness of advertising practices with that agency, . . . the Government's claims should not, and are not, subject to adjudication in this context." [sic]); p. 834 ¶ 2026 ([t]he Government's claims related to tobacco advertising, marketing, promotion and warning practices rest within the exclusive jurisdiction of the FTC. . . . The specific provisions of the Federal Trade Commission Act and the Federal Cigarette Labeling and Advertising Act control over the far more generalized provisions of RICO."). In other instances, Joint Defendants attempt to characterize the Brown & Williamson case as a pre-emption decision. See, e.g., JD. PFF p. 805 ¶1951 ("The Brown & Williamson case thus shows that . . . (c) Congress has created a unique and comprehensive regulatory scheme to govern tobacco, which should not be shattered by the blunt hammer of RICO in the context of this case . . . (d) the particular remedies sought here by the government are incompatible with Congress' carefully-tailored regulatory scheme."); pp. 833-34 ¶ 2024.

regulatory scheme is unfounded since they do not conflict, and in any event such concern is adequately addressed under the long standing pre-emption doctrine, which considers whether there is an "irreconcilable conflict" or "positive repugnancy" between two statutory schemes. See U.S. Pre-emption Br., pp. 22-23, 29-31; U.S. Pre-emption Reply Br., pp. 7-10. In short, Defendants cannot establish that Congress intended their proposed "harmonizing rule" – without Congress ever mentioning said rule or its underlying concept – to trump application of the RICO, mail and wire fraud statutes to the misconduct alleged in the United States' Complaint and proven by the evidence.[6]

Finally – contrary to Defendants' purported "harmonization rule" – the Supreme Court has repeatedly held that when a statute applies to certain conduct, courts have no license to interpret the statute contrary to its intended coverage in order to avoid constitutional questions or other perceived problems.[7] In keeping with this limitation on the authority of courts to construe statutes to ameliorate perceived problems, the Supreme Court has long held that where two federal statues apply to the same conduct, **"it is the duty of the courts . . . to regard each as effective"** unless, under pre-emption principles, the two statutes are "in 'irreconcilable conflict'

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[6] As outlined in the United States' Rule 7.1 Statement accompanying its Pre-Emption Brief, incorporated herein by reference, Defendants' own proffered expert witnesses support this conclusion, and undermine any credence to this unprecedented and unsound "harmonization rule." Dr. Alan Schechter testified that the mail and wire fraud statutes, and the RICO statute, were duly passed by Congress, and it is within the authority of the Department of Justice to enforce these statutes. See Rule 7.1 Statement at ¶¶ 55, 57, 61. Moreover, when Congress passed RICO, it was well aware of the existence of FCLAA. Rule 7.1 Statement at ¶ 59. Finally, the witness testified that the Court has the authority, if it finds a violation, to order equitable relief. Rule 7.1 Statement at ¶¶ 58, 60. Similarly, FTC representative David Scheffman testified that, to his knowledge, the FTC had never enforced the RICO statute. Rule 7.1 Statement at ¶ 62.

[7] See cases cited U.S. Pre-emption Reply Br., p. 7 n.4 and infra n.12.

in the sense that there is a **positive repugnancy** between them or that they cannot mutually co-exist." Radzanower v. Touche Ross & Co., 426 U.S. 148, 155 (1976) (citations and internal quotations omitted; emphasis added). Accord United States v. Borden, 308 U.S. 188, 198 (1939). See also U.S. Pre-emption Br., pp. 22-24.[8]

Defendants' reference (JD. PFF, p. 833 ¶ 2022) to Pan American World Airways Inc. v. United States, 371 U.S. 296 (1963) does not help them. There, the Supreme Court held that absent an explicit legislative intent, by "unequivocally declared congressional purpose," to limit the Department of Justice's authority to enforce the statutes under its jurisdiction, Courts should not infer such a limitation. 371 U.S. at 304-05. See U.S. Pre-emption Reply Br. p. 8. Defendants do not point to any explicit expression of Congress' intent to preclude application of the RICO, mail and wire fraud statutes which is even remotely close to that in Pan American World Airways. Viewed in its proper context, Pan American World Airways undermines, rather than supports, Defendants' position.

B. The Sought Equitable Relief Does Not Violate the Doctrine of Separation of Powers

Joint Defendants also contend that much of the relief sought by the United States in this action raises "separation of powers" concerns on the ground that the relief would interfere with Congress' regulatory scheme regarding the regulation of tobacco. See JD. PFF, pp. 52, 803, 888-894. As demonstrated supra § I.A, this claim is based on the erroneous premise that the RICO

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[8] Similarly, as set forth in the earlier briefing, there is neither a viable collateral estoppel nor a res judicata issue with regards to this litigation. See U.S. Pre-emption Reply Br., pp. 11-12, 21-22. See also United States v. Angelica, 861 F.2d 268, 1988 WL 114151 (9th Cir. 1988) (unpublished) (holding that res judicata and collateral estoppel did not prohibit mail or wire fraud prosecution because of a prior successful FTC suit for injunctive relief and restitution under the FTC Act for the same misconduct).

claims here conflict with, and are pre-empted by, Congress' regulatory regime regarding cigarettes.

Moreover, contrary to Defendants' suggestion, this case does not involve the issue whether Congress' delegation of its legislative authority to the Executive Branch or an administrative agency is constitutional. See JD. PFF, pp. 889-93. Rather, the dispositive issue presented here is whether the relief this Court ultimately grants constitutes equitable relief available to the United States under the RICO statute – a statute duly enacted by Congress that explicitly authorizes the Attorney General of the United States to bring civil RICO lawsuits to obtain equitable relief, as involved here.[9] The United States demonstrates that since it seeks **only** equitable relief squarely within the scope of RICO, this case does not even implicate separation of powers concerns, much less violate them.

1. The doctrine of separation of powers dictates that "one branch of the Government may not intrude upon the central prerogatives of another." Loving v. United States, 517 U.S. 748, 757 (1996). Unquestionably, Article I, Section One of the United States Constitution vests "[a]ll legislative powers" in Congress, which includes the authority to create statutory causes of action. See, e.g., Davis v. Passman, 442 U.S. 228, 241 (1979). It is also clear that Article II, Section One of the Constitution vests "the executive power of the Government" in the President. See, e.g., Myers v. United States, 272 U.S. 52 163-64 (1926). The Supreme Court has made clear that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute

[9] None of the cases Defendants rely upon, see JD. PFF, pp. 888-91, involve the above-referenced issue presented here; rather they involve the altogether different issue of whether a particular congressional delegation of its legislative authority to the Executive Branch or an administrative agency constitutes a lawful delegation.

a case", see United States v. Nixon, 418 U.S. 683, 693 (1974), and that "[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take care that the laws be faithfully executed'". Buckley v. Valeo, 424 U.S. 1, 138 (1976) (quoting Article II, § 3 of the Constitution). Accord Springer v. Philippine Islands, 277 U.S. 189, 202 (1928). Pursuant to Article II of the Constitution, the Attorney General of the United States and his subordinates are vested with the authority to conduct such litigation on behalf of the Executive Branch. See Nixon, 418 U.S. at 694.

It is also beyond dispute that Article III, Section One of the Constitution vests the "Judicial Power of the United States" in the Supreme Court and any inferior courts created by Congress and that such "Judicial Power" "gives the Federal Judiciary the power not merely to rule on cases, but to **decide** them."[10] Accordingly, "[i]t is the function of the judiciary to interpret and apply the law to cases between parties as they arise for judgment." Hepburn v. Griswold, 75 U.S. 603, 611 (1869). "[O]nce Congress has spoken it is 'the province and duty of the judicial department to say what the law is'." Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980) (quoting Marbury v. Madison, 1 Cranch 137, 177 (1803)).

2. Under the foregoing division of constitutional responsibilities, adjudication of the RICO claims involved here does not intrude upon the prerogatives of another branch of the federal government; rather it fully comports with the Constitution's allocation of powers among the three branches of the federal government. For example, pursuant to its lawmaking functions,

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[10] Miller v. French, 530 U.S. 327, 342 (2000) (quoting Plaut v. Sendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995)). Accord Davis, 442 U.S. at 245.

Congress enacted the RICO statute and explicitly authorized the Attorney General of the United States to bring civil RICO actions for equitable relief, as involved here. See 18 U.S.C. § 1964. In turn, the Attorney General of the United States brought this statutorily authorized lawsuit pursuant to its clear constitutional authority to "take care that the laws be faithfully executed." Since Congress plainly authorized the Attorney General to bring such RICO lawsuits, the Executive Branch has not intruded upon the prerogatives of Congress by bringing this RICO lawsuit, but instead has effectuated a proper exercise of prosecutorial discretion and an appropriate enforcement of duly enacted statutes. See, e.g., INS v. Chadha, 462 U.S. 919, 953-55 & n.16 (1983) ("When the Attorney General performs his duties pursuant to [a statute], he does not exercise 'legislative' power. . . ." Therefore, when Congress delegates authority to the Attorney General, "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked").[11]

Likewise, this Court's adjudication of the scope of the RICO statute and the relief available under it does not intrude upon the prerogatives of either Congress or the Executive

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[11] See also Touby v. United States, 500 U.S. 160, 167-68 (1991) (separation of powers not violated by Congressional statute authorizing the Attorney General to add or remove substances from schedules of controlled substances to which criminal penalties attach); Steel Workers v. United States, 361 U.S. 39 (1959) (congressional statute authorizing the United States to sue for injunctive relief in a federal district court did not violate separation of powers); United States v. Union Pacific R.R. Co., 98 U.S. 569, 601-607 (1878) (congressional statute authorizing Attorney General to bring a suit in equity did not violate separation of powers); United States v. Rose, 28 F.3d 181, 189-90 (D.C. Cir. 1994) (in filing Ethics in Government suit against congressman pursuant to 2 U.S.C. § 706, Department of Justice was not violating separation of powers: "Congress has empowered the executive and judicial branches to enforce [the requirements of the statute]; in bringing this action, then, the DOJ was fulfilling its constitutional responsibilities, not encroaching on Congress's."); Consumer Energy Council of America v. FERC, 673 F.2d 425, 473 n.203 (D.C. Cir. 1982) ("When the Executive acts to carry out laws passed by Congress, it remains a coordinate, not a subordinate, branch.").

Branch. For example, in Steel Workers v. United States, 361 U.S. 39, 43 (1959), the petitioner argued that a statute authorizing the United States to sue for an injunction against the continuation of an industry-wide strike violated "the constitutional limitations prohibiting courts from exercising powers of a legislative or executive nature" because the statute did not "set up any standard of lawful or unlawful conduct on the part of labor or management," and consequently afforded the judiciary excessive discretion. The Supreme Court rejected this argument, stating:

> But the statute does recognize certain rights in the public to have unimpeded for a time production in industries vital to the national health or safety. It makes the United States the guardian of these rights in litigation. . . . The availability of relief, in the common judicial form of an injunction, depends on findings of fact, to be judicially made. . . . We conclude that the statute entrusts the courts only with the determination of a "case or controversy", on which the judicial power can operate.

Id. at 43. Accord Caswell v. Califano, 583 F.2d 9, 16 (1st Cir. 1978) ("it is clear that no violence to the principle of the separation of powers arises from judicial efforts to enforce a congressional mandate"); Complaint of Bankers Trust Co., 651 F.2d 160, 174 (3d Cir. 1981) ("federal courts are not pre-empted from interpreting statutes, reviewing executive orders, or establishing common law standards of care merely because another branch of government has entered and regulated a sphere of conduct"). Cf. State of Connecticut v. Schweiker, 684 F.2d 979, 997 (D.C. Cir. 1982) ("We have made it clear that the [judiciary's] power to prevent the statutory lapse or revision of an agency's budget authority [through granting injunctive relief] does not conflict with Congress' exclusive power to appropriate funds").

At bottom, separation of powers principles pose no obstacle to this Court's adjudication of the RICO claims. Indeed, the Court has the duty to give full effect to the scope of equitable

relief Congress provided for under RICO.[12] Significantly in that regard, this Court correctly has ruled that the principal equitable relief sought by the United States in this case (i.e., a permanent injunction, disgorgement of ill-gotten gains, and court-appointed officers to monitor and implement the relief granted) as well as other forms of equitable relief (such as the creation of a medical monitoring fund and funding of research, smoking cessation, enforcement and public education programs) are available to the United States under RICO. See United States v. Philip Morris Inc., 116 F. Supp. 2d 131, 147-52 (D.D.C. 2000); United States v. Philip Morris Inc., 2002 WL 1925881 *4-6 (D.D.C. 2002). Accord cases cited infra at notes 13 & 14. Therefore,

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[12] See, e.g., Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) ("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."); Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291-92 (1960) ("When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purpose. As this Court has long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of legislature.' Clark v. Smith, 38 U.S. (13 Pet.) 195, 203, 10 L. Ed. 123.").

See generally United States v. Albertini, 472 U.S. 675, 680 (1985) ("Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature"); Salinas v. United States, 522 U.S. 52, 59-60 (1997) (same); Chapman v. United States, 500 U.S. 453, 464 (1991) (same); United States v. Henning, 344 U.S. 66, 70-76 (1952) (holding that courts lack authority to construe a statute to avoid "unfortunate consequences that might flow from strict adherence to the text of the Act"). See also Commissioner of Internal Revenue v. Lundy, 516 U.S. 235, 252 (1996) (holding that courts are bound by statutory language even if sound policy supports a different interpretation); Badarocco v. Commissioner of Internal Revenue, 464 U.S. 386, 398 (1984) (same).

Indeed, in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 488-93 (1985), the defendant argued that the Court should construe RICO to require that a defendant be convicted of the predicate offenses before a litigant could bring a private civil RICO lawsuit against the defendant for related unlawful conduct in order to avoid undue harsh consequences and to avoid depriving the defendant of "the constitutional protections of the criminal law." 473 U.S. at 492. The Supreme Court rejected this argument, stating that there is no "license for the judiciary to rewrite language enacted by the legislature" in order to avoid constitutional questions arising from the defendants' claims. Id. at 493 n.11 (quoting Albertini, supra).

such relief does not violate separation of powers principles.

Pointing to the United States' Responses to Joint Defendants' Fourth Set of Continuing Interrogatories to Plaintiff ("Fourth Response"), Defendants argue that "[m]uch of the injunctive relief requested by the Government asks this Court to create new tobacco-related federal programs to be administered by either existing federal agencies or by the functional equivalent of new federal agencies to be created by the Court." See JD. PFF, pp. 888-89. Defendants misconstrue the United States' Fourth Response. The United States did not state that it was in fact seeking every form of relief set forth in its Fourth Response, which addressed Defendants' broad discovery request. Rather, the United States merely set forth possible types of equitable relief that it might seek or that the Court, exercising its broad equitable discretion after its review of all the facts at trial, might impose. This was in response to the Defendants' interrogatory asking the United States to state how plaintiff would prevent, restrain or otherwise modify Defendants' practices or activities through injunctive relief.

Indeed, the United States does not intend to request much of the equitable relief Defendants complain about that is identified in the United States' Fourth Response. For example, the United States does not intend to seek the injunctive relief that would:

A. require warnings, or alter the size of warnings, on cigarette packages beyond what is required by any Act of Congress or any regulation duly promulgated thereunder;

B. require the Surgeon General to create and supervise health information messages to be carried out on all tobacco products;

C. require a public health agency to conduct ongoing consumer testing of awareness of and fatigue of revised labeling and health warning systems;

D. establish a "Less Hazardous Cigarette Project"; or

E. require Defendants to disclose a list of ingredients and additives to their tobacco products beyond what is required by any Act of Congress or any regulation duly promulgated thereunder.

As noted supra, pp. 15-16, the United States seeks only the equitable relief specified in its Amended Complaint (see pp. 92-94), as well as other forms of equitable relief that this Court has already indicated are available to the United States under RICO (such as court-appointed officers to monitor and implement the relief granted, the creation of a medical monitoring fund and funding of research, smoking cessation, enforcement, and public education programs.).

Furthermore, the various court-appointed officers should be given sufficient authority, subject to the Court's review, to enable them to effectively assist the Court in monitoring and implementing the relief granted, including, for example, authority:

1. to investigate any allegation of any violation of the permanent injunction, to bring charges, adjudicate charges, and impose sanctions for any such violation;

2. to review certain contracts and business practices, including advertising and marketing practices, that might violate the permanent injunction or constitute fraudulent conduct, and to prohibit such practices and conduct under standards to be established by the Court;

3. to require Defendants to submit periodic reports regarding their actions to comply with the relief granted;

4. to require Defendants, or any officer, agent, representative, or employee of Defendants, to produce any book, paper, document, record, other tangible object, or any other information relevant to any investigation or enforcement proceeding by any Court-appointed officer; and

5. to monitor Defendants' retention of records, documents, reports, other tangible objects, and other information, as directed by the Court.

In that regard, courts are vested with broad discretion under RICO to fashion appropriate equitable relief. For example, under RICO, courts have not only enjoined defendants from

engaging in unlawful activity, but also enjoined them from participating in businesses related to the corrupt enterprise, removed corrupt defendants from positions in the RICO enterprise, and imposed court monitorships to eliminate corruption within the enterprise.[13]

Moreover, in order to eliminate corruption within a RICO enterprise and to prevent racketeering activity, courts have frequently appointed officers, also referred to as monitors or trustees, to supervise activities of the enterprise. These officers have exercised broad powers, including to: (1) conduct aspects of the legitimate business of the enterprise; (2) review and approve hiring, certain contracts and financial expenditures; (3) impose and implement ethical practices codes governing members of the enterprise; (4) investigate, prosecute and adjudicate in civil proceedings allegations of violations of the ethical practices codes and other rules; (5) impose fines, discipline or removal from the enterprise for individuals found guilty of such violations; and (6) implement various reforms in the enterprise, including election reform for corrupt union enterprises.[14]

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[13] See, e.g., United States v. Private Sanitation Industry Ass'n, 995 F. 2d 375, 377-78 (2d Cir. 1993); United States v. Local 30, United Slate, Tile, et al., 871 F.2d 401, 403-07 (3d Cir. 1989); United States v. Local 560, International Brotherhood of Teamsters, 780 F.2d 267, 295-96 (3d Cir. 1985); United States v. Private Sanitation Industry Ass'n, 899 F. Supp. 974, 979-85 (E.D.N.Y. 1994) aff'd 47 F.3d 1158 (2d Cir. 1995); United States v. Local 1804-1, International Longshoreman's Ass'n, 831 F. Supp. 177, 191-92 (S.D.N.Y. 1993), aff'd in part and reversed in part on other grounds, United States v. Carson, 52 F.3d 1173 (2d Cir. 1995); United States v. Local 1804-1, International Longshoreman's Ass'n, 812 F. Supp. 1303, 1308, 1311-15 (S.D.N.Y. 1993); United States v. Local 295 of International Brotherhood of Teamsters, 784 F. Supp. 15, 19-23 (E.D.N.Y. 1992); United States v. Local 560 (I.B.T.), 754 F. Supp. 395, 407-08 (D.N.J. 1991) aff'd 974 F.2d 315 (3d Cir. 1992); United States v. Local 30, United Slate, Tile, et al., 686 F. Supp. 1139, 1142-62 (E.D. Pa. 1988), aff'd, 871 F.2d 401 (3d Cir. 1989); United States v. Local 560, International Brotherhood of Teamsters, 581 F. Supp. 279, 283-87, 321-26, 337 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1985).

[14] See United States v. Local 359, United Seafood Workers, 55 F.3d 64 (2d Cir. 1995); (continued...)

In sum, the relief that the United States seeks falls squarely within the scope of equitable relief Congress authorized the United States to seek under RICO, as this Court has ruled. See cases cited supra p.16 and notes 13-14. Therefore, the sought equitable relief does not even implicate, much less violate, separation of powers principles.[15]

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[14](...continued)
United States v. Local 1804-1, International Longshoreman's Ass'n, AFL-C10, 44 F.3d 1091, 1093-95 (2d Cir. 1995); United States v. International Brotherhood of Teamsters, 948 F.2d 98, 106 (2d Cir. 1991) vacated on other grounds, 506 U.S. 802 (1992); United States International Brotherhood of Teamsters, 907 F.2d 277, 279-81 (2d Cir. 1990); United States v. International Brotherhood of Teamsters, 905 F.2d 610, 613-17 (2d Cir. 1990); United States v. International Brotherhood of Teamsters, 899 F.2d 143, 145-46 (2d Cir. 1990); United States v. Hotel Employees and Restaurant Employees, International Union, 974 F. Supp. 411 (D.N.J. 1997); United States v. District Council of New York City, 941 F. Supp. 349, 355 (S.D.N.Y. 1993); United States v. Local 6A, 832 F. Supp. 674, 677 (S.D.N.Y. 1993); United States v. Local 1804-1, International Longshoremen's Ass'n, 831 F. Supp. 192, 193-95 (S.D.N.Y. 1993); United States v. International Brotherhood of Teamsters, 803 F. Supp. 761, 766-71 (S.D.N.Y. 1992); United States v. International Brotherhood of Teamsters, 782 F. Supp. 243, 248-51 (S.D.N.Y. 1992); United States v. International Brotherhood of Teamsters, 723 F. Supp. 203 (S.D.N.Y. 1989), aff'd as modified, 931 F. 2d 177 (2d Cir. 1991).

[15] Defendants' reliance (JD. PFF, pp. 891-93) upon Missouri v. Jenkins, 495 U.S. 33 (1990) (Jenkins I) and Missouri v. Jenkins, 515 U.S. 70 (1995) (Jenkins II) is misplaced. Jenkins I held the district court abused its discretion in directly ordering an increase in local property taxes that would enable the Kansas City, Missouri School District ("KCMSD") to fund the implementation of remedies to eliminate the vestiges of unlawful segregation in its schools. Jenkins I, 495 U.S. at 50-51. The Supreme Court explained that before such a remedy may be imposed, "a proper respect for the integrity and function of local government institutions" required the district court to employ a less-drastic alternative remedy. Id. at 51. The Supreme Court stated that "a court order directing a local government body to levy its own taxes is plainly a judicial act within the power of a federal court" (id. at 55) even if the levy imposed is "in excess of the limit set by state statute where there is reason based in the Constitution for not observing the statutory limitation." Id. at 57.

Jenkins II held that the District Court abused its discretion in ordering KCMSD to fund salary increases for teachers and other employees and to fund various "quality education" programs to remedy past unlawful segregation in its schools. The Court stated "the District Court must bear in mind that its end purpose is not only 'to remedy the violation' to the extent practicable, but also 'to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution'". Jenkins II, 515 U.S. at 102 (citation omitted).
(continued...)

II

THE REQUESTED DISGORGEMENT DOES NOT VIOLATE THE EX POST FACTO CLAUSE OR THE EIGHTH AMENDMENT

A. The Requested Disgorgement Does Not Violate The Ex Post Facto Clause

Defendants contend that disgorgement of proceeds they obtained from their RICO violations prior to the effective date of RICO, October 15, 1970, violates the Ex Post Facto Clause of the Constitution that prohibits imposition of a greater "punishment" than applied to an offense when it was committed. See JD. PFF, pp. 869-874 and ¶¶ 2094-2107. Because the United States does not seek disgorgement of proceeds the Defendants obtained before RICO's effective date, Defendants' contention is of no consequence. See United States' Preliminary Proposed Conclusions of Law ("U.S. PCL"), pp. 94-102.

1. Moreover, Defendants are wrong. Defendants' argument rests on the erroneous premise that RICO disgorgement constitutes "punishment" that triggers application of the Ex Post Facto Clause. However, this Court has already recognized that RICO disgorgement constitutes equitable relief, not "punishment". See United States v. Philip Morris, 2002 WL 1925881, *4-5 and n.9 (2002); see also U.S. PCL, pp. 98-102 and infra section II.C. Therefore, the Ex Post Facto Clause is not implicated. See Smith v. Doe, ___ U.S. ___, 123 S. Ct. 1140, (2003) (holding that a statute does not implicate the Ex Post Facto Clause unless it imposes

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[15](...continued)

The Jenkins decisions bear no resemblance to the issues involved in this case. The sought relief in this cases does not intrude upon either sovereign interests of local governments or Congress' lawmaking prerogatives. It bears repeating that in this case, the United States does not request this Court to impose any relief that does not constitute appropriate "equitable relief" squarely within the scope of the RICO statute enacted by Congress. Indeed, Jenkins I recognized that federal courts have broad equitable powers to remedy unlawful conduct, including ordering a local governmental body to levy taxes.

"punishment").

In any event, assuming arguendo that RICO disgorgement constitutes "punishment" that triggers the application of the Ex Post Facto Clause, the United States has conclusively demonstrated that it has long been the law that a statute neither constitutes retroactive application nor violates the Ex Post Facto Clause 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, as the RICO offenses involved here. See U.S. PCL, pp. 95-98.[16]

In Landgraf v. USI Film Products, 511 U.S. 244, 270 (1994), the Supreme Court made clear that the starting point in retroactivity analysis is to determine whether a statute **"attaches new legal consequences to events completed before its enactment.**" (emphasis added). Moreover, "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." Id. at 269 (citation omitted). Accord Miller v. Florida, 482 U.S. 423, 430 (1987); 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."); Cox v. Hart, 260 U.S. 427, 435 (1922); Sturges v. Carter, 114 U.S. 511, 519 (1885).

Indeed, it has long been the law that a statute neither constitutes retroactive application

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[16] Defendants' reliance (JD. PFF, p. 873) upon Burgess v. Salmon, 97 U.S. 381 (1878) is misplaced. Burgess ruled that "[t]o impose upon the owner of the goods a criminal punishment or a penalty" for an offense that had been completed "before the act . . . took effect" would violate the Ex Post Facto Clause. 97 U.S. at 382, 384. Here, in striking contrast, the RICO offenses began before RICO's effective date and continued well past it, and therefore they were not completed before RICO's effective date.

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). This principle applies with even greater force here because 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.

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. No. 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 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. The Supreme Court has long held that such a "straddle" offense does not constitute a retroactive application of law because such an offense is not **completed** before the effective date of the statute.

Consistent with the foregoing, 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.[17]

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. (Citation and footnote omitted).

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.

Defendants have not even addressed the foregoing overwhelming authority, much less refuted it. Indeed, Defendants do not cite a single decision holding that a RICO offense that

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[17] 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), rev'd on other grounds, 591 F.2d 1347 (4th Cir. 1979), rev'd en banc, 602 F.2d 653 (4th Cir. 1979).

"straddles" RICO's effective date, as involved here, violates the Ex Post Facto Clause. Therefore, there is no merit whatsoever to Defendants' claim that disgorgement of the RICO proceeds that Defendants obtained prior to RICO's effective date would violate the Ex Post Facto Clause.

2. Defendants' reliance (JD. PFF, pp. 870, 872) upon Snowden v. Lexmark Intern, Inc., 237 F.3d 620 (6th Cir. 2001); United States v. Newman, 144 F.3d 531 (7th Cir. 1998); United States v. Mindel, 80 F.3d 394 (9th Cir. 1996) and Kelly v. Robinson, 479 U.S. 36 (1986), is misplaced. Snowden held that the plaintiff failed to prove the requisite two racketeering acts, and could not rely on the defendant's alleged act of copyright infringement because "Snowden's alleged infringement took place before RICO was amended [on July 2, 1996] to include copyright violations" and the plaintiff did "not claim that Mr. Snowden committed any act of racketeering after July 2, 1996." Snowden, 237 F.3d at 623-24. Therefore, unlike here, Snowden's alleged RICO offense did not continue after the effective date of the RICO provision at issue.

Newman held that an order of restitution to the victim as part of the defendant's sentence on his criminal conviction "is not criminal punishment for the purposes of the Ex Post Facto Clause". Newman, 144 F.3d at 542. Therefore, Newman supports the United States' position, not the Defendants'.

Moreover, neither Kelly nor Mindel held that "[r]estitution or disgorgement is generally held to be penal in nature", as Defendants mistakenly contend. See JD. PFF, p. 872. Rather, Kelly held that restitution obligations imposed by a state court as part of a defendant's sentence for a criminal conviction are not dischargable in bankruptcy under § 523(a)(7) of the Bankruptcy

Code which precludes from discharge any debt that "is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss". Kelly, 479 U.S. at 41. In so holding, the Court noted that restitution **as part of a criminal sentence** serves "penal goals of the state". 479 U.S. at 52. Mindel likewise noted that a restitution order that is part of a defendant's criminal sentence "serves a penal rather than a compensatory purpose". Mindel, 80 F. 3d at 397.

The United States agrees that **criminal sentences** involving orders of restitution serve penal interests. However, everything that "serves penal interests" does not necessarily constitute "punishment" within the meaning of the Ex Post Facto Clause.[18] More importantly, this case does not involve an order of restitution imposed at sentencing as part of a defendant's punishment for his criminal conviction. Rather, it involves civil disgorgement that the District of Columbia Circuit and other courts have held does not constitute "punishment". See infra § II.C and U.S. PCL, pp. 98-100.

B. RICO Offenses May Include Predicate Acts That Would Have Been Time Barred If The Predicate Acts Had Been Brought As Free-Standing Offenses And Not As Part Of A RICO Offense

1. Defendants argue "that the RICO statute may not constitutionally revive alleged acts of wire or mail fraud as to which the criminal statute of limitations had already expired as of RICO's effective date. To the extent that the RICO predicate acts were barred by the limitations before 1970, they cannot be revived by a RICO claim." See JD. PFF, p. 871 n.86. Not surprisingly, Defendants cite no authority for this specious claim. This claim misperceives the

[18] For example, reduction of a prisoner's sentence for "good behavior" in prison serves penal interests, but plainly does not constitute "punishment".

operation of statutes of limitations and is totally without merit. To begin with, no statute of limitations applies here to the government's **civil RICO** suit for injunctive and equitable relief. See infra § X.C. Even assuming arguendo that a statute of limitations applied, none of the charged predicate acts of mail and wire fraud are time-barred. See infra § X.C.

A statute of limitation applies to determine whether the entire charged offense, and not subparts of the charged offense, was committed within the applicable statue of limitations period. The relevant charges to examine for any statute of limitations issue are the overarching RICO offenses, and not the alleged mail and wire fraud predicate acts that comprise part of the overarching RICO offenses. Courts have uniformly held in criminal RICO cases that a RICO predicate offense is not an independent count; rather it is part of a single overarching RICO offense. Therefore, as long as the RICO offense is brought within the applicable statute of limitations period, it may include predicate racketeering acts that would be time-barred if brought as free-standing offenses independent of the RICO offense. See, e.g., United States v. Starrett, 55 F.3d 1524, 1549-51 (11th Cir. 1995); United States v. Wong, 40 F.3d 1347, 1365-68 (2d Cir. 1994); United States v. Gonzalez, 921 F.2d 1530, 1547-48 (11th Cir. 1991); United States v. Pungitore, 910 F.2d 1084, 1129 n.63 (3d Cir. 1990); United States v. Torres Lopez, 851 F.2d 520, 522-25 (1st Cir. 1988); United States v. Castellano, 610 F. Supp. 1359, 1383-84 (S.D.N.Y. 1985); United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), aff'd mem., 578 F.2d 1371 (2d Cir. 1978).

As the Court explained in Wong:

> [I]n the statute of limitations context . . . jurisdiction over a single RICO predicate act confers jurisdiction over other predicate acts, including some that could not be prosecuted separately. Because the limitations period is measured from the point

> at which the crime is complete . . . a defendant may be liable under substantive RICO for predicate acts the separate prosecution of which would be barred by the applicable statute of limitations, so long as the defendant committed one predicate act within the [applicable] five-year limitations period . . . similarly, a defendant is liable for participation in a RICO conspiracy for predicate acts the separate prosecution of which would be time-barred, so long as that defendant has not withdrawn from the conspiracy during the limitations period.

Wong, 40 F.3d at 1367 (citations omitted).

The United States has conclusively established that the charged RICO offenses are continuing offenses that began in or about the early 1950's and continued up to at least the date of the filing of the Amended Complaint, and that therefore they were timely brought within any conceivable applicable statute of limitations. Accord cases cited supra p. 27; see also infra § X.C. Accordingly, it is immaterial whether some mail and wire fraud predicate acts that are charged as part of these timely brought RICO offenses would be time-barred if they were brought as free-standing mail and wire fraud offenses wholly independent of the RICO offense.

2. Moreover, this case does not involve the issue presented in Stogner v. California, 93 Cal. App. 4th 1229 (2001), petition for cert. granted, No. 01-1757. See 123 S. Ct. 658 (Dec. 2, 2002). Stogner involves a California state statutory amendment that provides that, effective January 1, 1994, a prosecution for certain sex offenses against persons under the age of 18 may be commenced notwithstanding the expiration of the limitations period if the action is filed within one year of the date of a victim's report to a law enforcement agency and other certain conditions are satisfied. See Cal. Penal Code § 803(g)(1) and (2)(B) (Supp. 2003). After several California Courts of Appeals held that the amendment did not apply when the otherwise applicable statute of limitations had expired before the amendment's effective date, the California legislature further amended the law. The new amendment provides that section 803(g)

applies to a cause of action arising "before, on, or after, January 1, 1994," and that it operates to "revive any cause of action barred by section 800 or 801." Id. § 803(g)(3)(A) and (B)(i) & Section 8-3 Law Revision Comm'n Cmt. (Supp. 2003).

Stogner presents the question whether **in a criminal case** a law that allows the government to prosecute an offense for which the statue of limitations had expired before the law's enactment violates the Ex Post Facto Clause. That issue is not presented here for three principal reasons. First, a statute of limitations does not apply to the government's civil RICO action here. See infra § X.C. Second, even if a statute of limitations did apply, at no time has any conceivable statute of limitations expired on the alleged RICO offenses which continued from the early 1950's to at least the date the Amended Complaint was filed. Hence, the RICO charges do not attempt to "revive any cause of action" barred by a statute of limitations. See also infra § X.C.

Finally, this case does not involve a criminal prosecution as in Stogner, but rather is a civil cause of action. The Supreme Court has repeatedly held that statutes reviving expired civil causes of action do not violate retroactivity principles protected by the Due Process Clause.[19]

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[19] See, e.g., International Union of Electrical, Radio & Mechanical Workers v. Robbins & Meyers, 429 U.S. 229, 243-44 (1976) (upholding constitutionality of an Act of Congress reviving a civil cause of action that was time-barred before its enactment); Chase Securities Corp. v. Donaldson, 325 U.S. 304, 311-12, 318 (1945) (same as to a state statute and stating that "a state legislature consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar", and that the "shelter [of a statute of limitations] has never been regarded as what now is called 'fundamental' right".); Campbell v. Holt, 115 U.S. 620, 628-30 (1885)(same); Stewart v. Kahn, 78 U.S. 493, 504 (1870) (holding that an Act of Congress tolling the statute of limitations applied retroactively in civil cases even "where the action was barred at the time of its passage," and that "[t]here is no prohibition in the Constitution against retrospective legislation of this character"). Accord Wesley Theological

(continued...)

Therefore, even assuming arguendo that the civil RICO charges involved here revived time-barred causes of action, due process is not violated.

C. The Sought Disgorgement Does Not Violate the Eighth Amendment

The Eighth Amendment of the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". Quoting Austin v. United States, 509 U.S. 602, 609-10 (1993), Defendants correctly state that the "Excessive Fines Clause limits the Government's power to extract payments . . . as **punishment** for some offense." JD. PFF, p. 875 (emphasis in original; internal quotations omitted). Defendants contend that "the Government's proposed disgorgement amount (up to $868 billion) is grossly disproportionate to the alleged offenses in this case . . . and is this impermissible under the Excessive Fines Clause." JD. PFF, p. 876 (internal quotations omitted).[20] This claim is utterly meritless for several reasons. First, the Eighth Amendment does not apply because disgorgement does not constitute "punishment". Second, the "gross disproportionality" test for determining an Eighth Amendment violation is a "narrow" principal that applies to the "rare" case, and does not apply to disgorgement of proceeds of unlawful conduct. Rather, disgorgement of proceeds of unlawful conduct may never be considered "excessive" or "grossly disproportionate". Moreover, even if the "gross disproportionality" test applied, the sought disgorgement is not grossly disproportionate to Defendants' massive RICO offenses.

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[19](...continued)
Seminary v. United States Gypsum Co., 876 F.2d 119, 121 (D.C. Cir. 1989)("the Due Process Clause would not prevent the District from extending the [statute of limitations] period and thereby reviving a cause of action that the statute had expunged").

[20] The United States seeks disgorgement of approximately $289 billion, not $868 billion.

1. Disgorgement Does Not Constitute Punishment

The defendant has the burden of establishing an Eighth Amendment violation.[21] Defendants cannot establish that civil disgorgement like that involved here constitutes "**punishment** for some offense"; therefore the Eighth Amendment does not apply.

In Smith v. Doe, 123 S. Ct. 1140 (2003), the Supreme Court recently explained that where Congress intended to impose "civil and non-punitive" remedies "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." Id. at 1147 (internal quotations and citation deleted). Congress clearly intended the disgorgement sought here to be a civil remedy available under RICO's **civil provisions**, 18 U.S.C. § 1964.

The Senate Report regarding RICO discussed the remedies available under Section 1964 of RICO, stating in relevant part:

> The use of such remedies as prohibitory injunctions and the issuing of orders of divestment or dissolution is explicitly authorized. Nevertheless, it must be emphasized that these remedies are not exclusive, and that [RICO] seeks essentially an economic, not punitive goal. However remedies may be fashioned, it is necessary to free the channels of commerce from predatory activities, **but there is no intent to visit punishment on any individual; the purpose is civil**.

S. Rep. No. 617, 91st Cong., 1st Sess. at 81 (1969)(emphasis added). Defendants have not established any proof, let alone "the clearest proof", to justify overriding Congress' intent to

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[21] See, e.g., United States v. Bollin, 264 F.3d 391, 417 (4th Cir. 2001); United States v. Lot Numbered One (1) of Lavaland Annex, 256 F.3d 949, 958 (10th Cir. 2001); United States v. Premises Known as 6040 Wentworth Avenue, 123 F.3d 685, 689-90 (8th Cir. 1997); United States v. Alexander, 108 F.3d 853, 855 (8th Cir. 1997); United States v. One 1970 36.9' Columbia Sailing Boat, 91 F.3d 1053, 1057 (8th Cir. 1996); United States v. Real Prop. Known & No. as 429 S. Main Street, 52 F.3d 1416, 1422 (6th Cir. 1995); United States v. Alexander, 32 F.3d 1231, 1235, 1237 (8th Cir. 1994); United States v. Bucuvalas, 970 F.2d 937, 946 (1st Cir. 1992); United States v. Walsh, 700 F.2d 846, 857 (2d Cir. 1983).

establish civil, non-punitive remedies under 18 U.S.C. § 1964.

Moreover, the United States Court of Appeals for the District of Columbia and other courts have repeatedly held that, flatly contrary to Defendants' argument, disgorgement of a defendant's ill-gotten gains does not constitute "punishment" that triggers constitutional protections applicable in criminal prosecutions. For example, in SEC v. First Financial Corp., 890 F.2d 1215, 1230-31 (D.C. Cir. 1989), the District of Columbia Circuit held that disgorgement of a defendant's unlawfully obtained proceeds "is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the . . . laws" and hence is "remedial" and is not "punishment". Significantly, in Smith v. Doe, supra, 123 S. Ct. 1140, the Supreme Court rejected the argument that a deterrence purpose rendered a remedy "punishment", stating:

> Any number of governmental programs might deter crime without imposing punishment. To hold that the mere presence of a deterrent purpose renders such sanctions "criminal" . . . would severely undermine the Government's ability to engage in effective regulations.

123 S. Ct. at 1152 (internal quotations and citations omitted).

Moreover, in SEC v. Bilzerian, 29 F.3d 689 (D.C. Cir. 1994), the D.C. Circuit stated:

> [W]e reject Bilzerian's argument that disgorgement constitutes punishment unless it is ordered to make the government whole. Disgorgement is no less remedial in nature merely because victims other than the government have been injured by Bilzerian's violations of the securities laws. The district court ordered Bilzerian to give up only his ill-gotten gains; it did not subject him to an additional penalty. Therefore, the disgorgement does not constitute punishment.

Id. at 696. Bilzerian also 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'". Id. (quoting United

States v. Tilley, 18 F.3d 295, 300 (5th Cir. 1994)). Accordingly, this 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." Id.[22] Consistent with the foregoing precedent in this Circuit, this Court also has stated that the disgorgement the United States seeks in this case constitutes permissible "equitable relief", and not "the statutory imposition of a penalty". United States v. Philip Morris, 2002 WL 1925881, *4-5 and n.9 (2002).

Congress' explicit statement that civil RICO does not impose punitive sanctions and this Circuit's decisions holding that disgorgement of a defendant's ill-gotten gains, as involved here, does not constitute "punishment" are dispositive of Defendants' mistaken claim that disgorgement constitutes "punishment", and hence the Eighth Amendment does not apply.

2. Disgorgement of Proceeds of Unlawful Conduct Can Never Be "Excessive" or "Grossly Disproportionate" to the Offense

Moreover, even again assuming arguendo that RICO disgorgement constitutes "punishment" that triggers the Eighth Amendment, disgorgement of a defendant's ill-gotten proceeds can never be considered "excessive" or "grossly disproportionate" in violation of the Eighth Amendment. Recently, the Supreme Court stated that the Eighth Amendment "contains a narrow proportionality principle", and that accordingly "outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare". Ewing v. California, ___ U.S. ___, 123 S. Ct. 1179, 1185 (2003) (internal

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[22] Accord 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. De Mario Jewelry, Inc., 361 U.S. 288, 293 (1960) (equitable remedy of restitution of lost wages for violation of statute is not "punitive").

quotations and citations omitted). Therefore, the Supreme Court emphatically admonished "that federal courts should be reluctant to review legislatively mandated terms of imprisonment, and that successful challenges to the proportionality of particular sentences should be exceedingly rare." Id. at *7. Accord Lockyer v. Andrade, ___ U.S. ___, 123 S. Ct. 1166, 1175 (2003) ("The gross disproportionality principle reserves a constitutional violation for only the extraordinary case"). Disgorgement of a wrongdoer's ill-gotten gains does not constitute such an "extraordinary case."

Indeed, federal courts of appeals have repeatedly held in both criminal and civil forfeiture cases 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 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"), cert. denied, 534 U.S. 974 (2001). It is particularly noteworthy that Defendants do not even attempt to address the foregoing authority that conclusively establishes that disgorgement of proceeds of unlawful conduct can never constitute an excessive fine in violation of the Eighth Amendment.

a. Defendants' reliance (JD. PFF, p. 875) upon United States v. Halper, 490 U.S. 435 (1989) is unavailing. Halper held that an in personam "civil penalty of . . . an amount equal to 2 times the amount of damages the Government sustain[ed] because of the [defendant's violation of law], and costs of the civil action" could constitute "punishment" that triggered application of the Double Jeopardy Clause. Id. at 438, 452. In United States v. Ursery, 518 U.S. 267, 278-88 (1996), the Supreme Court held that Halper was confined to its facts that involved "in personam civil penalties under the Double Jeopardy Clause", and did not apply to "in rem civil forfeitures." Id. at 288. Accordingly, the Supreme Court held that civil in rem forfeitures, pursuant to 21 U.S.C. § 881(a)(7), "are neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause." Id. at 292.[23]

[23] Ursery involved the forfeiture of the defendant's house that had been used to facilitate illegal drug transactions. Ursery, 518 U.S. at 271.

In so holding, Ursery, 518 U.S. at 282-85, rejected Halper's case-by-case analysis to determine whether a civil sanction constitutes "punishment". In that respect, Halper stated "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purpose, is punishment". See Halper, 490 U.S at 448. Thus, Ursery rejected Halper's case-by-case approach, stating:

> It is difficult to see how the rule of Halper could be applied to a civil forfeiture. Civil penalties are designed as a rough form of "liquidated damages" for the harms suffered by the Government as a result of a defendant's conduct. . . . **Forfeitures serve a variety of purposes**, but are designed primarily to confiscate property used in violation of the law, **and to require disgorgement of the fruits of illegal conduct**. Though it may be possible to quantify the value of the property forfeited, it is virtually impossible to quantify, even approximately, the non-punitive purposes served by a particular civil forfeiture. Hence, it is practically difficult to determine whether a particular forfeiture bears no rational relationship to the non-punitive purpose of that forfeiture. Quite simply, the case-by-case balancing test set forth in Halper, in which a court must compare the harm suffered by the Government against the size of the penalty imposed, is inapplicable to civil forfeiture.

Id. at 283-284 (emphasis added).

Therefore, Halper is of no help to the Defendants. Moreover, unlike Halper, this case does not involve an in personam civil penalty to compensate the government for harm suffered as a result of the Defendants' conduct, but rather it involves civil disgorgement of the Defendants' ill-gotten gains which, as Ursery recognized and the District of Columbia Circuit and other courts have held, is "remedial" and does not constitute "punishment".

b. Defendants' reliance (JD. PFF, p. 875) upon United States v. Bajakajian, 524 U.S. 321 (1998) and Austin v. United States, 509 U.S. 602 (1993) is also misplaced. Bajakajian held that the forfeiture of $357,144 that the defendant was carrying when he attempted to leave the United States without reporting it, imposed as part of the defendant's criminal sentence for violating the

reporting requirements of 31 U.S.C. § 5316,[24] violated the Excessive Fines Clause of the Eighth Amendment. The Court explained that such "in personam criminal forfeitures" constitute "punishment" since such forfeitures "serve[] no remedial purposes" and "clearly" are part of the defendant's criminal "punishment" imposed at sentencing. 524 U.S. at 343-44.

Austin held that the civil in rem forfeiture of a defendant's vehicles and real property used to facilitate the commission of drug-related crimes could constitute "punishment" within the scope of the Excessive Fines Clause because such forfeiture historically had been considered punishment (509 U.S. at 612-14) and currently "serves, at least in part, to punish the owner." 509 U.S. at 618.[25]

In striking contrast to the criminal and civil forfeitures involved in Bajakajian and Austin, it is well established that civil disgorgement sought here is designed to serve entirely remedial purposes, i.e., to deter unlawful conduct and to prevent unjust enrichment. The purposes of the sought here is not to punish the wrongdoer. Historically such disgorgement has not been considered punishment. See supra pp. 31-35. On this basis alone, Bajakajian and Austin are clearly inapposite. Moreover, this case does not involve forfeiture imposed as part of the defendant's sentence to punish him for his criminal conviction that plainly implicates the Eighth Amendment. Finally, neither Bajakajian nor Austin involved the disgorgement of a defendant's proceeds of unlawful activity, as involved here, a remedy which does not, and can never,

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[24] 31 U.S.C. § 5316 provides, in relevant part, that it is a crime to wilfully transport or attempt to transport out of the United States more than $10,000 at one time without reporting it to the proper authorities.

[25] The Court remanded the case to the Court of Appeals to determine whether the forfeiture was excessive in violation of the Eighth Amendment. Austin, 509 U.S. at 623.

constitute a violation of the Eighth Amendment because a wrongdoer does not have any cognizable right to the proceeds of his unlawful conduct. See supra pp. 34-35. In sum, Bajakajian and Austin offer no support to Defendants' argument that the sought civil disgorgement of their ill-gotten gains even implicates, much less violates, the Eighth Amendment.

3. The Sought Disgorgement is Not Grossly Disproportionate to Defendants' RICO Offenses

Assuming arguendo that under Bajakajian's proportionality analysis disgorgement of proceeds of unlawful conduct could ever violate the Excessive Fines Clause of the Eighth Amendment, the sought disgorgement is constitutional. In Bajakajian, the Court stated that "[i]f the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional". 524 U.S. at 337. Applying this test, the Court concluded that the forfeiture at issue was unconstitutional because: (1) the defendant's "crime was solely a reporting offense" (id. at 337); (2) the defendant's "violation was unrelated to any other illegal activities (id. at 338); (3) the "money was the proceeds of legal activity" (id. at 338); (4) "the maximum fine was $5,000 which was substantially less than the amount of forfeiture (id. at 338); and (5) "[t]he harm that [the defendant] caused was also minimal. Failure to report his currency affected only one party, the Government, and in a relatively minor way. There was no fraud on the United States. . . . Had his crime gone undetected, the Government would have been deprived only of the information that $357,144 had left the country" (id. at 339).

Each of these factors compels the conclusion that the disgorgement sought in this case is not grossly disproportionate to the gravity of Defendants' unlawful conduct. First, Defendants'

offenses are not mere reporting offenses and are not an isolated incident unrelated to other illegal activity. Rather, Defendants' offenses involve a massive scheme to defraud the public as part of an extensive pattern of racketeering activity spanning almost 50 years, in violation of the RICO statute. It is also particularly significant that, unlike in Bajakajian, the sought disgorgement constitutes proceeds of unlawful activity, to which the Defendants have no lawful claim.

Moreover, the maximum sentence that could have been imposed in a criminal prosecution includes restitution and a fine "of twice the gross gain or twice the gross loss". See 18 U.S.C. § 3571(c)(2) & (d). Since the United States established that Defendants' gross gain is at least $742 billion (see U.S. PCL, pp. 94-102), the total potential fine is at least $1.484 trillion which far exceeds the amount of sought disgorgement. Indeed, even if the $289 billion figure is used to calculate the maximum potential fine, the sought disgorgement is still one half of the $578 billion maximum fine,[26] which "presumptively" establishes that the sought disgorgement is not excessive.[27]

Finally, the harm Defendants have caused is hardly minimal. In addition to unlawfully

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[26] Therefore, Defendants' claim that the sought disgorgement "dwarfs any conceivable criminal or civil fines or penalties that would be applicable to the challenged conduct" is flatly wrong. See JD. PFF, pp. 876-77.

[27] See, e.g., United States v. Moyer, 313 F.3d 1082, 1086 (8th Cir. 2002) ("the court-ordered forfeiture was half the amount of the permissible fine. . . . Thus, the forfeiture is presumptively not excessive"); United States v. Hill, 167 F.3d 1055, 1072-73 (6th Cir. 1999) ("there is no [Eighth Amendment] violation when the forfeiture does not exceed the maximum fine allowed by statute"); United States v. Elder, 90 F.3d 1110, 1132-33 (6th Cir. 1996) (same); United States v. Libretti, 38 F.3d 523, 531 (10th Cir. 1994) (holding that where the value of the property forfeited was less than the permissible fine the forfeiture was not excessive), aff'd on other grounds, 516 U.S. 29 (1995); United States v. One Parcel Prop. Loc. at Lot 85, Ctry. Ridge, 894 F. Supp. 397, 406-07 (D. Kan. 1995) (same). See also United States v. One Parcel Property, 106 F.3d 336, 339 (10th Cir. 1997); United States v. Bieri, 68 F.3d 232, 236-7 (8th Cir. 1995).

defrauding millions of victims of at least $289 billion (if not $742 billion), the Defendants have caused substantial financial harm to the United States and to the public as well as incalculable harm to the health of the American people. It has been reasonably calculated by the United States' experts that society will suffer harm to the health care system in the amount of $938 billion (in 2001 dollars) only in connection with the Youth Addicted Population utilized to calculate the United States' disgorgement calculation of $289 billion. Put another way, with regard to the 49 million persons who were smoking more than five cigarettes per day before reaching age 21 during the period 1954-2000, $938 billion in costs is likely to be incurred by the health care system, including payments borne by individuals and their families, by 2050. These total health care costs will likely be incurred for the treatment of over 38 million person-years of lung cancer and chronic obstructive pulmonary disease, and 70 million person-years of coronary heart disease, stroke, and other major smoking-attributable diseases. In this population, these 49 million smokers will likely experience **13 million premature deaths** and **174 million years of life lost** as a result of these diseases. Expert Report of Timothy Wyant, Ph.D., and Scott L. Zeger, Ph.D., July 19, 2002. As this Court has held, such health care costs attributable to smoking are relevant to Defendants' Eighth Amendment claim. See United States v. Philip Morris, Order No. 235 (Sept. 30, 2002).

In all these circumstances, assuming arguendo that Bajakajian's proportionality analysis applies, the sought disgorgement of $289 billion is not grossly disproportionate to Defendants' massive unlawful conduct and does not violate the Eighth Amendment.[28]

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[28] Accord e.g., Bollin, 264 F.3d at 417-19; Loe, 248 F.3d at 464; Hill, 167 F.3d at 1072-73; United States v. Hurley, 63 F.3d 1, 21-23 (1st Cir. 1995); United States v. Saccoccia, 58 F.3d

(continued...)

4. Defendants May Not Claim Hardship

Moreover, Defendants have no cognizable claim that disgorgement of $289 billion in proceeds is impermissible because it is a large amount and would adversely effect their businesses. See JD. PFF, p. 887, ¶ 2146. It cannot be overemphasized that the amount of disgorgement is solely a result of Defendants' massive unlawful conduct, and they never had a right to the proceeds of their unlawful conduct in the first place. Furthermore, in enacting RICO Congress recognized that a wrongdoer may not be heard to complain that the United States is not entitled to deprive a wrongdoer of the fruits of his illegal conduct merely because it would impose an economic hardship. The Senate Report regarding RICO discussed the remedies available under RICO, stating in relevant part:

> The use of such remedies as prohibitory injunctions and the issuing of orders of divestment or dissolution is explicitly authorized. Nevertheless, it must be emphasized that these remedies are not exclusive, and that [RICO] seeks essentially an economic, not a punitive goal. However remedies may be fashioned, it is necessary to free the channels of commerce from predatory activities, but there is no intent to visit punishment on any individual; the purpose is civil.
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> **If the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the later remedy because economic hardship, however severe, may result.**

S. Rep. No. 617, 91st Cong., 1st Sess. at 81 (1969)(emphasis added).

At bottom, a wrongdoer who steals or otherwise obtains through fraud billions of dollars from his victims has no cognizable right to either preclude disgorgement of the proceeds of his

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[28](...continued)
754, 785, 787-89 (1st Cir. 1995). See also cases cited supra n.27.

crimes or to keep those proceeds. To rule otherwise would eviscerate the remedial purposes served by disgorgement.[29]

III

THE UNITED STATES HAS ESTABLISHED THAT IT IS ENTITLED TO DISGORGEMENT OF AT LEAST $289 BILLION OF DEFENDANTS' ILL-GOTTEN GAINS

A. The United States Has Established That It Is Entitled To Disgorgement Of At Least $289 Billion In Proceeds As a Remedy For Defendants' Unlawful Conduct

The United States has established that it is entitled to disgorgement of approximately $289 billion in proceeds Defendants unlawfully obtained during the period 1971 to 2000 from the Youth Addicted Population – approximately 33 million youth-addicted smokers who were smoking more than five cigarettes a day (a predictor of continued smoking and nicotine dependence) when they became 21 years of age. The United States also demonstrated that its calculation is reasonable and establishes the necessary causal relationship between Defendants' unlawful conduct and the proceeds obtained from the Youth Addicted Population. See U.S. PCL § IV.

As discussed in the U.S. PCL § IV.B.1, 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." Once the plaintiff

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[29] Defendants' arguments (JD. PFF, pp. 875-880) that the United States has not properly calculated the amount of proceeds to be disgorged, has not demonstrated a causal nexus between the Defendants' unlawful conduct and the sought disgorgement and that disgorgement must be limited pursuant to United States v. Carson, 52 F.3d 1173 (2d Cir. 1995), are addressed infra § III.

establishes such a "reasonable approximation," the burden shifts to the defendant "clearly to demonstrate that the disgorgement figure was not a reasonable approximation." SEC v. First City Financial Corp., 890 F.2d 1215, 1232 (D.C. Cir. 1989). 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, this Circuit has emphasized that "the risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." See First City Financial Corp., 890 F.2d at 1232 .

Defendants' arguments that the United States' calculation is not reasonable or fails to establish a causal relationship between Defendants' conduct and the $289 billion in proceeds to the Youth Addicted Population are not persuasive. See JD. PFF, pp. 698-801. Further, Defendants offer no principled alternative approach, but merely set forth an ill-defined series of limiting "steps" designed to severely reduce or preclude entirely any equitable disgorgement.[30] If adopted, Defendants' alternative would be inconsistent with the purposes of RICO disgorgement, inconsistent with D.C. Circuit precedent governing disgorgement, and not supported even by United States v. Carson, 52 F.3d 1173 (2d Cir. 1995), the Second Circuit case upon which Defendants so heavily depend. Moreover, Defendants have failed to adequately define its "alternative" and have performed no actual calculation on which to base some alternative level of

[30] Cigarette Company Defendants have engaged different experts to offer slightly different "alternatives," but they are similar in approach, e.g., R.J. Reynolds offers the testimony of Dr. Roman Weil; Philip Morris Defendants offer the testimony of Mr. Robert Schweihs, and Defendants refer to both experts as examples of their three-step alternative to disgorgement. See Expert Reports of Mr. Robert Schweihs and Dr. Roman Weil, May 10, 2002. Therefore, the United States responds collectively to Defendants' alternatives in this filing.

disgorgement. Accordingly, Defendants have not met their burden to demonstrate that the United States' disgorgement is unreasonable. See First City Financial Corp., 890 F.2d at 1232.

B. Carson Does Not Bar The Disgorgement Of $289 Billion Of Defendants' Proceeds Derived From The Youth Addicted Population, And The Law In This Circuit Supports The United States' Request For Disgorgement

Defendants argue that pursuant to Carson, disgorgement must be limited to the amount necessary to "prevent and restrain" future violations of RICO and the amount "available" to the Defendants to fund or promote future illegal conduct. See JD. PFF, pp., 33, 698-99, 703, 706-11, 716-719, 721, 803, 839, 875-78, 887 and ¶¶ 58, 1507, 1510-11, 1528, 1544-65, 1585, 1591-93, 1598-99, 1606, 1949, 2040, 2113, 2118-20, and 2148. For the reasons stated in U.S. PCL, pp. 134-144, Carson was wrongly decided and does not bind this Court. Carson is flatly inconsistent with the remedial purposes of RICO disgorgement – to deter violations of the law and to prevent unjust enrichment by depriving wrongdoers of their ill-gotten gains; Carson's limitation on the scope of disgorgement is not supported by the text of RICO; and Carson conflicts with interpretations of similarly worded equitable provisions by the Supreme Court and other federal courts. Indeed, Defendants make no effort to demonstrate that Carson was correctly decided on this point.

In any event, as discussed in the U.S. PCL p. 145, Carson is entirely distinguishable from this case. While the court in Carson was not of the view that there was a civil RICO purpose to disgorging long ago ill-gotten gains of a retired person from a few discrete unlawful acts, see Carson, 52 F.3d at 1182, the present case involves a massive, continuing scheme for nearly 50 years to defraud millions of consumers of billions of dollars. Defendants in this case are "in the business of selling and marketing tobacco products, and they will have countless 'opportunities'

and temptations to [continue to] take unlawful actions." United States v. Philip Morris, 116 F. Supp. 2d at 149.

With their indefensible reading of Carson as a starting point, Defendants invent an ill-defined collection of "filters," which would result in little to no disgorgement.[31] Specifically, Defendants propose a three-step alternative to estimate the amount of any ill-gotten gains truly available now to finance potential future wrongdoing. See JD. PFF, pp. 712-723 ¶¶ 1547-1593. Defendants' novel alternative finds no support in prior cases that have considered how best to approximate a wrongdoer's ill-gotten gains for purposes of disgorgement. Further, it is inconsistent with D.C. Circuit precedent set forth in Banner and First City Financial Corp., because it contradicts the deterrent and remedial purposes of disgorgement reflected in those cases.

Banner involved an SEC enforcement action against principals of a trust for fraud and sale of unregistered securities. In addition to injunctive relief, the district court granted an award of disgorgement against several co-defendants, including two individuals and the trust, for $6.5 million (plus prejudgment interest of approximately $2.7 million), an amount which the district court found represented the defendants' "unjust enrichment." Defendant-appellant had contended that he was not in a position to pay the awarded disgorgement because he did not have access to any assets related to the fund which was subject to the finding of fraud. Rejecting the defendant's claim, the D.C. Circuit upheld the district court's disgorgement order even if the defendant no longer had the property (trust assets) that was the subject of the fraud. The D.C.

[31] For example, R.J. Reynolds's expert, Dr. Roman Weil, has determined that disgorgement in this case should be **zero**. See JD. PFF, p. 773 ¶ 1590.

Circuit specifically held: "Because disgorgement is an equitable obligation to return a sum equal to the amount wrongfully obtained, rather than a requirement to replevy a specific asset, we reject [appellant's] challenge. Banner, 211 F.3d at 617. The court further stated:

> To hold, as [appellant] maintains, that a court may order a defendant to disgorge only the **actual** assets unjustly received would lead to absurd results. Under [appellant]'s approach, for example, a defendant who was careful to spend all of the proceeds of his fraudulent scheme, while husbanding his other assets, would be immune from an order of disgorgement. [Appellant]'s would be a monstrous doctrine for it would perpetuate rather than correct an inequity.

Id. at 617 (emphasis added).

In discussing the remedial purpose of disgorgement, the Banner court explained that the required causal nexus between the property and the wrongdoing "does not imply that a court may order a malefactor to disgorge only the **actual** property obtained by means of his wrongful act. Rather, the causal connection required is between the amount by which the defendant was unjustly enriched and the amount he can be required to disgorge". Id. (emphasis added) (citing First City Financial Corp., 890 F.2d at 1231).

1. Cigarette Company Defendants' First Disgorgement "Filter"

Defendants' first "filter" in their results-driven alternative – to estimate what they refer to as "gains" from each Defendant's domestic cigarette sales in any given time period that theoretically remain available to Defendant today to finance potential future wrongdoing, see JD. PFF, pp. 713-714 ¶¶ 1548-1555 – conflicts with Banner and should be rejected. This alternative does not measure in any sense the money **acquired** by Defendants due to their pervasive, fraudulent conduct over 50 years. Rather, Defendants would purport to measure the **book value of Defendants' net assets** (subtracting capital contributions from owners during that time period

and adding changes over time in the fair value of economic assets) that Defendants still have available today.[32] Cigarette Company Defendants essentially argue that the Court should disregard the United States' calculation of proceeds from the Youth Addicted Population in favor of the current book value of their net assets as a first step in the computation. Unsurprisingly, Defendants do not cite to any court that has considered the book value of assets as a first step measure of a defendant's gain. Rather, Defendants refer repeatedly to Carson, which is devoid of such discussion. Defendants' alternative, however, is markedly inconsistent with the D.C. Circuit's opinion in Banner, a case Defendants ignore entirely.

This proposed alternative stems from the argument that Defendants no longer have the actual proceeds from the Youth Addicted Population because they spent them in one fashion or another, and thus are not available for disgorgement:

> The vast majority of the money from the sale of cigarettes from 1954 or 1971 to 2000 has not been retained by the Defendants. Those funds have been used either (1) pay the direct and indirect costs of manufacturing cigarettes or (2) were distributed to the shareholders by way of dividends or stock repurchases.

JD. PFF, p. 739 ¶¶ 1663-1664.

In fact, this exact same argument was raised by defendant-appellant and rejected by the Banner court. As noted above, Banner made clear that the proper approach to the causal nexus requires consideration of "the amount by which the defendant was unjustly enriched and the amount he can be required to disgorge." Banner, 211 F.3d at 617 (emphasis added). Just as in

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[32] "Book value" in this context is the amount shown in the books or in the accounts for an asset, liability, or owner's equity item. The term is generally used to refer to the net amount of an asset or group of assets shown in the account that records the asset and reductions, such as for amortization, in its cost. The "book value" of a company or firm refers to the excess of total assets over total liabilities; net assets. Accounting: The Language of Business, Roman L. Weil, et al. Tenth Ed., p. 15.

Banner, Defendants' proposal to examine "net assets" as an artificial proxy for "actual property" would yield "absurd results" and create a "monstrous doctrine for it would perpetuate rather than correct an inequity." Id. In short, Cigarette Company Defendants' first step is exactly the same argument rejected by the D.C. Circuit in Banner. It should similarly be rejected here. See also U.S. PCL, p. 137 n.105.

2. Cigarette Company Defendants' Second Disgorgement "Filter"

Defendants' second step in their alternative is to take the alleged gains – or book value of the net assets – and further limit the allowable disgorgement to those gains that are truly, not just theoretically, available to finance future wrongdoing. See JD. PFF, p. 713 § II.B.2. Specifically, Defendants would place beyond the reach of RICO disgorgement any ill-gotten proceeds that they have tied up and made "unavailable" by converting them into non-liquid assets. See Expert Report of Franklin Fisher, Ph.D., July 24, 2002 Rebuttal Report at ¶¶ 34-35. As Defendants claim: "Those gains [] are embodied in existing assets that, while they theoretically could be liquidated, are presumptively being put to an economically beneficial use." See JD. PFF, p. 715, ¶ 1558. Thus, Defendants' second "filter" simply imposes a narrow definition of "available" assets intended to further limit the amount of potential disgorgement to the United States. Just as with Defendants' first step, this results-driven effort to define the universe of "available" assets to current liquid assets is exactly the type of argument that the D.C. Circuit found "absurd" in Banner, because it would permit Defendants to control totally the level – or even existence – of assets "available" for equitable disgorgement. See Banner, 211 F.3d at 617. Although Cigarette Company Defendants avoid Banner entirely, and cite Carson, no reading of Carson supports their argument. As Defendants' second "filter" would yield the perverse result of giving the

wrongdoer total control to limit or eliminate entirely any disgorgement award against him, it should be rejected. See Expert Report of Franklin Fisher, Ph.D., July 24, 2002 Rebuttal Report at ¶ 37.

As briefly explained above, under Defendants' unsupportable approach, not only would disgorgement be limited to gains as measured by Defendants' book value of net assets, but the amount disgorged could derive only from the book value of net assets that are in fact available to Defendants (as Defendants uniquely define "available"). Defendants' determination of "availability," would be based on Defendants' net working capital (which excludes all earnings that Defendants have reinvested and tax liabilities they have paid). See JD. PFF, p. 715 ¶ 1562. As Defendants describe it, "net working capital is the difference between a company's current assets and its current liabilities; it roughly measures a company's potential reservoir of cash." See id.

Philip Morris's expert, Mr. Schweihs, opines that it is proper to look at Defendants' net working capital as a measure of disgorgement that is "available to fund the wrongdoing." See id. The current net working capital of any Defendant is not determinative of the amounts that Defendants were unjustly enriched as a result of their pervasive fraud over a period of five decades. Practically speaking, net working capital does not necessarily represent a company/s value, and thus does not address the question of "capital available" under any reading of Carson. A company can have a negative net working capital but still remain a going, viable concern and have plenty of cash on hand to do with as it chooses. See e.g., Deposition of Robert Schweihs, United States v. Philip Morris, June 27, 2002, pp. 287-289 ("Schweihs Dep."). Net working capital (current assets minus current liabilities) can be negative or positive, and has generally no

implications on the value or financial health of a company; it simply refers to stockholder's equity. See id., pp. 272, 287-289.

Philip Morris Companies, now Altria Group, serves as an example. The value of Philip Morris Companies' net working capital has changed substantially on an annual basis, and bears little or no connection to: its net income; the amount of operating cash flow; the amount of cash dividends it pays to shareholders; or its market value, or market capitalization. Compare 2048000095-0136 (PMC Annual Report, 1985) and 2051890726-0757 (PMC Annual Report, 1993). See Schweihs Dep., pp. 272, 287-291. Philip Morris Companies' figures for these various values (net income, etc.) for most of the years of its existence are much larger than the value of its "net working capital." This is also true of Philip Morris (the cigarette company). In addition, the cash the company paid in dividends to its shareholders far exceeds the company's net working capital for certain years. Yet, applying the "filters" Defendants construct to strain most, if not all, unlawfully obtained proceeds from any disgorgement award, the United States would be able to disgorge **zero** from Cigarette Company Defendants in this case if a Defendant's net worth were zero or negative. See Schweihs Dep., pp. 285-286. A concrete example is provided. In 1993, Philip Morris Companies had a **negative** net working capital of $731 million.[33] However, that same year, Philip Morris Companies had a market capitalization (or market value) of $48.7 billion; had net income of $3.1 billion; possessed cash and marketable

[33] Although under Defendants' alternative the sole relevant figure would be Defendants' **current** net working capital, pointing out the year-by-year variations in net working capital is relevant because it illustrates a fundamental flaw in Defendants' unprincipled approach to disgorgement. If, for example, the Court ordered disgorgement from Philip Morris Companies in 1993 (the year in which net working capital was a negative number), the disgorgement amount would be zero before even reaching Defendant's third filter.

securities of $182 million; paid cash dividends to its shareholders in the amount of $2.2 billion; and had net cash provided by its operating activities of $6.9 billion. See 2051890726-0757. Similarly, in 2000, while Philip Morris Companies had a **negative** net working capital of $8.7 billion, it had a market capitalization (or market value) of $97 billion; earned a net income of $8.5 billion; possessed cash and marketable securities of $937 million; paid cash dividends to its shareholders in the amount of $4.5 billion; and had net cash provided by its operating activities of $11 billion. See Philip Morris Companies 2000 10K (publicly available). Nonetheless, Defendants would contend that in 1993 and 2000, Philip Morris Companies had no "gains available to fund future wrongdoing," and therefore had no proceeds eligible for disgorgement. See JD. PFF, p. 723 ¶ 1591; Schweihs Dep., pp. 285-286.

According to Mr. Schweihs, the following funds should be considered beyond the reach of disgorgement because they are not "available" to Defendants to fund future wrongdoing: (a) ill-gotten funds that Defendants have decided to use to pay dividends to their shareholders; (b) ill-gotten funds that Defendants lost due to good and bad business decisions; (c) ill-gotten funds that Defendants lost by gambling; (d) ill-gotten funds that Defendants lost due to some unrelated fraud committed by the company's CEO; (e) ill-gotten funds Defendants spent on costs to manufacture cigarettes; and (f) ill-gotten funds Defendants spent through payment of dividends to shareholders. See JD. PFF, p. 737 ¶¶ 7-8; Schweihs Dep., pp. 265-266. Yet Mr. Schweihs admitted at his deposition that Defendants' own acts – whether they be intentional or negligent – could reduce Defendants' retained (or reinvested) earnings and thus its "capital available":

Q: [I]f you had a reckless CEO or a CFO who misspent funds, misallocated

> funds, made bad investments, and as a result, reduced the net earnings there, that would also reduce . . . the earnings reinvested?
>
> A: That would be one way to reduce earnings . . . . [P]erfectly legitimate business decisions could also result in a reduction of earnings. . . . [G]ood decisions that were based on sound, fundamental analyses, perhaps a reaction to competitive efforts and in order to protect market share, the company made investments that weren't profitable[,] could result in negative retained earnings, even though those were appropriate business decisions that were made legitimately to defend market share, for example.

Schweihs Dep., pp. 265-266.

Mr. Schweihs admitted that Defendants could also manipulate their retained earnings, thereby shielding more ill-gotten gains from disgorgement (under Defendants' approach), by increasing or decreasing their expenses. See Schweihs Dep., p. 277. Under Defendants' proposal, the more Defendants spend, the fewer funds that would be "available" for the United States to disgorge.[34] Indeed, Defendants' alternative to disgorgement would encourage those who commit RICO violations to spend all their ill-gotten gains as quickly as possible or to convert their liquid assets or cash to non-liquid assets so that nothing is "available" for

[34] Defendants' expert, Mr. Schweihs, offered yet another absurd way in which the amounts available for disgorgement in this case could be further limited by Defendants' own conduct if the Court were to ignore Banner and its progeny, and adopt Defendants' skewed interpretation of Carson. Philip Morris and Philip Morris Companies, according to Mr. Schweihs, are required to maintain a minimum net worth of $6.4 billion, pursuant to a stipulation in the Engle v. R.J. Reynolds, et al., case that gives them the right to avoid payment of the liability judgment found by the trial court in that litigation pending their appeal of Engle to the appellate court. See Schweihs Dep., pp. 207-273. According to Mr. Schweihs, this minimum net worth requirement of $6.4 billion pursuant to the Engle stipulation should be taken into consideration by this Court in its determination of disgorgement in this case. See Schweihs Dep., pp. 272-273. According to Defendants Philip Morris and Philip Morris Companies, since they must maintain $6.4 billion in net worth under the Engle stipulation, the amount they have "available" for future racketeering activities would be an amount that would not put them in a position of violating the stipulation currently in place. See Schweihs Dep., p. 275. Thus, Defendants would **further** limit an award of disgorgement by Defendants' voluntary, and presumably beneficial, stipulation in Engle – a case in which the United States is not a party.

disgorgement. As the United States' expert Dr. Fisher explained, "[E]xclusion of proceeds [from the disgorgement award] that have been reinvested or passed on to someone else [through dividend payments] will generate perverse economic incentives." See Expert Report of Franklin Fisher, Ph.D., July 24, 2002 Rebuttal Report at ¶ 37. As but one example, under Defendants' unmoored approach, monies spent to target youth in marketing may reduce Defendants' retained earnings and thus the amount would be "available" for potential disgorgement. Given Defendants' unilateral ability to manipulate the amount of money available for disgorgement – including by spending money to fund the very unlawful activities that prompted the need for disgorgement – such an approach would work an "absurd" and "monstrous" result. See Banner, 211 F.3d at 617.

3. Cigarette Company Defendants' Third Disgorgement "Filter"

Defendants add a third "filter" designed to further limit what they contend the United States may seek by way of disgorgement. In Defendants' third step in their effort to use Carson as a springboard to eliminate the possibility of **any** disgorgement of their billions of unlawfully obtained proceeds, any disgorgement (from whatever assets, if any, remain available after Defendants' first two results-driven "filters") would be further restricted to amounts proximately caused by Defendants' RICO violations.[35] See JD. PFF, p. 716 ¶ 1564-1565. Note, however, as

[35] As this conclusion is based on erroneous factual and legal premises, it is not credible. To the extent that Defendants' argument suggest that the United States should be required as a matter of law to narrow the disgorgement request to **some** portion of the proceeds of the Youth Addicted Population that was caused by Defendants' RICO violations, there is no legal requirement that disgorgement be calculated so as to arbitrarily narrow the proceeds to be disgorged in this manner. The only legal support Defendants provide is Carson. Carson does not address this type of calculation, much less provide support for Defendants' argument, as Carson did not remotely involve a computation of disgorgement for Defendants that were engaged in (continued...)

discussed further below, under Schweihs's proposed methodology, the Court may not even reach this third step because for any year in which a company had a negative net working capital, the disgorgement award would be **zero**. Schweihs Dep., pp. 285-286. As mentioned previously and discussed further below, Dr. Roman Weil, R.J. Reynolds's disgorgement expert, would arrive at a disgorgement award of **zero** after applying this third restrictive "filter," because as a starting proposition he incorrectly assumes that "zero percent of the Defendants' past cigarette sales in the pertinent period were caused by the Defendants' alleged RICO violations." See JD. PFF, p. 717 ¶ 1590.

Defendants' attempt to limit disgorgement to gains proximately caused by Defendants' RICO violations is tantamount to a request for a damages award in lieu of an award of disgorgement. As this is a civil RICO case for equitable relief, the United States has not computed – and need not compute – damages caused by Defendants' unlawful conduct. Defendants' attempt to equate disgorgement with damages – and thereby to constrain a permissible disgorgement award – is legally without support.

Defendants also claim that by including in the disgorgement calculation the income taxes paid by Defendants and their indirect costs, as defined by the forfeiture statute, Dr. Fisher's calculated proceeds exceed the financial "benefits" received by Defendants. See JD. PFF, pp. 703-704 ¶¶ 1530-1534. Defendants can point to no court decision where a disgorgement award has been limited to so-called "benefits" received by the wrongdoer. If that were the legal standard, disgorgement's goals of preventing unjust enrichment and deterring others from

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[35](...continued)
massive fraud spanning nearly 50 years.

violating the laws would be eviscerated.

The evidence overwhelmingly demonstrates that Defendants were unjustly enriched by their gains, some portion of which they presumably paid in income taxes. The inclusion of income taxes paid by Defendants in the disgorgement amount of $289 billion is consistent with the forfeiture statute, which provides useful guidance in formulating an appropriate disgorgement figure. The forfeiture statute explicitly provides, in cases involving lawful goods (cigarettes, for example) "that are sold or provided in an illegal manner, the term 'proceeds' 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 . . . . The direct costs shall not include . . . any part of the income taxes paid by the entity." 18 U.S.C. § 981(a)(2)(B). Although the forfeiture statute is not per se applicable to this civil case, the rationale for the inclusion of income taxes in criminal forfeiture supports similar inclusion in the proceeds to be disgorged in this case.

For example, in United States v. DeFries, 129 F.3d 1293, 1313-15 (D.C. Cir. 1997), the District of Columbia Circuit joined every other court that has considered the issue in holding that the income taxes paid by a wrongdoer on forfeited unlawful proceeds should not be deducted from the amount of forfeiture.[36] The D.C. Circuit explained that deduction of taxes from the forfeiture amount would be inconsistent with RICO's expansive remedial purposes and RICO's legislative history indicating that "it should not be necessary for the prosecutor to prove what the defendant's overhead expenses were." Id. at 1314 (quoting S. Rep. No. 98-225, at 199 (1984)).

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[36] Accord United States v. Lizza Industries, Inc., 775 F.2d 492, 498 (2d Cir. 1985), cert. denied, 475 U.S. 1082 (1986); Wood v. United States, 863 F.2d 417, 419-22 (5th Cir. 1989); United States v. Elliott, 727 F. Supp. 1126, 1129 (N.D. Ill. 1989); United States v. Milicia, 769 F. Supp. 877, 889 (E.D. Pa. 1991).

The D.C. Circuit also explained that

> a deduction for taxes could create unwarranted complexities in the administration of [RICO]. The amount of taxes that a person pays depends upon his or her other income as well as the nature of deductions taken by the taxpayer. . . . Recognizing this difficulty, the majority in Lizza concluded that "RICO does not require the prosecution to prove or the trial court to resolve complex computations, so as to ensure that a convicted racketeer is not deprived of a single farthing more than his criminal acts produced." Lizza, 775 F.2d at 498.

DeFries, 129 F.3d at 1314-15.

The foregoing rationale also applies to RICO disgorgement, especially since this Circuit has admonished that in calculating the amount of disgorgement "the risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." First City Financial Corp., 890 F.2d at 1232.[37] The United States reasonably looked to the forfeiture statute's definition of "proceeds" to aid in its calculation of an appropriate disgorgement figure. Defendants fail to explain why such reference was impermissible, or how consideration of the factors contained in that definition yielded an unreasonable approximation of Defendants' unlawfully obtained proceeds. Accordingly, Defendants have not met their burden.

Even if the Court were to determine that Defendants' disgorgement of proceeds should exclude some portion of State or Federal income taxes paid by Defendants, the Court has no basis upon which to make a factual determination because Defendants have not proffered the amounts of income taxes they purportedly paid that would be deducted from the disgorgement amounts.

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[37] Accord SEC v. Hughes Capital Corp., 124 F.3d 449, 455 (3d Cir. 1997); SEC v. First Jersey Securities, 101 F.3d 1450, 1475 (2d Cir. 1996); SEC v. Lorin, 76 F.3d 458, 462 (2d Cir. 1996); SEC v. Patel, 61 F.3d 137, 140 (2d Cir. 1995). 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.").

The disgorgement of $289 billion serves the purpose of depriving the wrongdoer of his unjust enrichment and deterring others from violating the law. Unlike a private plaintiff in a RICO damages action, the United States does not bear the burden of calculating harm proximately caused by Defendants' RICO violations. This is **not** a damages case. Carson does not require that the United States make this showing. No other precedent requires it. Harm proximately caused by Defendants' conduct as alleged in this case is **irrelevant** to the calculation of RICO disgorgement. All of Defendants' arguments, therefore, can be dismissed in this context. See U.S. PCL, pp. 108-112. The United States has previously explained that given the systematic and pervasive nature of Defendants' fraud, it is reasonable to infer that **all** of Defendants' proceeds from 1954 onward are, in fact, causally related to the fraud. See U.S. PCL, pp. 102-134. Accordingly, the United States is legally entitled to recover this entire amount. As the United States explained, however, it seeks a far lesser amount.

In sum, Defendants' vague, artificial, results-driven alternative would not serve the goals of depriving Defendants of their unjust enrichment or deterring others from violating the RICO laws, in no way measures Defendants' ill-gotten proceeds, and is wholly at odds with the D.C. Circuit's decision in Banner. Accordingly, it should be rejected. By contrast, as explained in the U.S. PCL, pp. 102-112, the United States' calculation of proceeds causally related to Defendants' unlawful conduct is reasonable and derives from a legally supported methodology. Defendants fail to present evidence to rebut that calculation. Accordingly, disgorgement in the United States' requested amount – $289 billion – will serve the purposes of RICO disgorgement because it will prevent unjust enrichment and will deter others from committing RICO violations.

C. The Time Value Of The Proceeds Derived From The Youth Addicted Population Is Reasonably Included In An Award Of Disgorgement In This Case

Defendants further complain that the United States' requested disgorgement should not include the hundreds of billions of dollars in gains from the proceeds of the Youth Addicted Population – what Defendants' incorrectly characterize as prejudgment interest. See JD. PFF, ¶¶ 1639-1674. Defendants' complaint appears to be twofold. First, according to Defendants, the United States' calculation of proceeds includes prejudgment interest and the United States cannot meet the standard set for obtaining prejudgment interest. See JD. PFF, ¶¶ 1535, 1656-1660. Second, Defendants complain that the United States' disgorgement calculation did not remain true to the definition of "proceeds" in the forfeiture statute because interest is not mentioned in the definition of proceeds. See JD. PFF, ¶¶ 1645-1655.

In responding to Defendants' claims, it is important to first restate the basis for the United States' computation of the $289 billion disgorgement amount. The $289 billion represents Cigarette Company Defendants' proceeds derived from the sale of cigarettes to the Youth Addicted Population for the years 1971 to 2000. See U.S. PFF § IX. ¶ 103. The starting period of the calculation in 1971 is the first calendar year after the enactment of the RICO statute. Id. The computation of the proceeds ends at December 31, 2000. Of the $289 billion in proceeds from the Youth Addicted Population, $78 billion represents the contemporaneous value of the proceeds and $211 billion is the adjustment that accounts for the time value of money, or Defendants' gains. Specifically, the United States' expert, Dr. Fisher, calculated the contemporaneous value of the proceeds (e.g., the value of the proceeds in 1971, 1972, 1973, etc.) and then adjusted them to account for their value, as of December 31, 2000. Presumably, it is

this $211 billion that Defendants would object to for the reasons stated above.

Defendants' actual argument is difficult to discern. However, if, by defining a portion of Dr. Fisher's calculation as "prejudgment interest," Defendants intend to suggest that the United States has not met the legal standards for prejudgment interest, Defendants' contention is without merit because it is inconsistent with the testimony of Dr. Weil that the weighted average cost of capital would not be used in calculating prejudgment interest (see Deposition of Dr. Roman Weil, United States v. Philip Morris, Aug. 9, 2002, pp. 256-59), and is an irrelevant legal standard for purposes of this equitable RICO action. What is relevant is that the United States' disgorgement calculation is reasonable and clearly satisfies the purposes of RICO disgorgement. Indeed, here, the inclusion of what Defendants characterize as prejudgment interest is essential to realize the objectives of equitable disgorgement. To achieve those objectives, the United States requests, and the Court may order, a disgorgement amount that includes all gains flowing from the illegal activities. "The ill-gotten gains include prejudgment interest to ensure that the wrongdoer does not profit from the illegal activity." SEC v. Cross Financial Services, Inc., 908 F. Supp. 718, 734 (C.D. Cal. 1995) (citations omitted). Dr. Fisher aptly explains the economic rationale for the calculation of gains in this case: failure to force companies to pay back what is essentially illegally borrowed money will generate perverse economic incentives to further malfeasance because exclusion of additional gains from the proceeds is equivalent to granting an interest-free loan worth many millions of dollars. See Expert Report of Franklin Fisher, Ph.D., July 24, 2002 Rebuttal Report at ¶¶ 26-28. Therefore, the United States' disgorgement includes the gains "flowing from the illegal activities," and ensures that Defendants do not profit from their RICO violations. See Cross Financial, 908 F. Supp. at 734.

Even assuming arguendo that it were proper for the Court to consider the United States' disgorgement request under the legal standard for assessing whether to award prejudgment interest, that standard is easily satisfied in this case. The legal standard for an award of prejudgment interest is very flexible. In deciding whether an award of prejudgment interest is warranted, a court should consider a broad array of factors: "(1) the need to fully compensate the wronged party for actual damages suffered, (2) considerations of fairness and the relative equities of the award, (3) the remedial purpose of the statute involved, and/or (4) such other general principles as are deemed relevant by the court." See SEC v. First Jersey Securities, 101 F.3d 1450, 1476 (2d Cir. 1996) (citing Wickham Contracting Co. v. Local Union No. 3, 955 F.2d 831, 833-34 (2d Cir.), cert. denied, 506 U.S. 946 (1992)); see also Commercial Union Assurance Co. v. Milken, 17 F.3d 608, 613 (2d Cir.), cert. denied, 513 U.S. 873 (1994); SEC v. Kenton Capital, Ltd., 69 F. Supp. 2d 1, 16 (D.D.C. 1998). See JD. PFF, p. 738, n.80.[38] The United States' disgorgement computation, as discussed further below, is reasonable and therefore should be adopted by the Court.

Defendants' second argument, that the United States has not followed the letter of the forfeiture statute, is also immaterial because even if true, it does not alter the reasonableness of the United States' disgorgement computation. See JD. PFF, ¶¶ 1645-1655. As made clear above, the United States is **not** seeking forfeiture in this case, but rather used the forfeiture

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[38] In a footnote, Defendants cite United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 831 F. Supp. 177, 188 (S.D.N.Y. 1993). See JD. PFF, p. 712. In that RICO action, which ultimately resulted in the Carson decision before the Second Circuit, the district court noted that, "Sitting in equity, this Court must balance several factors when fashioning relief." See 831 F. Supp. at 185. Nothing in the discussion or rationale of Int'l Longshoremen's Ass'n precludes the Court in this case from awarding the reasonable amount of disgorgement sought by the United States, notwithstanding Defendants' citation to it as authoritative.

statute as one source of guidance to inform its methodology and calculation of a disgorgement amount appropriate to address Defendants' decades of unlawful conduct consistent with the purposes of disgorgement and this equitable RICO action. Given the complexity of determining disgorgement for numerous unlawful acts spanning five decades, and the lack of a specific statutory provision controlling the calculation of disgorgement, the United States reasonably looked to the definition of "proceeds" in the civil forfeiture statute to calculate the proceeds to the Youth Addicted Population. That statute provides generally 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." See 18 U.S.C. § 981(a)(2)(B). While the definition of proceeds in the forfeiture statute does not expressly include a computation of the time value of money, neither the United States nor the Court is bound by the four corners of the forfeiture statute in its calculation of disgorgement.

The United States' inclusion of a calculation for the time value of the proceeds is reasonable and based upon precedent in this jurisdiction even if one concludes that this is prejudgment interest. In Banner, the district court awarded disgorgement in the amount of $6.5 million **plus** prejudgment interest of approximately $2.7 million, which was found by the district court to represent defendants' "unjust enrichment." Banner, 211 F.3d at 617. Similarly, other courts have upheld an award of disgorgement that includes substantial prejudgment interest. SEC v. First Jersey Securities, Inc., 101 F.3d 1450 (2d Cir.1996); SEC v. Patel, 61 F.3d 137, 140 (2d Cir. 1995); SEC v. Tome, 833 F.2d 1086, 1096 (2d Cir. 1987) (upholding district court award of disgorgement of over $2.7 million in profits plus over $1.3 million in prejudgment interest for trading on nonpublic information). In First Jersey, the Securities and Exchange

Commission ("SEC") initiated enforcement action against a broker-dealer and its principal. Following a bench trial, the district court held defendants liable for federal securities law violations, and, among other things, ordered disgorgement of unlawful gains and assessed prejudgment interest against defendants jointly and severally. First Jersey, 101 F.3d at 1450. The district court's award of prejudgment interest in the amount of $52,689,894 was more than twice the sum of profits of $22,288,099. Id. at 1461. Disgorgement was based upon the profits gained by the firm as a result of the six frauds and the prejudgment interest on those amounts from the dates of the gains through the entry of judgment, which was a period of up to 12 years. Id.

Defendants on appeal in First Jersey argued that the profits, less than twice the sum of prejudgment interest on the profits, was "grossly disproportionate" and "unduly inflated" because the court (a) improperly used the rate employed by the Internal Revenue Service ("IRS") for an underpayment of taxes, rather than the treasury-bill rate (resulting in a difference of more than $23 million), and (b) inappropriately ordered that interest be paid for the entire 12-year period since the violations occurred notwithstanding delays that defendants attributed to the SEC. The court found that there was no abuse of discretion and upheld the computation of disgorgement and the prejudgment interest award. Id. at 1476.

The Court of Appeals held that the decision whether to grant prejudgment interest and the rate used if such interest is granted are matters committed to the district court's broad discretion, and will not be overturned on appeal absent an abuse of that discretion. Id. (citing Endico Potatoes, Inc. v. CIT Group/Factoring, Inc., 67 F.3d 1063, 1071-72 (2d Cir. 1995)). As for the rate of interest to be applied, the Court of Appeals looked to the remedial purpose of the statute.

It noted that when the SEC itself orders disgorgement to "strip a wrongdoer of its unlawful gains," the interest rate it imposes is generally the IRS underpayment rate as subject to regulation. "That rate reflects what it would have cost to borrow the money from the government and therefore reasonably approximates one of the benefits the defendant derived from its fraud." Id. Though defendants in First Jersey urged the court that the treasury-bill rate of interest should have been used instead (a much lesser rate), that is the rate at which one lends money to the government rather than borrows money from it. Thus, the Court of Appeals ruled, that advantageous rate would seem highly inappropriate in the circumstances of that case, where defendants had had the use of the money. Id.

Finally, the court concluded that the district court's order that prejudgment interest be paid for the entire period from the time of defendants' unlawful gains to the entry of judgment was reasonable even if defendants were correct that the present litigation was protracted through some fault of the SEC. The Court of Appeals stated that defendants plainly had the use of their unlawful profits for the entire period. Id. at 1476-1477.

Defendants make the same or similar arguments regarding the United States' computation of proceeds to include the time value of money that were considered and rejected by the Court of Appeals in First Jersey. However, Defendants do not even mention the decision in First Jersey in the context of its ruling on prejudgment interest, much less attempt to distinguish it.

First, Defendants argue that the United States' disgorgement amount, including prejudgment interest, is inflated because the United States did not file suit earlier. See JD. PFF,

p. 823.[39] According to Defendants, they could have altered their conduct at an earlier time and avoided a larger disgorgement amount.[40] This **precise** argument was raised by defendants and addressed in First Jersey. Defendants in this case, as in First Jersey, "plainly had the use of their unlawful profits for the entire period." See First Jersey, 101 F.3d at 1477. Cigarette Company Defendants have made use of their proceeds from the Youth Addicted Population, consisting of 33 million youth-addicted smokers, from 1971 to 2000. The timing of the United States' lawsuit has no bearing on the reasonableness of the United States' computation of disgorgement. Accordingly, Defendants offer nothing to counter the United States' reasonable disgorgement calculation of $289 billion in proceeds unlawfully obtained by Defendants.

Second, Defendants assert, without any support, that the United States' calculation of gains is inflated. See JD. PFF ¶¶ 1669-1674. The computation applied by the United States' experts is based upon a standard methodology used by economists as applicable to companies such as Defendants that trade on the capital markets, referred to as the "weighted average cost of capital," the equivalent of the amount Defendants would have had to borrow from the capital

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[39] Defendants cite one case, White v. Fosco, 599 F. Supp. 710, 715-716 n.28, n.31 (D.D.C. 1984), for their contention that "timely prosecution of claim would have permitted Defendants to avoid the alleged violation." See JD. PFF, ¶ 1998. This case is irrelevant to the United States' case. First, White involved a private cause of action under RICO. The district court noted in White that plaintiffs claim might be time barred under the local statute of limitations. 599 F. Supp. at 716 n.31. Second, the White court determined that, as a factual matter, had defendants been aware of any alleged duty to account for funds, they would not have committed the accounting violation at issue. 599 F. Supp. at 716, n.28. Defendants make no effort to highlight these material factual differences between White and this case. To the extent that Defendants attempt to introduce a laches argument here, it is meritless. See infra § X.C.

[40] As noted above in the United States' response to Defendants' Eighth Amendment arguments, the United States is not seeking all of the $868 billion to which it is legally entitled. See supra § II.

markets if they had not received the unlawful gains. The weighted average cost of capital rate "reflects what it would have cost to borrow the money from the [capital markets] and therefore reasonably approximates one of the benefits the defendant derived from its fraud." See First Jersey, 101 F.3d at 1476. Thus, applying any other rate would be "highly inappropriate in the circumstances here, where Defendants have had the use of the money." See id. at 1476.

Third, Defendants argue that "prejudgment interest is unavailable" to the United States in this case. See JD. PFF ¶¶ 1656-1659. As its rationale, Defendants claim that the United States can only disgorge ill-gotten gains that remain available to defendants as of the present to fund future RICO violations. Thus, Defendants argue, prejudgment interest would exceed the amount available to Defendants as of the present to be disgorged. By their arguments, Defendants ask this Court to ignore the amounts they have been unjustly enriched over the last five decades and fix an amount that is currently "available" to them as they uniquely define "available," i.e., ill-gotten proceeds not spent or reallocated by Defendants. The only authority cited by Defendants for this proposition is Carson. Even assuming Carson were correct on this point – which it is not – Carson does not limit the reach of disgorgement to current liquid assets. Accordingly, Defendants' arguments are entirely without merit.

In summary, the United States' computation of disgorgement of proceeds to the Youth Addicted Population is reasonable and serves the primary purposes of RICO disgorgement: to deprive a wrongdoer of his unjust enrichment and to deter others from violating the RICO laws. See First City Financial Corp., 890 F.2d at 1230.

IV

DEFENDANTS ARE JOINTLY AND SEVERALLY LIABLE FOR THE ENTIRE AMOUNT OF DISGORGEMENT

Defendants contend that "it is contrary to the principles of equity for a disgorgement remedy to be joint and several." See JD. PFF, p. 882 ¶ 2156. Not surprisingly, Defendants do not cite any authority for this incorrect proposition. Overwhelming precedent establishes quite the contrary: joint and several liability for joint wrongdoers is the general rule. As discussed in U.S. PCL, p. 104 & n.86, all Defendants are jointly and severally liable for the total amount of unlawful proceeds obtained by all Defendants through their joint scheme to defraud and RICO violations.

A. The General Rule is Joint and Several Liability

1. The "standard American rule is that a plaintiff may recover against any joint wrongdoer," Walker v. United States Dept. of Housing & Urban Dev., 99 F.3d 761, 773 (5th Cir. 1996).[41] In various contexts, courts have imposed joint and several liability on joint wrongdoers, including in actions for equitable disgorgement and restitution under various statutes. See, e.g., United States v. Andrews, 146 F.3d 933, 936 (D.C. Cir. 1998) (pointing out that the district court had ordered defendants jointly and severally liable for the payment of $1.5 million in

[41] Of course, United States is not limited to disgorgement from the specific acts of racketeering alleged in the Complaint. "Where the defendant is convicted of conspiracy to defraud, the district court has 'the authority to order restitution for the losses caused by the entire fraud scheme, not merely for the losses caused by the specific acts of fraud proved by the government at trial.'" United States v. Davis, 117 F.3d 459, 462 (11th Cir. 1997) (quoting United States v. Brothers, 955 F.2d 493, 497 (7th Cir. 1992)); accord United States v. Dabbs, 134 F.3d 1071 (11th Cir. 1998); see also United States v. Martin, 195 F.3d 961, 969 (7th Cir. 1999) ("[I]n determining the scope and consequence of the scheme [to defraud] the judge was not limited to the evidence presented at trial.").

disgorgement to victim of securities fraud); FTC v. Gill, 265 F.3d 944 (9th Cir. 2001) (affirming district court's order for defendants jointly and severally to pay the sum of $1,335,912.14 to the FTC as equitable monetary relief, including without limitation consumer redress, restitution and/or disgorgement); SEC v. Hughes Capital Corp., 124 F.3d 449, 455 (3d Cir. 1997); First Jersey, 101 F.3d at 1475; SEC v. Lorin, 76 F.3d 458, 461-62 (2d Cir. 1996); SEC v. First Pacific Bancorp, 142 F.3d 1186, 1191 (9th Cir. 1998) ("[W]here 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."); Hateley v. SEC, 8 F.3d 653, 656 (9th Cir.1993); SEC v. Risman,7 Fed. Appx. 30 (2d Cir. 2001) (summarily affirming order for joint and several disgorgement); United States Dep't of Housing & Urban Dev. v. Cost Control Marketing & Sales Mgt. of Virginia, Inc., 64 F.3d 920 (4th Cir. 1995) (upholding joint and several disgorgement order for violations of the federal Interstate Land Sales Full Disclosure Act); Colonial Williamsburg Foundation v. Kittinger Co., 792 F. Supp. 1397, 1406, 1409-10 (E.D. Va. 1992) (joint and several liability for sanctions, including sanctions for disgorgement of one-third of revenues from trademark-infringing items), aff'd, 38 F.3d 133 (4th Cir. 1994); Ohio Drill & Oil Co. v. Johnson, 625 F.2d 738 (6th Cir. 1980) (joint and several liability for breach of fiduciary duty); United States v. Diaz, 245 F.3d 294, 312 (3d Cir. 2001) ("[a] District Court may . . . impose joint and several liability on multiple defendants for restitution, permitting the victim to recover its losses from all or some of the wrongdoers.") (applying Mandatory Victims Restitution Act, 18 U.S.C. § 3663A and 18 U.S.C. § 3664(f)(1)(A) following convictions for mail fraud and money laundering relating to scheme to defraud Department of Education); United States v. Quackenbush, 9 Fed. Appx. 264, 269-270

(4th Cir. 2001) (accessory-after-the-fact in bank robbery); United States v. Alas, 196 F.3d 1250, 1251-52 (11th Cir. 1999) (defendant jointly and severally liable for entire restitution from "check washing" scheme); United States v. Hunter, 52 F.3d 489, 494-95 (3d Cir. 1995) (credit card fraud conspiracy); United States v. Scop, 940 F.2d 1004 (7th Cir. 1991) (joint and several liability for restitution for defendant convicted of conspiracy and securities fraud); United States v. Moore, 225 F.3d 637, 643 n.1 (6th Cir. 2000); United States v. Odom, 252 F.3d 1289, 1299 (11th Cir. 2001), cert. denied, 535 U.S. 1058 (2002) (upholding joint and several restitution order for coconspirator in church-burning case, despite claim that she withdrew from the conspiracy: "A restitution order may order payment of losses consistent with the common law of conspiracy. Namely, a defendant convicted of participation in a conspiracy is liable not only for her own acts, but also those reasonably foreseeable acts of others committed in furtherance of the conspiracy."); Commodity Futures Trading Comm'n v. American Bd. of Trade, Inc., 803 F.2d 1242, 1252-53 (2d Cir. 1986) (affirming district court's order of joint and several liability for disgorgement for violations of Commodities Exchange Act).

2. In both civil and criminal RICO cases, courts have repeatedly imposed joint and several liability. For example, in criminal RICO prosecutions, each defendant convicted on a RICO charge is jointly and severally liable for the forfeiture of all 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), cert. denied, 1235 S. Ct. 1336 (Mar. 2003); 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) ("Codefendants are properly held jointly and severally liable for the proceeds of a RICO enterprise." (citing cases)); United States v. McHan, 101 F.3d 1027, 1043 (4th Cir. 1996)

("[I]n cases involving the RICO forfeiture statute, courts have unanimously concluded that conspirators are jointly and severally liable for amounts received pursuant to their illicit agreement" (citing cases); United States v. Hurley, 63 F.3d 1, 22 (1st Cir. 1995); United States v. Saccoccia, 58 F.3d 754, 785 (1st Cir. 1995) (defendants jointly and severally liable for $136 million that they laundered even thought they received only a laundering fee of 5 to 15% of the money they laundered); United States v. Masters, 924 F.2d 1362, 1369-70 (7th Cir. 1991); Fleischhauer v. Feltner, 879 F.2d 1290, 1301 (6th Cir. 1989) ("there are numerous RICO criminal forfeiture cases which indicate that the nature of the RICO offense mandates joint and several liability"); 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).

Likewise, in private civil RICO actions for treble damages, courts do not hesitate to attach liability jointly and severally to all defendants. See, e.g., Oki Semiconductor Co. v. Wells Fargo Bank, Nat. Ass'n, 298 F.3d 768 (9th Cir. 2002); Fleischhauer v. Feltner, 879 F.2d 1290, 1301 (6th Cir. 1989) (civil RICO damage awards are joint and several); Beneficial Standard Life Ins. Co. v. Madariaga, 851 F.2d 271, 272 (9th Cir. 1988) (noting that district court had assessed civil RICO liability jointly and severally, but reversing on other grounds); Bank One of Cleveland, N.A. v. Abbe, 916 F.2d 1067, 1081 (6th Cir. 1990); Corporacion Insular de Seguros v. Reyes-Munoz, 849 F. Supp. 126, 134 (D.P.R. 1994); Empire Blue Cross & Blue Shield v. Finkelstein, 887 F. Supp. 473, 480 (E.D.N.Y. 1995) (coconspirators in civil RICO conspiracy to fraudulently secure health coverage for nonexistent employee groups were jointly and severally

liable to health insurer for treble damages); see also Resolution Trust Corp. v. Stone, 998 F.2d 1534, 1549-1550 & n.17 (10th Cir. 1993) (noting that subsidiary was not indispensable party because parent was named in complaint, and parent and subsidiary were alleged to be jointly and severally liable).

3. Joint and several liability is especially appropriate in conspiracy cases.[42] In fact, "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." SEC v. First Pacific Bancorp, 142 F.3d 1186, 1191 (9th Cir. 1998); see also Lewis v. Whelan, 99 F.3d 542, 544 (2d Cir. 1996) (where union and employer were found to have "participated together in a 'deceitful dance' to conceal their agreement not to dovetail seniority from union members," joint and several liability for damages and attorney's fees appropriate); Bennett v. Local Union No. 66, 958 F.2d 1429, 1440-41 (7th Cir. 1992) (where parties participate in each other's breaches, "it is no longer 'unjust' to hold either

[42] Additionally, courts in tort cases frequently impose joint and several liability. See, e.g., The Beaconsfield, 158 U.S. 303, 307 (1895); Sessions v. Johnson, 95 U.S. 347 (1977); Faison v. Nationwide Mortgage Corp., 839 F.2d 680, 687 (D.C. Cir. 1988); Bowman v. Redding Co., 449 F.2d 956, 967 (D.C. Cir. 1971) ; McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); In re Merritt Logan, Inc., 901 F.2d 349, 365 (3d Cir. 1990) (joint and several liability not precluded simply because one defendant was found liable on breach of warranty theory and another liable based on negligence: "Joint and several liability is commonly imposed in breach of warranty actions and in tort actions."); Stifle v. Marathon Petroleum Co., 876 F.2d 552, 555 (7th Cir. 1989); Archer v. Pavement Specialist, Inc., 278 F.3d 845 (8th Cir. 2002) (Arkansas law); General Motors Corp. v. Doupnik, 1 F.3d 862 (9th Cir. 1993) (California law). The same is true in maritime actions, Coats v. Penrod Drilling Corp., 61 F.3d 1113 (5th Cir. 1995), as well as suits in admiralty, see McDermott, Inc. v. AmClyde, 511 U.S. 202, 220-21 (1994). See also Restatement (Third) of Torts: Apportionment of Liability § 15 ("When persons are liable because they acted in concert, all persons are jointly and severally liable for the share of comparative responsibility assigned to each person engaged in concerted activity.").

party accountable for the entire period of injury"); Allen v. Allied Plant Maintenance Co. of Tenn., 881 F.2d 291, 298 (6th Cir. 1989) (joint and several liability for damages and attorney's fees appropriate where the employer and union "colluded" in the breach); Aguinaga v. United Food & Comm. Workers Int'l Union, 993 F.2d 1463 (10th Cir. 1993) (in hybrid § 301 case of Labor Management Relations Act, joint and several liability was appropriate "where a union affirmatively caused the employer to commit the contract breach, or where the union and the employer actively participated in the other's breach.") (citing Vaca v. Sipes, 386 U.S. 171, 197 n.18 (1966)); Baskin v. Hawley, 807 F.2d 1120 (2d Cir. 1986); Fletcher v. Atex, Inc., 68 F.3d 1451, 1464-65 (joint and several liability for all defendants having an understanding, express or tacit, to participate in a common plan to commit tortious act); Restatement (Second) of Torts § 876(a) (joint and several liability for tortious action in concert with another or pursuant to a common design); Refuse & Environmental Systems, Inc. v. Industrial Servs. of America, Inc., 392 F.2d 37, 40 (1st Cir. 1991) (same; Massachusetts law); Hyde & Drath v. Baker, 24 F.3d 1162, 1170-1172 (9th Cir. 1994) (in RICO case, corporations' attorneys could be held liable for some costs and expenses for attorneys' fees and costs assessed for violations of discovery orders); In re Kunstler, 914 F.2d 505, 525 (4th Cir. 1990) (attorneys may be held jointly and severally liable for Rule 11 violations where attorneys had signed pleading); United States v. McHan, 101 F.3d 1027, 1043 (4th Cir. 1996) (listing RICO forfeiture cases where "courts have unanimously concluded that conspirators are jointly and severally liable for amounts received pursuant to their illicit agreement"); United States v. Pitt, 193 F.3d 751, 765 (3d Cir. 1999) (§ 982(a)(1) imposes "a rule of joint and several liability in the case of a money laundering conspiracy."); United States v. Martin, 195 F.3d 961, 968-69 (7th Cir. 1999) ("The liability of coconspirators is joint as

well as several, . . . consistent with the general common law rule making joint tortfeasors jointly as well as severally liable for the harm caused by the tort.") (citing cases);[43] See also Restatement (Third) of Torts: Apportionment of Liability § 15 ("When persons are liable because they acted in concert, all persons are jointly and severally liable for the share of comparative responsibility assigned to each person engaged in concerted activity.").[44]

B. Defendants' Argument Conflicts with the Remedial Purposes of Joint and Several Liability and the Principles of Equity

This principle of attaching joint liability to joint wrongdoers logically follows from the principle that "a defendant is liable for reasonably foreseeable acts of others committed in furtherance of the conspiracy of which the defendant has been convicted." See United States v.

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[43] Moreover, even where the defendant is not charged with conspiracy, courts have held defendants jointly and severally liable for restitution where they participate in a fraudulent scheme. See e.g., Martin, 195 F.3d at 969.

[44] See also Hateley, 8 F.3d at 656 (joint and several disgorgement order where defendants "acted collectively in violating the association's rules and because of the close relationship among the three of them"); Hunter, 52 F.3d at 494-95 (credit card fraud conspiracy: "We agree with well-settled law that the state's interests in justice and rehabilitation should allow a district court the discretion to impose joint and several liability on multiple defendants" (citing cases)); Diaz, 245 F.3d at 312; Odom, 252 F.3d at 1299 (upholding joint and several restitution order for coconspirator in church-burning case, despite claim that she withdrew from the conspiracy: "A restitution order may order payment of losses consistent with the common law of conspiracy. Namely, a defendant convicted of participation in a conspiracy is liable not only for her own acts, but also those reasonably foreseeable acts of others committed in furtherance of the conspiracy"); Scop, 940 F.2d at 1010 (conspiracy and securities fraud); Quackenbush, 9 Fed. Appx. at 269-270 (defendant may be held jointly and severally liable for the full amount of restitution "notwithstanding his role as an accessory after the fact."); Alas, 196 F.3d at 1251-52 (defendant jointly and severally liable for entire restitution from "check washing" scheme, including checks cashed by codefendants while he was briefly incarcerated, even if he was unaware of the continued operation of the scheme, because "he is liable for the acts that flow as a natural consequence of the conspiracy").

Davis, 117 F.3d 459, 463 (11th Cir. 1997);[45] accord United States v. Dabbs, 134 F.3d 1071 (11th Cir. 1998). Indeed, as one Circuit Court of Appeals has recently noted, "[j]oint and several liability is another vital instrument for maximizing deterrence," a fundamental purpose of disgorgement. See Paper Systems Inc. v. Nippon Paper Industries Co., 281 F.3d 629, 633 (7th Cir. 2002) (antitrust conspiracy).

Nowhere is this principle more appropriate than in RICO cases. See, e.g., Oki Semiconductor Co., 298 F.3d at 775 ("Holding RICO conspirators jointly and severally liable for the acts of their co-conspirators reflects the notion that the damage wrought be the conspiracy 'is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.'") (quoting Sec. Investor Prot. Corp. v. Vigman, 908 F.2d 1461, 1468 (9th Cir.1990), rev'd on other grounds sub nom. Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258 (1992)). Just as liability for a RICO conspiracy conviction under 18 U.S.C. § 1962(d) does not require proof that the defendant "knew all the details or the full extent of the conspiracy," it is also true that "a defendant who does not know the 'entire conspiratorial sweep' is nevertheless jointly and severally liable, in the civil context, for all acts in furtherance of the conspiracy." See Aetna Cas. Sur. Co. v. P&B Autobody, 43 F.3d 1546, 1562 (1st Cir. 1994).

Moreover, as a factual matter, the equities involved here decidedly favor a finding of shared liability. As detailed more thoroughly in the United States' Proposed Findings of Fact, Defendants were involved in a scheme to defraud the public for nearly 50 years, involving

[45] Indeed, in Davis, the court of appeals affirmed joint and several liability against various defendants, one of whom was only convicted of the conspiracy count. 117 F.3d at 461 n.2.

thousands of false, fraudulent, and misleading public statements, and engaging in a conspiracy to do the same. In furtherance of their fraudulent scheme, Defendants created and operated various entities to disseminate false and misleading statements, and to generate misleading and irrelevant research. Defendants shared common objectives – to preserve and enhance the market for cigarettes, and to avoid adverse liability exposure in products liability litigation – and conducted the affairs of an unlawful Enterprise in furtherance of these objectives. In circumstances such as these – and following the analysis of every other court that has considered similar circumstances – equity demands that Defendants be jointly and severally liable for disgorgement of their ill-gotten proceeds. See, e.g., Ohio Drill & Oil Co. v. Johnson, 625 F.2d 738 (6th Cir. 1980) (joint and several liability for breach of fiduciary duty).

Defendants state, without citing any case that so holds, that joint and several liability must be "based on a finding that the ill-gotten gains cannot be apportioned among the defendants." See JD. PFF, p. 883 ¶ 2157. This is not the law, nor was it the law in SEC v. Hughes Capital, 124 F.3d 449, the case which Defendants cite. In that case, the court pointed out that in order to apportion disgorgement, the burden is on the **defendant** "to establish that the liability is capable of apportionment," **and** the district court still "has broad discretion" to order disgorgement on a joint and several basis. 124 F.3d 455 (citing cases). In addition to proving whether the disgorgement amount can be reasonably divided, the defendant must prove "the propriety of the apportionment of the disgorgement amount". Id. In other words, indivisibility is one, but not the only, reason to assess joint and several liability. It is notable that in Hughes, the lone case to which Defendants refer for this point, the court ordered joint and several disgorgement where "the defendants all collaborated in a single scheme to defraud". Id.

Moreover, simply because monetary liability **might** be capable of a apportionment does not mean that it **should** be. Even where a court **may** apportion disgorgement in its discretion, it need not do so. See, e.g., United States v. Booth, 309 F.3d 566, 576 (9th Cir. 2002) ("[t]he court had the discretion to apportion the total [for restitution to reflect roles in defendants' fraudulent scheme], but was not required to do so"); United States v. Woodard, 208 F.3d 219 (8th Cir. 2000) (table) (under Restitution Act, court is permitted, but not required, to apportion liability, and no abuse of discretion ordering defendant to pay full restitution, jointly and severally with other codefendants, although he was only aidor and abettor); United States v. Berardini, 112 F.3d 606, 613 (2d Cir. 1997) (no abuse of discretion in ordering joint and several liability for restitution order).[46]

In such a case as this, where Defendants have worked together for decades to defraud millions of individuals – and have obtained hundreds of billions of dollars of unjust proceeds – it would be not only illogical, but unjust to disassociate the members of the enterprise and conspiracy for purposes of assessing disgorgement when the liability that gave rise to the disgorgement is based in part on their coordinated conduct. Such an approach would require "dismembering [the conspiracy] and viewing its separate parts", see Vigman, 908 F.2d at 1468,

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[46] See also Slotkin v. Citizens Casualty Co., 614 F.2d 301 (2d Cir. 1980); Grober v. Capital Transit Co., 119 F. Supp. 100 (D.D.C. 1954) (where jury has attempted to apportion damages as between joint tortfeasors, court can properly amend the verdict on its own by striking the attempted apportionment); George B. Scrambling Co. v. Tennant Drug Co., 25 Ohio App. 197, 158 N.E. 282 (1927) (where jury returned verdict for $7500 "against all three defendants equally divided" trial court was empowered to treat the phrase "equally divided" as surplusage, and enter verdict for plaintiff for $7500 against all defendants). Cf. Faison v. Nationwide Mortgage Corp., 839 F.2d 680, 687-88 (D.C. Cir. 1988) (noting that under D.C. law, if the jury does **not** state the aggregate amount of damages, the appropriate remedy is to revise "the verdict against all defendants for the largest sum found against any defendant.").

rather than looking at it as a whole, in which "a defendant is liable for reasonably foreseeable acts of others committed in furtherance of the conspiracy", see Davis, 117 F.3d at 463, and would fail to utilize a "vital instrument for maximizing deterrence". See Paper Systems Inc., 281 F.3d at 633.

In fact, it would be an abuse of discretion **not** to impose joint and several liability. See, e.g., Ohio Drill & Oil Co., 625 F.2d at 743 (upholding amount of disgorgement award, but reversing in part because the district court "incorrectly refused to hold defendants jointly and severally liable for their breach."); Fleischhauer, 879 F.2d at 1301 (district court erred in awarding civil RICO damages individually, as opposed to jointly and severally, and noting that "there are numerous RICO criminal forfeiture cases which indicate that the **nature of the RICO offense mandates joint and several liability**." (emphasis added)); United States v. Corrado, 227 F.3d 543, 553 (6th Cir. 2000). See also United States v. Hurley, 63 F.3d 1, 23 (1st Cir. 1995) (joint and several liability for foreseeable acts of RICO co-conspirators permissible: "We appreciate the fact that a formidable penalty can be inflicted when one disallows a passing-on defense then imposes vicarious liability for the foreseeable acts of co-conspirators. . . . But there is no reason to think that this result is unattractive to Congress, which requested a broad construction of RICO, or to the Supreme Court, which followed this policy in Russello [v. United States, 464 U.S. 16 (1983)].") In short, the nature of the offenses, the relationship of Defendants' unlawful activities, and the equitable principles governing disgorgement, not only allow but indeed warrant imposition of joint and several liability.

V

THE RICO COUNTS AND SOUGHT RELIEF DO NOT VIOLATE THE 10TH AMENDMENT

The United States established that during Defendants' commission of the RICO offenses at issue here, Defendants obtained in interstate commerce at least one trillion dollars from the sale of cigarettes throughout the United States and many foreign countries, and that the Defendants used instrumentalities of interstate commerce, including the United States mails, interstate wire communications and advertising campaigns in magazines, newspapers and other fora, to defraud millions of consumers throughout the United States. Indeed, 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 U.S. PCL, pp. 19-24 and U.S. PFF §§ I, II and IV and V. In the face of such overwhelming evidence, Defendants' contention (JD. PFF, pp. 902-05) that the RICO claims and sought relief here address "purely intrastate matters, such as local transactions between buyers and sellers of cigarettes, [that] are beyond the scope of federal authority", is frivolous. Moreover, Defendants' argument is inconsistent with their argument that the conduct underlying the RICO counts falls within the exclusive province of Congress' regulatory regimen under the FTC Act and FCLAA. See supra § I.A.

A. Defendants' Distribution of Cigarettes to Consumers Falls Squarely With Congress' Power to Regulate Commerce

1. The 10th Amendment to the Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Commerce Clause of the Constitution provides that: "The Congress shall have Power . . . To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes". U.S. Const. Art. I, Sec., 8, cl. 3. The Supreme Court has explained:

> The commerce clause is in no sense a limitation upon the Power of Congress over interstate and foreign commerce. On the contrary, it is, as Marshall declared in Gibbons v. Ogden, a grant to Congress of plenary and supreme authority over those subjects. **The only limitation it places upon Congress' power is in respect to what constitutes commerce.**

Prudential Ins., Co. v. Benjamin, 328 U.S. 408, 423 (1946) (emphasis added). Accord Gibbons v. Ogden, 22 U.S. 1, 196-97 (1824) (Congress' "power to regulate . . . commerce . . . like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are proscribed in the Constitution . . . [and it] is plenary as to those objects").

Accordingly, since the Constitution explicitly delegates to Congress the "plenary" authority to regulate interstate and foreign commerce, the 10th Amendment can never be violated by an exercise of Congress' "plenary" authority to regulate interstate and foreign commerce, especially regarding the commercial activities of private parties as involved here. As the Supreme Court noted, the only "limitation" is whether particular activity "constitutes commerce" within the scope of the Commerce Clause; if activity falls within the scope of the Commerce Clause it may be regulated by Congress without intruding upon the 10th Amendment.

For example, in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1984), the Supreme Court explicitly overruled National League of Cities v. Usery, 426 U.S. 833 (1976), which had held that the Commerce Clause does not empower Congress to enforce minimum-wage and overtime provisions of the Fair Labor Standards Act ("FLSA") against the States "in

areas of traditional governmental functions." 426 U.S. at 852. The Garcia Court stated:

> We . . . reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional".

469 U.S. at 546-47.

Rather, the Court explained that state sovereignty interests are protected by the structure of the Constitution's limits on the grants of authority to the federal government. Id. at 550-51. The Supreme Court added:

> The power of the Federal Government is a 'power to be respected' as well [as state sovereignty], and the fact that the states remain sovereign as to all powers not vested in Congress or denied them by the Constitution offers no guidance about where the frontier between state and federal power lies. **In short, we have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under Commerce Clause.**

Id. at 550 (emphasis added).

The Court also noted that "[a]ny substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation". Id. at 554. Accordingly, the Court concluded that application of minimum-wage and overtime requirements of the FLSA to a state agency was within Congress' Commerce Clause powers, and hence did not violate "state sovereignty" or "any constitutional provision." Id.[47] Therefore, the

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[47] Accord United States v. Darby, 312 U.S. 100, 114 (1941)("The Power of Congress over interstate commerce . . . can neither be enlarged nor diminished by the exercise or non-exercise of state power"); Fry v. United States, 421 U.S. 542, 547-48 and n.7 (1975)(holding that a congressional act regulating wages of state employees did not violate the 10th Amendment since that was within Congress' constitutional authority to regulate commerce and stating that "States are not immune from all federal regulation under the Commerce Clause merely because of their sovereign status"); Reno v. Condon, 528 U.S. 141, 148 (2000)(holding that a congressional statute regulating the states' ability to disclose certain information obtained from drivers by state departments of motor vehicles did not violate state sovereignty because the statute "is a proper (continued...)

dispositve issue is what activity constitutes "commerce" within the scope of Congress' Commerce Clause powers.

2. Turning to that issue, the Supreme Court long ago rejected the argument that sales transactions between buyers and sellers are purely local in nature and are beyond Congress' Commerce Clause powers, as Defendants argue here. For example, in United States v. Underwriters Ass'n, 322 U.S. 533 (1944), the Supreme Court rejected the argument that transactions involving the sale of insurance policies were local in nature and hence were beyond Congress' Commerce Clause powers and were a matter solely for state regulation. The Court stated:

> [T]his [argument] rests upon a distinction between what has been called "local" and what [is] "interstate", a type of mechanical criterion which this Court has not deemed controlling in the measurement of federal power . . . Only by treating the Congressional power over commerce among the states as a 'technical legal conception' rather than as a 'practical one, drawn from the course of business' could such a conclusion be reached. . . . **In short, a nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature. Were the rule otherwise, few businesses could be said to be engaged in interstate commerce**.

322 U.S. at 546-47 (emphasis added) (citations and footnote omitted).[48] The Court added:

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[47](...continued)
exercise of Congress' authority to regulate interstate commerce under the Commerce Clause.").

[48] Indeed, under Defendants' squarely rejected view of the Commerce Clause, virtually every facet of the federal government's modern regulatory regimen would be beyond the scope of federal authority, including regulations regarding transactions between buyers and sellers involving the sale of stocks, securities, lawful drugs, motor vehicles, fuel, etc. Such is not the case. See, e.g., Overnight Motor Transportation Co., Inc. v. Missel, 316 U.S. 572 (1942) (regulation of wages and hours of employees of common carriers under the Fair Labor Standards Act of 1938 is within Congress' Commerce Clause powers); North American Company v. SEC, 327 U.S. 686 (1946) (ownership of securities is subject to Congress' regulatory authority under its Commerce Clause powers); American Power & Light Co. v. SEC, 329 U.S. 90, 99-100 (1946) (continued...)

> No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance.

Id. at 553.

Similarly, in United States v. Walsh, 331 U.S. 432 (1947), the Supreme Court rejected the argument that Congress' Commerce Clause powers do not extend to prohibiting the giving of a false guaranty that any food, drug or device is not adulterated or misbranded unless "that guaranty leads in any particular instance to an illegal shipment in interstate commerce". 331 U.S. at 437. The Court concluded that:

> The Commerce Clause of the Constitution is not to be interpreted so as to deny to Congress the power to make effective its regulation of interstate commerce. Where the effectiveness depends upon a regulation or prohibition attaching regardless of whether the particular transaction in issue is interstate or intrastate in character, **a transaction that concerns a business generally engaged in interstate commerce, Congress may act. Such is this case.**

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[48](...continued)
(upholding Public Utility Holding Company Act of 1935, 15 U.S.C. § 79k(b)(2), as within Congress' Commerce Clause authority); United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940) (provisions of federal license for construction of hydro-electric dam subjecting licensee to regulations of Federal Power Commission (now Department of Energy), were within Commerce Clause powers); United States v. Rock Royal Co-operative, Inc., 307 U.S. 533, 569 (1939) (Upholding order of Department of Agriculture promulgated under Agricultural Marketing Act relating to milk producers under interstate Commerce Clause: "This power over commerce when it exists is complete and perfect."); Currin v. Wallace, 306 U.S. 1, 9-11 (1939) (inspection statute of tobacco produced intrastate and destined to consumers within state as well as without was consistent with Congress' Commerce Clause authority); United States v. Sullivan, 332 U.S. 689, 697 (1948) (upholding "misbranding" provision of Food, Drug and Cosmetic Act of 1938 as within Congress' Commerce Clause powers and rejecting challenge that the statute "invades the powers reserved to the states"); Jefferson County Pharmaceutical Ass'n, Inc. v. Abbott Laboratories, 460 U.S. 150, 154 & n.6 (1983) (Tenth Amendment does not preclude Robinson-Patman Price Discrimination Act (15 U.S.C. § 13c et seq.) as applied to state purchases).

Id. at 437-38 (emphasis added).[49]

The foregoing authority firmly establishes that, contrary to Defendants' argument, for purposes of determining whether an activity constitutes interstate commerce, the end result of a flow of commerce – the local sale of goods to consumers – can not be separated from the stream of interstate commerce of which it is a part. As the Supreme Court observed in a recent RICO case, "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.'" United States v. Robertson, 514 U.S. 669, 672 (1995) (citation omitted).[50]

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[49] See also Fry v. United States, 421 U.S. 542, 547 (1975) ("Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the states or with foreign nations"); Perez v. United States, 402 U.S. 146, 154 (1971)("Extortionate credit transactions, though purely intrastate, may in the judgement of Congress affect inter state commerce", and thus is within Congress' Commerce Clause powers); United States v. Shubert, 348 U.S. 222, 227, 230 (1955) (rejecting the argument that productions and presentations of theater shows constituted "local exhibitions" beyond Congress' authority to regulate interstate commerce); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 227-238 (1948) (ruling that the **local intrastate** refining of sugar could not be separated from the **interstate aspects of the business** involving growing and distributing sugar beets, and hence constituted interstate commerce); North American Company v. SEC, 327 U.S. 686, 700-07 (1966) (rejecting the argument that mere ownership of securities was the province of state regulation and did not constitute "commerce" within the ambit of Congress' Commerce Clause powers); Polish Alliance v. Labor Board, 322 U.S. 643, 648 (1944) ("Congress has explicitly regulated not merely transactions or goods in interstate commerce but activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce").

[50] To be sure, the interstate shipment of goods and services, both legal and illegal, has long been within Congress' authority under the Commerce Clause to regulate through legislation. See, e.g., United States v. Hill, 248 U.S. 420, 423-24 (1919) (upholding the defendant's conviction for traveling interstate with one quart of liquor meant solely for personal consumption, and stating that even the "transportation of one's own goods from state to state is interstate commerce, and, as such, subject to regulatory power of Congress"). See also United States v. Darby, 312 U.S. 100, 113 (1941)(shipment of manufactured goods interstate falls within (continued...)

In that respect, the United States established by undisputed evidence, including the Cigarette Company Defendants' stipulations, that for many years the Defendant Cigarette Companies have been engaged in the manufacture, marketing and distribution of at least one trillion dollars in cigarettes to millions of consumers throughout the 50 states and foreign countries. See U.S. PCL, pp. 19-22 and U.S. PFF § II. Indeed, Congress has explicitly recognized that such activities of tobacco companies constitute interstate commerce and substantially affects interstate and foreign commerce. See 7 U.S.C. § 1311(a): "The marketing of tobacco constitutes one of the greatest 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, moves almost wholly in interstate and foreign commerce from the producer to the ultimate consumer."

In a word, Defendants' argument that their conduct is "purely intrastate" and "beyond the scope of federal authority" is frivolous.[51]

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[50](...continued)
Congress' Commerce Clause powers); Cleveland v. United States, 329 U.S. 14, 19 (1946)(upholding the defendant's Mann Act conviction for interstate transportation of a women for immoral, non-commercial purposes); Caminetti v. United States, 242 U.S. 470, 491-73 (1917)(same).

[51] Defendants' reliance (JD. PFF, pp. 903-04) upon Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); and Alden v. Maine, 527 U.S. 706 (1999) is misplaced. College Sav. Bank held that a federal statute that "expressly abrogated the States' sovereign immunity from claims of patent infringement" violated the States' guarantee under the 11th Amendment to the Constitution of sovereign immunity from such suits without the States' consent and could not be justified as a valid exercise of Congress' power to do so under the 14th Amendment. 527 U.S. at 630, 634, 642-48. Similarly, Alden held that Congress lacked "power to subject non-consenting States to private suits for damage in state courts" in violation of the States' sovereign immunity protection under the 11th Amendment. 520 U.S. at 712-13. This case does not involve the 11th Amendment sovereign immunity issue raised in those cases;
(continued...)

B. RICO Constitutes A Lawful Exercise of Congress' Commerce Clause Powers

1. The RICO statute bears no resemblance to the statutes found to be unconstitutional in United States v. Lopez, 514 U.S. 549 (1995) and United States v. Morrison, 529 U.S. 598 (2000), upon which Defendants mistakenly rely. See JD. PFF, pp. 903-04. Indeed, after Lopez every court that has considered the issue has held that RICO constitutes a valid exercise of Congress' Commerce Clause powers.[52] In Lopez, the Supreme Court held that 18 U.S.C. § 922(q), which makes it a crime for "any individual knowingly to posses a firearm at a place that [he] knows . . . is a school zone", could not be upheld as a regulation of **intrastate** activities that "substantially

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[51](...continued)
rather this case turns on the scope of Congress' Commerce Clause powers, an issue which was not even discussed in those cases.

City of Boerne v. Flores, 521 U.S. 507 (1997) and Printz v. United States, 521 U.S. 898 (1997) also are of no help to Defendants. See JD. PFF, pp. 903-04. Flores held that Congress lacked authority under its power to enforce the provisions of the 14th Amendment to prohibit state governments and officials from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 521 U.S. at 515-16. (internal quotations omitted). The Court explained that the statute was not "a proper exercise of Congress' remedial or preventive power" (id. at 529) because it was not "responsive to, or designed to prevent, unconstitutional behavior" and "[i]t appears, instead, to attempt a substantive change in constitutional protections". Id. at 532.

Printz held that the federal Brady Act's requirement that state law enforcement officials conduct background checks on prospective hand gun purchasers to assist in administering a federally enacted regulatory scheme violated state sovereignty. 521 U.S. at 925-33.

Clearly, Flores and Printz do not involve the Commerce Clause issue presented here. It bears repeating that the Supreme Court has long held that Congress' Commerce Clause powers extend to such interstate commercial activities that underlie the RICO counts.

[52] See, e.g., United States v. Frega, 179 F.3d 793, 800-01 (9th Cir. 1999); United States v. Juvenile Male, 118 F.3d 1344, 1347-49 (9th Cir. 1997); United States v. Griffith, 85 F.3d 284, 281-88 (7th Cir. 1996); United States v. Maloney, 71 F.3d 645, 662-63 (7th Cir. 1995); United States v. Garcia, 68 F. Supp. 2d 802, 808 (E.D. Mich. 1999). Cf. United States v. Kehoe, 310 F.3d 579, 588 (8th Cir. 2002)(18 U.S.C. § 1959, which makes it a crime to commit murder in aid of a racketeering enterprise, does not violate the 10th Amendment).

affects" interstate commerce under Congress' Commerce Clause authority. The Court explained that three principal factors dictated its holding. See Lopez, 514 U.S. at 559-67:

> [First], Section 922(q) . . . has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.
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> * * *
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> Second, § 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.
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> * * *
>
> [Third], neither the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.

Id. at 561-62 (emphasis added).

In Morrison, the Supreme Court held that Congress lacked authority under the Commerce Clause to enact 42 U.S.C. § 13981, which provides a federal civil remedy for the victims of gender-motivated crimes of violence. The government argued that the statute was a proper exercise of Congress' Commerce Clause power because it regulated "those activities that substantially affect interstate commerce." 529 U.S. 609. The Court explained that three considerations required rejection of this argument.

First, the Court noted that whether the activity at issue is "economic" in nature is central to its Commerce Clause analysis. Id. at 610. The Court added that:

> Lopez's review of Commerce Clause case law demonstrates that in those cases

> where we have sustained federal regulation of **intrastate activity** based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.

Id. at 611 (emphasis added). The Court concluded that:

> Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of **intrastate activity** only where that activity is economic in nature.

Id. at 613 (emphasis added).

Second, the Court "found important" that the statute contained no express jurisdictional element requiring an explicit connection with or effect on interstate commerce which may establish that the statute is a proper enactment under Congress' Commerce Clause powers. Id. at 612-13.

Third, although the statute was supported by congressional findings regarding the alleged effects on interstate commerce by gender-based crimes of violence, the Court ruled that the alleged nexus was too attenuated, adding:

> We . . . reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local . . . . In recognizing this fact we preserve one of the few principles that has been consistent since the [Commerce] Clause was adopted. **The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States**.

Id. at 617-18 (footnote deleted)(emphasis added).

2. None of the factors that underlie the Court's decisions in Lopez and Morrison can be said about the RICO statute. First, although RICO is not limited to commercial or economic

activity, its focus is on such activity. In that regard, RICO's enterprise element includes many entities which are engaged in interstate commerce, such as corporations, labor unions and other legal entities; and RICO's pattern of racketeering activity includes many offenses that involve interstate commercial or economic activity, such as mail and wire fraud (18 U.S.C. §§ 1341, 1343), conducting illegal gambling businesses (18 U.S.C. § 1955), interstate travel in aid of racketeering activity (18 U.S.C. § 1952), money laundering (18 U.S.C. §§ 1956, 1957), interstate transportation of wagering paraphernalia (18 U.S.C. § 1953), interstate transportation of stolen goods (18 U.S.C. § 2314), etc. Cf. United States v. Green, 350 U.S. 415, 420-21 (1956) ("racketeering affecting interstate commerce was within federal legislative control").

Second, RICO requires proof in each case that the alleged RICO enterprise "is engaged in, or the activities of which affect, interstate or foreign commerce." See 18 U.S.C. § 1962.

Third, the RICO provisions and counts at issue here address **interstate economic activity**, see supra § V.A and U.S. PCL, pp. 19-24, and not **intrastate non-economic activity** as in Lopez and Morrison. As the Supreme Court noted in Lopez, 514 U.S. at 558-59, and Morrison, 529 U.S. at 609-13, the Supreme Court has upheld Commerce Clause regulation of **intrastate** activity that "substantially affects" interstate commerce. See, e.g., Wickard v. Filburn, 317 U.S. 111, 124 (1942). The Supreme Court has never applied the "substantial affects" test to invalidate regulation of **interstate economic activity**, as involved here, and hence that test does not apply here. See, e.g., United States v. Robertson, 514 U.S. 669, 671 (1995) (stating that the "'affecting commerce' test was developed in our jurisprudence to define the extent of Congress's power over purely **intra**-state commercial activities that nonetheless have substantial **inter**state effects", and holding that where the evidence was sufficient that the RICO enterprise was

engaged in interstate commerce, an affect on commerce need not be shown) (emphasis added); United States v. Harrington, 108 F.3d 1460, 1470 (D.C. Cir. 1997) (stating that the "substantial affects" test "was inapplicable to a case in which a federal statute with a jurisdictional element was applied to regulate interstate activities"); United States v. Page, 167 F.3d 325, 335 (6th Cir. 1999) ("the 'substantial effects' test defines the extent of Congress's power to regulate intrastate activity and does not apply when the regulated activity itself crosses state lines"); United States v. Atcheson, 94 F.3d 1237, 1242-43 (9th Cir. 1996) ("where the crime itself directly affects interstate commerce, as in the Hobbs Act, no requirement of a substantial effect is necessary to empower Congress to regulate activity under the Commerce Clause").[53]

Fourth, RICO's legislative history is replete with congressional findings that RICO was designed to address the substantial adverse effects on interstate commerce caused by organized crime and other illegal conduct that falls within RICO's scope. See, e.g., S. Rep. No. 617, 91st Cong., 1st Sess. at 1-2, 76-83 (1969). See also H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 246-48 (1989); Russello v. United States, 464 U.S. 16, 26 (1983) ("The legislative

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[53] Likewise, the "substantial effects" test, which applies to the **legal issue** whether Congress has the constitutional authority under the Commerce Clause to regulate wholly **intrastate** activity, does not apply to the **factual issue** whether the evidence in a particular case is sufficient to prove any statutory requirement of an interstate nexus element. See, e.g., United States v. Peterson, 236 F.3d 848, 853-56 (7th Cir. 2001); Harrington, 108 F.3d at 1470. Regarding the latter, both before and after Lopez, the federal courts of appeals uniformly have held that the plaintiff is required to prove that the activities of a RICO enterprise had only a "de minimis" effect on interstate or foreign commerce, and not a "substantial effect". 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); United States v. Farmer, 924 F.2d 647, 651 (7th Cir. 1991); United States v. Muskovsky, 863 F.2d 1319, 1325 (7th Cir. 1988).

history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon Organized Crime and its economic roots"); United States v. Turkette, 452 U.S. 576, 588-89 (1981).[54] The Senate Report regarding RICO states that "its purpose [is] the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. Rep. No. 617, 91st Cong., 1st Sess. at 76 (1969). The Senate Report states that RICO's civil remedies involved here were designed to do whatever "is necessary to free the channels of commerce from predatory activities." Id. at 81 and 160. Accord H.R. Rep. No. 1549, 91st Cong., 2d Sess. at 57 (1970).

The Senate Report added regarding RICO's civil remedies and purposes:

> What is needed here . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short,

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[54] For example, in Turkette, the Supreme Court stated:

The statement of findings that prefaces the Organized Crime Control Act of 1970 reveals the pervasiveness of the problem that Congress was addressing by this enactment:

> "The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens."

452 U.S. at 588 (quoting 84 Stat. 922-23).

> an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.

See S. Rep. No. 91-617 at 79 (1969); Russello, 464 U.S. at 27.

In sum, none of the shortcomings that dictated the Supreme Court's decisions in Lopez and Morrison apply to the RICO statute, as every court to decide the issue has held. See supra cases cited n.52.

VI

THE DISSOLUTION OF TI AND CTR DOES NOT MINIMIZE OR VITIATE THEIR LIABILITY, AND IT DOES NOT NEGATE THE CONTINUED EXISTENCE OF THE RICO ENTERPRISE OR THE RICO CONSPIRACY

Joint Defendants note that the MSA required the dissolution of two defendants – TI and CTR – "which were at the vortex of the conspiracy alleged" in the complaint. See JD. PFF, p. 837, ¶ 2034. Joint Defendants further contend that because "[f]or all practical purposes, CTR and TI no longer exist," and because the MSA "establishes stringent rules regarding the formation of any new tobacco-related trade organizations", the threat of possible continuity must also have disappeared. See JD. PFF, pp. 840-41, ¶¶ 2045-46.

1. Contrary to Defendants' argument, it is well established that proof of a conspiracy is not defeated merely because membership in the conspiracy changes and some defendants cease to participate in it.[55] The rule is the same for membership in a RICO enterprise.[56] Furthermore,

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[55] See, e.g., United States v. Garcia, 785 F.2d 214, 225 (8th Cir. 1986)("An agreement may include the performance of many transactions, and new parties may join or old parties terminate their relationship with the conspiracy at any time."); United States v. Warner, 690 F.2d 545, 549 n. 7 (6th Cir. 1982); United States v. Varelli, 407 F.2d 735, 742 (7th Cir. 1969); United States v. Boyd, 595 F. 2d 120, 123 (3d Cir. 1978); United States v. Klein, 515 F.2d 751 (3d Cir. 1975); United States v. Bates, 600 F.2d 505, 509 (5th Cir. 1979)("Nor does a single conspiracy become several merely because of personnel changes."); United States v. Michel, 588 F.2d 986 (continued...)

the requisite "continuity" is proven by the totality of the evidence of **all** the enterprise's and conspirators' activities, not each defendant's activities viewed in isolation. See U.S. PCL, pp. 64-68 and n. 60. Therefore, it is clear that the existence of the RICO conspiracy and RICO enterprise is not defeated merely because TI and CTR were dissolved.

Moreover, Defendants miss the point: neither the Tobacco Institute nor the Council for Tobacco Research constitute the Enterprise **itself**, but instead are **members** of the association-in-fact Enterprise. See U.S. PCL, pp. 10-12 and n.7. As alleged in the Complaint, TI and CTR served as important components of the Enterprise, promulgating false and misleading press releases and other public statements, and supporting Defendants' biased research efforts to support their public relations and litigation positions. See U.S. PFF §§ I.B, I.C., I.E, and I.I; see

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[55](...continued)
(5th Cir. 1979); United States v. Lemm, 680 F.2d 1193 (8th Cir. 1982)(for RICO conspiracy, continuity may be met even with changes in personnel or even when different individuals manage the affairs of the enterprise); United States v. Tillett, 763 F.2d 628, 631-32 (4th Cir. 1985)(personnel change does not prevent RICO conspiracy); United States v. Bello-Perez, 977 F.2d 664, 668 (1st Cir. 1992)("What was essential is that the criminal 'goal or overall plan' have persisted without fundamental alteration, notwithstanding variations in personnel and their roles."); United States v. Kelley, 849 F.2d 999, 1003 (6th Cir. 1988)(single conspiracy can be found even where "the cast of characters changed over the course of the enterprise"); United States v. Nasse, 432 F.2d 1293 (7th Cir. 1970); United States v. Sepulvedam, 15 F.3d 1161, 1191 (1st Cir. 1993)("in a unitary conspiracy it is not necessary that the membership remain static") (citing United States v. Perholtz, 842 F.2d 343, 364 (D.C. Cir. 1988)); United States v. Bryant, 364 F.2d 598, 603 (4th Cir. 1966)("The addition of new members to a conspiracy or the withdrawal of old ones from it does not change the status of the other conspirators.") (quoting Poliafico v. United States, 237 F. 2d 97, 104 (6th Cir. 1956)); United States v. Shorter, 54 F.3d 1248 (7th Cir. 1995).

[56] See U.S. PCL, p. 11 and n.7. See also United States v. Perholtz, 842 F.2d 343, 364 (D.C. Cir. 1988)("The enterprise may exist even if its membership changes over time, or if certain defendants are found by the jury not to have been members at any time."); United States v. Hewes, 729 F.2d 1302, 1311-1312, 1316-1317 (11th Cir. 1984)("The law does not require all members of the RICO enterprise to have maintained their association with it throughout the enterprise's life. . . ."); United States v. Weinstein, 762 F.2d 1522, 1537 n.13 (11th Cir. 1985).

also U.S. PFF § I ¶¶ 518-534. Several entities, including various international committees and organizations, remain in existence, many of which perform functions comparable to those undertaken by TI and CTR. See U.S. PCL, pp. 15-18; U.S. PFF § I.H.(3). Moreover, as more fully elaborated in the United States' Preliminary Proposed Findings of Fact and Conclusions of Law, Defendants have continued to commit various acts in furtherance of their fraudulent scheme and in furtherance of the affairs of the conspiracy and Enterprise. See U.S. PCL, pp. 86-92 and U.S. PFF § VIII.

Even assuming, arguendo, that other Defendants and other persons and entities did not assume the functions that TI and CTR performed, this would not in any way eliminate liability. See, e.g., United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) (when allegedly illegal trade association was dissolved before trial, action for injunction not moot); see also United States v. W.T. Grant Co., 345 U.S. 629 (1953) (resignation from boards of directors after complaint filed would not moot antitrust action challenging anticompetitive effect of interlocking directorships).[57] See also infra § XII and U.S. PCL, pp. 82-86.

Moreover, even if the Court were to decide not to order an injunction against TI or CTR governing future conduct, the Court would (and should) still order disgorgement against these two entities. As described more fully in the United States' Proposed Conclusions of Law, the

[57] Additionally, Defendants' relationship in participating in the activities of CTR and TI, even though such entities are engaged in dissolution, provides valid evidence of the continuing conspiracy and Enterprise between the Joint Defendants. See, e.g., American Tobacco Co. v. United States, 147 F.2d 93, 119 (6th Cir. 1944) (in criminal prosecution under Sherman Act, evidence showing relation of defendant corporations to former dissolved corporation of which such corporations had been a part was admissible to throw light on subsequent offenses, acts and practices charged, and whether such relation threw any light on offenses was for jury) aff'd, 328 U.S. 781 (1946).

United States is entitled to disgorgement independent of its entitlement to an injunction. See U.S. PCL § III.C, pp. 92-93; Interstate Commerce Comm'n v. B&T Transp. Co., 613 F.2d 1182, 1183 (1st Cir. 1980); ABC Int'l Traders, Inc. v. Matsushita Electric Corp. of America, 931 P.2d 290, 304 (Cal. 1997). This disgorgement is jointly and severally assessed against all Defendants. See supra § IV and U.S. PCL, p. 104 & n.86; see also Superintendent of Ins. of State of N.Y. v. Freedman, 443 F. Supp. 628 (S.D.N.Y.1977) (Under New York law, directors and coconspirators who willingly and knowingly participate in conspiracy to defraud corporation may be held jointly and severally liable, notwithstanding amount of any direct benefit conferred upon them through fraudulent transaction).

Thus, the respective dissolutions of TI and CTR do not affect Defendants' liability. Under Southern Pacific Co. v. Interstate Commerce Comm'n, 219 U.S. 433, 452 (1911), even if an issue were moot, the controversy is still alive to determine the financial liability. This is especially true on a matter of public interest. See also Trans-Missouri, 166 U.S. at 309 (even where association has been dissolved, "there has been no extinguishment of the rights . . . of the public, the enforcement of which the government has endeavored to procure . . . .").

2. Additionally, although presently engaged in corporate dissolution, both CTR and TI remain subject to suit under state law. Pursuant to Fed. R. Civ. P. 17(b), "[t]he capacity of a corporation to sue or be sued shall be determined by the law under which it was organized."

Under the law of New York (the state of incorporation for both TI and CTR), dissolving corporations are still subject to suit. Even if a corporation is dissolved prior to the commencement of an action, this does not serve to bar the action. See, e.g., Bouhayer for Benefit of Gregouar Food Specialties, Inc. v. Georgalis, 645 N.Y.S.2d 1008 (N.Y. Sup. 1996); Wells v.

Ronning, 702 N.Y.S.2d 718 (N.Y.A.D. 3 Dept. 2000) (Corporation continues to exist, while undergoing dissolution, for so long as is necessary to satisfy its debts and it may sue or be sued until its business affairs are fully adjusted); Harris v. Stony Clove Lake Acres, Inc., 633 N.Y.S.2d 691 (N.Y.A.D. 3 Dept. 1995) (corporation, dissolved by Secretary of State, may defend foreclosure action relating to its corporate assets); Briere v. Barbera, 558 N.Y.S.2d 278 (N.Y.A.D. 3 Dept. 1990); Independent Investor Protective League v. Time, Inc., 406 N.E.2d 486 (N.Y. 1980) (corporation continues to exist as legal entity after dissolution, at least for purposes of actions and proceedings); 60 Columbia St. v. Leofreed Realty Corp., 110 N.Y.S.2d 417 (N.Y. Sup. 1952) (corporation, though dissolved, exists for purpose of paying, satisfying and discharging existing liabilities or obligations, collecting and distributing its assets and doing all acts required to adjust and wind up its business and affairs and it may sue and be sued in its corporate name); Feneck v. Murdock, 181 N.Y.S.2d 441 (N.Y. Sup. 1958) (mere filing of a certificate of dissolution does not fully dissolve an existent corporation; it must first lawfully dispose of its assets and do all other acts required to adjust and wind up its business and affairs, and it may sue and be sued in its corporate name).[58]

The same is true for a dissolved corporation's criminal liability because "[u]nder New York law, a dissolution . . . of a corporation will not preclude the assessment of criminal liability against such malefactor corporation." United States v. Stone, 452 F.2d 42, 47 (8th Cir. 1971) (citing cases); United States v. Cigarette Merchandisers Ass'n, 136 F. Supp. 214, 217 (S.D.N.Y. 1955) (noting under New York Stock Corporation Law dissolution provisions the "clear public

[58] Similarly, neither entity has contested their capacity to be sued; accordingly, even if such a defense had been viable, it is now waived. See Erljur Associates v. Weissman, 520 N.Y.S.2d 798 (N.Y.A.D. 2 Dept. 1987).

policy of the state [of New York] with respect to a dissolved or consolidated corporation is that it shall, for a determined period beyond its dissolution, be entitled to pursue its rights and also to remain suable for its debts and obligations, that **the public purpose also contemplates the right of the community to vindicate any charge against the corporation for crimes it may have committed prior to dissolution.** And unless the legislative purpose to abate a criminal prosecution is clear and unequivocal, the public policy of the state to hold a corporation liable for acts committed during its existence should not be defeated by dialectical definitions which serve to discriminate against the community at large." (emphasis added)); United States v. Brakes, Inc., 157 F. Supp. 916, 918 (S.D.N.Y. 1958) (same: rejecting defendant's contention that its dissolution "sweeps away its liability to criminal prosecution."); People v. Pymm Thermometer Corp., 591 N.Y.S.2d 459, 460 (N.Y.A.D. 2nd Dept. 1992) ("we reject Pymm's argument that any prosecution of it abated upon its dissolution, in view of New York's strong public policy in favor of maintaining corporate liability beyond dissolution."); United States v. Mobile Materials, Inc., 776 F.2d 1476, 1480-81 (10th Cir. 1985) (noting public policy reasons for holding a dissolved corporation subject to criminal liability); see also Melrose Distillers, Inc. v. United States, 359 U.S. 271, 274 (1959)(applying Maryland and Delaware laws, and noting that dissolved corporations had become divisions of a new corporation under the same ultimate ownership: "[i]n this situation there is no more reason for allowing them to escape criminal penalties than damages in civil suits.").

Indeed, even if TI and CTR were immune from most other lawsuits brought by other litigants, New York's dissolution statute covering nonprofit corporations **expressly** provides that suits brought by the United States are not precluded. See McKinney's Not-For-Profit

Corporation Law § 1007(c).[59] Moreover, the terms of their respective dissolution agreements specifically anticipate that these two entities may be subject to suit for their misconduct.[60]

Accordingly, for several reasons, the dissolution of TI and CTR cannot serve to "sweep away [their] liability," United States v. Brakes, Inc., 157 F. Supp. 916, 918 (S.D.N.Y. 1958), and entitle them to avoid suit. In short, and in the words of one court:

> It would be contrary to sound public policy to permit a defendant charged with criminal conduct to foreclose the vindication of public rights by its voluntary action. **Dissolution should not work absolution** unless the legislative intent is clear beyond question.

Cigarette Merchandisers Ass'n, 136 F. Supp. at 217 (emphasis added).

3. Almost in passing, Defendants next raise the specter of the "needless[] disrupt[ion] of

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[59] NY Not Prof Corp. Law Subsection 1007(c) provides: "Notwithstanding this section and section 1008, tax claims and other claims of this state and of the United States shall not be required to be filed under those sections, and such claims shall not be barred because not so filed, and distribution of the assets of the corporation, or any part thereof, may be deferred until determination of any such claims."

Various courts have upheld civil suits brought by the United States against dissolved corporations. See, e.g., United States v. High Country Broadcasting Co., 3 F.3d 1244 (9th Cir. 1993) (Arizona law: "the United States' claim survives the corporation's dissolution.").

[60] In that regard, paragraph 7 of the Dissolution Order regarding TI provides: "This Order and dissolution of TI pursuant to the MSA shall not alter, interfere with or otherwise effect in any way TI's right or ability to continue, after the winding up of its other activities, to conduct litigation-related activities as provided in the Plan in connection with the defense or lawsuits that are pending or threatened now or that are brought, pending or threatened in the future, and to act to protect any interests that TI considers to be significant to the defense of such lawsuits, pursuant to the provisions of the N-PCL and as set forth in Section 5 of the Plan." Bates No. TI31113188-3192.

Likewise, paragraph 10 of the Dissolution Order regarding CTR provides: "This Order and the non-judicial dissolution of CTR shall not alter, interfere with or otherwise affect in any way CTR's right or ability to continue, after the winding up of its other activities, to conduct litigation-related activities in connection with the defense of lawsuits that are pending or threatened now or that are brought or pending in the future, and to act to protect any interests that CTR considers to be significant to the defense of such lawsuits, pursuant to the provisions of the N-PCL and as set forth in Section 6 of the Plan." Bates No. 70005157-5161.

state efforts to establish coherent policy in an area of comprehensive state regulation," and argue that abstention should preclude this Court's exercise of jurisdiction pursuant to Burford v. Sun Oil Co., 319 U.S. 315 (1943). Remarkably, although such abstention is discretionary, see Burford, 319 U.S. at 317,[61] Defendants suggest that "this Court **must** abstain under the doctrine first articulated in Burford v. Sun Oil, 319 U.S. 315 (1943)." See JD. PFF, p. 905, ¶ 2220 (emphasis added).

Abstention is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it" applicable only in "exceptional circumstances." County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959); see also New Orleans Pub. Serv., Inc. v. City Council of New Orleans, 491 U.S. 350, 359 (1989) ("NOPSI") (abstention is "the exception, not the rule"); Fragoso v. Lopez, 991 F.2d 878, 882 (1st Cir. 1993).

Defendants' abstention argument fails on several fronts. First, as noted supra, dissolved and dissolving corporations are still subject to suit under New York state law, the state of incorporation for both TI and CTR. Thus, the instant litigation is not only authorized under state law, but in fact is **explicitly anticipated** in the specific terms of dissolution for both entities. Second, Defendants fail to identify, much less support, any state interest or policy that would be frustrated by this Court's adjudication of a federal statute for a nationwide scheme to defraud. See, e.g., NOPSI, 491 U.S. at 361 (Burford abstention inappropriate because the case did "not involve a state-law claim, nor even an assertion that the federal claims [were] 'in any way entangled in a skein of state law that must be untangled before the federal case can proceed.'")

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[61] See also Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 728 (1996) (Burford abstention "derives from the discretion historically enjoyed by courts of equity.").

(quoting McNeese v. Board of Ed. for Community Unit School Dist. 187, 373 U.S. 668, 674 (1963)). Indeed, the statutes involved in this case – the federal mail and wire fraud statutes, and the RICO statute – are creatures of federal law, which makes abstention not only unwarranted, but inappropriate. See, e.g., Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 (1983) ("the presence of federal-law issues must always be a major consideration weighing against surrender" of federal jurisdiction); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 815 n.21 (1976) ("Indeed, the presence of a federal basis for jurisdiction may raise the level of justification needed for abstention."); Grode v. Mutual Fire, Marine & Inland Ins. Co., 8 F.3d 953, 960 (3d Cir. 1993) ("Abstention is also inappropriate in this case because a federal issue is involved which gave the district court independent federal jurisdiction."); see also Izzo v. Borough of River Edge, 843 F.2d 765, 768 (3d Cir. 1988).[62]

Moreover, **none** of the United States' requested relief serves to modify, frustrate, or hinder TI's or CTR's dissolution under state law.[63] Defendants point to no state interest, no state

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[62] Indeed, the narrow category of abstention cases relating to corporate dissolution involve situations where federal courts consider whether to dissolve a corporation based on a cause of action under state law, or to remand such an action to state court. See, e.g., In re English Seafood (USA) Inc., 743 F. Supp. 281 (D. Del. 1990) (remanding action to dissolve the corporation under Delaware General Corporation Law § 293 due to deadlock back to state court under abstention principles).

[63] Additionally, the existence of New York's state regime for dissolution **itself** cannot serve as the premise for federal court abstention, for two reasons. First, "[w]hile Burford is concerned with protecting complex state administrative processes from undue federal interferences, it does not require abstention whenever there exists a process, or even in all cases where there is a potential for conflict with a state regulatory law or policy." NOPSI, 491 U.S. at 362. Thus, "NOPSI makes clear that Burford abstention requires more than a desire to avoid every inconvenience to, or disruption of, a state's regulatory systems. Otherwise, abstention would be proper 'in any instance where a matter was within an administrative body's jurisdiction." Fragoso v. Lopez, 991 F.2d 878, 885 (1st Cir. 1993)(citations omitted). Second, as (continued...)

policy, no "unsettled" area of state law, or any other state concern that might be affected by this Court's exercise of jurisdiction.

Third, this is quite unlike a situation where a federal court might refrain from dissolving a corporation based on state law, in favor of remanding the action to the appropriate state forum. See English Seafood, supra. Rather, consideration of abstention in the instant case – a federal court exercising federal jurisdiction over violations of federal statutes – is both illogical and inappropriate. Indeed, abstention in the instant case would wholly undermine Congress' purpose. As the Seventh Circuit recently held:

> [W]e note that the Supreme Court has recently stressed that the federal courts have a strict duty to exercise the jurisdiction conferred upon them by Congress. . . . For this reason, the doctrine of abstention is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it" and may be invoked only in those "exceptional circumstances" in which surrendering jurisdiction "would clearly serve an important countervailing interest."

International College of Surgeons v. City of Chicago, 153 F.3d 356, 360 (7th Cir. 1998) (citations to Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996) and County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959) omitted).

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[63](...continued)
noted supra, the New York statute specifically envisions (and permits) suits brought by the United States. If anything, the mere existence of New York's well-established statutory framework governing the dissolution of TI and CTR eviscerates Defendants' Burford argument, because "Burford abstention is rarely, if ever, appropriate when 'the state law to be applied appears to be settled.'" See International College of Surgeons v. City of Chicago, 153 F.3d 356, 362 (7th Cir. 1998) (citing Colorado River, 424 U.S. at 815).

VII

DEFENDANTS' PUBLIC STATEMENTS HAVE BEEN INTEGRAL TO THE SCHEME TO DEFRAUD AND ARE NOT PROTECTED BY THE FIRST AMENDMENT

Defendants claim that their innumerable public statements cannot constitute violations of the mail and wire fraud statutes because they were "good-faith" expressions of opinion or belief and are protected by the First Amendment. See JD. PFF, pp. 848-863. Defendants are incorrect as a matter of law and fact. In its Preliminary Proposed Findings of Fact, the United States presented overwhelming evidence that Defendants' statements were false, misleading, and deceptive in furtherance of a scheme to defraud. As a result, the labels that Defendants now attach to these statements – attempting to cast the public communications as political speech, commercial speech, or expressions of scientific opinion – are wholly irrelevant. False, misleading, or deceptive speech in furtherance of a scheme to defraud receives no First Amendment protection.

A. The First Amendment Does Not Immunize Speech That Is Integral To Unlawful Activity

Defendants endeavor to cast all of their public statements as protected speech, citing cases that concern either fully protected expression of opinion on issues of public concern or commercial speech that receives a lesser degree of First Amendment protection. See JD. PFF, pp. 850-53. However, Defendants do not cite to a single civil or criminal case in which the First Amendment has been held to be a legitimate defense to a fraud-based claim where the speech at issue was integral to the fraudulent conduct, as is the case here. That is because the Supreme Court has made it clear that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated,

evidenced, or carried out by means of language, either spoken, written, or printed." See, e.g., Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)); Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (holding that no First Amendment protection is afforded speech which amounts to incitement of imminent unlawful action).[64]

"[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).[65] Consistent with this principle, the

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[64] See also National Organization for Women, et al. v. Operation Rescue, 37 F.3d 646, 655-56 (D.C. Cir. 1994) (noting that provision of injunction prohibiting "directing, aiding or abetting illegal trespasses or blockades" is "unproblematic" from a First Amendment perspective and collecting cases) (internal citations omitted); United States v. Varani, 435 F.2d 758, 762 (6th Cir. 1970) (upholding conviction for 26 U.S.C. § 7212, which prohibits attempts to interfere with administration of internal revenue laws, against First Amendment attack, because "speech is not protected by the First Amendment when it is the very vehicle of the crime itself"); United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1982), cert. denied, 476 U.S. 1120 (1986) (noting that "where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone"); United States v. Barnett, 667 F.2d 835, 842 (9th Cir. 1982) ("The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose."); United States v. Lincoln, 589 F.2d 379, 382 (8th Cir. 1979) (upholding conviction for mailing threatening communications over First Amendment challenge); United States v. Riggs, 743 F. Supp. 556, 559-61 (N.D. Ill. 1990); United States v. Kufrovich, 997 F. Supp. 246, 254 (D. Conn. 1997) (collecting cases); New York v. Ferber, 458 U.S. 747 (1982) (finding a New York state statute restricting the promotion of child sexual acts constitutional over a First Amendment challenge).

[65] As noted below, and in the U.S. PCL, pp. 40-42, the mail and wire fraud statutes prohibit any scheme intended to defraud. Thus, deceptive or overreaching conduct within the scope of the mail and wire fraud statutes includes literally true statements, half-truths and material omissions as well as affirmative false statements. See, e.g., Brontston v. United States, 409 U.S. 352, 358 n.4 (1973); Donaldson v. Read Magazine, Inc., 333 U.S. 178, 188-89 (1948) (communications "as a whole may be completely misleading although every sentence separately (continued...)

Supreme Court and lower courts have repeatedly recognized that the First Amendment is no bar to vigorous enforcement of antifraud laws. See, e.g., Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980) (noting that "[f]raudulent misrepresentations can be prohibited" and citing approvingly to village statute prohibiting fraudulent solicitations); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) ("The State may, and does, prohibit fraud directly."); Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 800 (1988) ("the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements."); Donaldson v. Read Magazine, Inc., 333 U.S. 178, 190 & n.2 (1948) (governmental power to enact laws protecting people against fraud "has always been recognized in this country and is firmly established," and rejecting notion that "freedom of speech . . . include[s] complete freedom, uncontrollable by Congress, to use the mails for perpetration of swindling schemes"); Cantwell v. Connecticut, 310 U.S. 296, 306 (1940); Schneider v. State, 308 U.S. 147, 164 (1939) (overturning an ordinance that gave police impermissible discretion to determine prospectively who could distribute information door-to-door, while making clear that "[f]rauds may be denounced as offenses and punished by law."); Lowe v. SEC, 472 U.S. 181, 225 (1985) (White, J., concurring) ("[T]here is no suggestion that the application of the antifraud provisions of the [SEC] Act to require investment advisory publishers to disclose material facts would present serious First Amendment difficulties.") (citations omitted); Commodity Trend Service, Inc. v.

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[65](...continued)
considered is literally true. This may be because things are omitted that should be said, or because [they] are composed or purposefully printed in such way as to mislead."); Equitable Life Ins. Co. of Iowa v. Halsey, Stuart & Co., 312 U.S. 410, 426 (1941); see also U.S. PCL, pp. 40-42, n.32.

CFTC, 233 F.3d 981, 992 (7th Cir. 2000) (rejecting First Amendment challenge to antifraud provisions of Commodity Exchange Act, 7 U.S.C. § 6o(1)(A), and implementing regulation, 17 C.F.R. § 4.41); CFTC v. Vartuli, 228 F.3d 94, 110 (2d Cir. 2000); R&W Technical Servs. v. CFTC, 205 F.3d 165, 175 (5th Cir. 2000) ("[T]he CEA [Commodity Exchange Act] can impose liability . . . for violations of the CEA's antifraud provisions, since liability for fraud would not run afoul of the First Amendment."); Freeman, 761 F.2d 549 (rejecting need to give First Amendment defense instruction for certain violations of the antifraud provisions of the tax code, 26 U.S.C. § 7206).[66] This rule is unsurprising, since fraudulent schemes inevitably involve some form of speech or communication.[67] If part of a scheme to defraud, the type or category of speech at issue is simply irrelevant. "Laws directly punishing fraudulent speech survive constitutional scrutiny even where applied to pure, fully protected speech." Commodity Trend Service, Inc. v. Commodities Futures Trading Comm'n, 233 F.3d 981, 992 (7th Cir. 2000) (citations omitted).

Indeed, in cases involving the same mail and wire fraud statutes that underlie Defendants' racketeering activity in this case, the Supreme Court and lower courts have rejected the contention that the First Amendment is a bar to liability, finding that the First Amendment is not implicated simply because the fraudulent scheme involved speech. See Donaldson, 333 U.S. at

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[66] While the United States "is not limited only to explicit antifraud measures to prevent its citizens from being defrauded; certain other narrowly tailored measures with a direct relationship to preventing fraud may be used as well," the mail and wire fraud statutes on which Defendants' RICO liability rests are "explicit antifraud" laws. See Commodity Trend Service, Inc. v. CFTC, 233 F.3d 981, 992 (7th Cir. 2000).

[67] Indeed, the mail fraud statute itself refers to "false or fraudulent pretenses, representations, or promises," all actions that depend upon communication by the wrongdoer. See 18 U.S.C. § 1341.

189-92; United States v. Ballard, 322 U.S. 78, 84 (1944) (approving district court's jury instruction to decide whether defendants convicted of mail fraud for soliciting funds for a claimed religious movement genuinely held their asserted religious beliefs); United States v. Rowlee, 899 F.2d 1275, 1278 (2d Cir. 1990) ("[S]peech is not protected by the First Amendment when it is the very vehicle of the crime itself."); United States v. Hildebrand, 152 F.3d 756, 765 (8th Cir.), cert. denied, 525 U.S. 1035 (1998) (finding no error in district court's refusal to give First Amendment instruction in mail fraud prosecution for defendants' activities in fraudulent claim-filing business); United States v. DeFusco, 930 F.2d 413, 415 (5th Cir. 1991), cert. denied, 502 U.S. 885 (1991) (rejecting First Amendment challenge to convictions for mail fraud and conspiracy to commit mail fraud because defendant's fraudulent publishing activities were misleading commercial speech); United States v. Rasheed, 663 F.2d 843 (9th Cir. 1981); In re Grand Jury Matter, Gronowicz, 764 F.2d 983, 988 (3d Cir. 1985), cert. denied sub nom., Gronowicz v. United States, 474 U.S. 1055 (1986); Riggs, 743 F. Supp. at 559-560.[68]

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[68] In scores of cases, courts have upheld convictions under the mail and wire fraud statutes where the scheme to defraud was predicated in whole or in part on false or misleading advertising statements and marketing practices analogous to Defendants' conduct here. See, e.g., Blanton v. United States, 213 F. 320, 325 (8th Cir. 1914) (fraudulent advertisements for the defendant's scheme to sell worthless instruments passed off as genuine soldier's script); United States v. Pike, 158 F.2d 46, 47 (7th Cir. 1946)(fraudulent advertisements regarding mail-order seed business); Crooks v. United States, 179 F.2d 304 (4th Cir. 1950) (per curiam) (fraudulent newspaper advertisements sent through the mails in furtherance of a fraudulent work-at-home scheme); United States v. Sylvanus, 192 F.2d 96, 103-106 (7th Cir. 1951) (mail fraud conviction based on misleading letters and advertisements); United States v. Owen, 231 F.2d 831, 832 (7th Cir. 1956)(fraudulent advertisements for the defendant's mail-order plant business); United States v. Pearlstein, 576 F.2d 531, 536 (3d Cir. 1978) ("The most crucial evidence of the fraudulent nature of the overall [mail fraud] scheme lies in the false and misleading statements included in the [defendant's company's] promotional material."). See also United States v. Kyle, 257 F.2d 559, 561 (2d Cir. 1958); Sonntag v. United States, 267 F.2d 820, 821 (9th Cir. 1959) (per curiam); United States v. Baren, 305 F.2d 527, 528-29 (2d Cir. 1962); Babson v. United

(continued...)

Defendants wholly ignore this entire body of caselaw.

As explained in more detail below, above all else, Defendants' speech has been the primary means for executing the scheme to defraud underlying the mail and wire fraud activities alleged; therefore, **it is speech that is not cloaked with any constitutional protection**. Accordingly, Defendants are liable for all conduct in furtherance of its fraudulent scheme, including the publication of false and misleading statements in many different forums.

B. Even if Defendants' Public Statements at Issue Were Not Part of a Scheme to Defraud, They Constitute At Best Unlawful, Misleading Commercial Speech Not Afforded Constitutional Protection

As discussed above, Defendants' use of public communications to effect their scheme to defraud strips such communications of any First Amendment protection. Even if, contrary to fact, Defendants' statements were somehow considered not part of their fraudulent scheme, Defendants' public statements, press releases, pamphlets, and advertisements constitute commercial speech that would not receive any protection under the First Amendment because they were and are false and misleading.

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[68](...continued)
States, 330 F.2d 662, 662-64 (9th Cir. 1964); United States v. Press, 336 F.2d 1003, 1006 (2d Cir. 1964); United States v. Rosenblum, 339 F.2d 473, 474 (2d Cir. 1964); Atkinson v. United States, 344 F.2d 97, 98-100 (8th Cir. 1965); United States v. Thaw, 353 F.2d 581, 582-84 (4th Cir. 1965); United States v. Hopkins, 357 F.2d 14, 16 (6th Cir. 1966); United States v. Andreadis, 366 F.2d 423, 428-33 (2d Cir. 1966); Lustiger v. United States, 386 F.2d 132, 135 (9th Cir. 1967); United States v. Grow, 394 F.2d 182, 202-203 (4th Cir. 1968); United States v. Sheiner, 410 F.2d 337, 341 (2d Cir. 1969); United States v. Regent Office Supply Co., 421 F.2d 1174, 1179-80 (2d Cir. 1970); United States v. Caine, 441 F.2d 454, 455-56 (2d Cir. 1971); United States v. Uhrig, 443 F.2d 239, 241 (7th Cir. 1971); United States v. Netterville, 553 F.2d 903, 909-10 (5th Cir. 1977); United States v. Themy, 624 F.2d 963, 967-68 (10th Cir. 1980); United States v. Serian, 895 F.2d 432, 433-34 (8th Cir. 1990); United States v. Hawkins, 905 F.2d 1489, 1497 (11th Cir. 1990); United States v. Queen, 4 F.3d 925, 926 (10th Cir. 1993); United States v. Pirello, 255 F.3d 728, 730-31 (9th Cir. 2000), cert. denied, 534 U.S. 1034 (2001).

Contrary to Defendants' suggestions, Defendants' public communications about such matters as smoking and health, addiction, marketing to youth, and their research efforts – either by individual companies or collectively through the Tobacco Institute or TIRC/CTR – constitute at most commercial speech, not speech on matters of public controversy that would be entitled to the highest level of First Amendment protection. In Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), the Supreme Court articulated a flexible test for determining whether speech was commercial in nature. Among the factors the Court weighed were: the format of the communication and whether it proposed a commercial transaction; whether the communication referred to a particular product; and the economic motivation of the speaker. 463 U.S. at 66-67. The Court cautioned that the absence of any one of the factors did not remove a communication from the realm of commercial speech, and that commercial speech could concern matters of public importance. See id. at 67-68, 68 n.14. Further, the Court also noted that a communication that refers to a product only generically "does not . . . remove it from the realm of commercial speech. . . . [A] trade association may make statements about a product without reference to specific brand names." Id. at 66 n.13 (citing National Commission on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977)).[69]

[69] Defendants' contention that certain of their statements are not commercial speech merely because they do not explicitly "propose a commercial transaction" rests upon a crabbed view of what constitutes commercial speech. The cases Defendants cite are inapposite because, unlike here, the speakers in those cases were third party compilers and disseminators of information, not the products' manufacturers or their agents as is the case here. For example, in Commodity Trend Service, Inc. v. Commodities Futures Trading Comm'n, 149 F.3d 679 (7th Cir. 1998), on remand, 1999 WL 965962 (N.D. Ill. Sept. 29, 1999), aff'd, 233 F.3d 981 (7th Cir. 2000), the Court found that a financial publication providing "impersonal evaluations and recommendations regarding available trading options" was not commercial speech. See 149 F.3d at 686; Taucher v. Born, 53 F. Supp. 2d 464, 480-81 (D.D.C. 1999) (finding that publications (continued...)

The issue advertisements, press releases, pamphlets, and other publications developed and disseminated by the Defendant Cigarette Companies or TI in this case are similar to statements that were deemed commercial speech in National Commission on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1978) ("NCEN II"). In that case, the Seventh Circuit, over a First Amendment challenge, upheld the propriety of an injunction that prohibited false and misleading advertisements paid for by NCEN, which was a private, not-for-profit corporation organized to represent associations of egg producers. 570 F.2d at 161-63. NCEN had issued advertisements that denied the existence of scientific evidence linking egg consumption to increased risk of heart disease and heart attacks. In an initial interlocutory appeal, the court had upheld the district court's finding that "NCEN was organized for the profit of the egg industry, even though it pursues that profit indirectly. The clear purpose of the statements in issue in this case is to encourage the consumption of eggs by allaying fears the public may have about their high cholesterol content." FTC v. National Commission on Egg Nutrition, 517 F.2d 485, 488 (7th Cir. 1977) ("NCEN I"). There, the trade association's statements qualified as advertisements because "they were representations concerning the qualities of a product and promoting its purchase and use." Id. In NCEN II, the Court noted that "[t]he nature of the communication is not changed when a group of sellers joins in advertising their common product." NCEN II, 570 F.2d at 163. Similarly here, the evidence in the United States' proposed fact findings

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[69](...continued)
providing "impersonal" commodity trading information was not commercial speech, relying on Commodity Trend Service). The final case cited in support of Defendants' claim that their statements are not commercial speech, Johnson v. R.J. Reynolds Tobacco Co., No. H-86-1343, 1987 WL 860608 (S.D. Tex. Apr. 2, 1987), is a one-page order without explanation or citation to the grounds or reasoning for the court's conclusion, and says nothing about the content or nature of the speech at issue.

demonstrates that Defendants' statements, such as those denying that smoking had been scientifically proven to cause disease, denying that smoking and nicotine delivered by cigarettes are addictive, and denying that the manufacturers intentionally market their products to attract underage consumers, were intended to "encourage the consumption of [cigarettes] by allaying fears the public may have about" their role in causing disease or the cigarette manufacturers' efforts to target youth smokers for profit. See, e.g., U.S. PFF § IV.A. at ¶ 165. And, just as noted in Bolger and the NCEN decisions, the commercial nature of Defendants' statements is not altered because certain of them were issued by TI, an entity jointly created and funded to promote the tobacco industry's interests.

Commercial speech that is misleading or related to unlawful activity is not guaranteed any protection under the First Amendment. See, e.g., Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 563-64 (1980); Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 527 U.S. 173, 183 (1999); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Vidal Sassoon, Inc. v. Bristol-Meyers Co., 661 F.2d 272, 276 n.8 (2d Cir. 1981) (noting that the "Lanham Act's content-neutral prohibition of false and misleading advertising does not arouse First Amendment concerns that justify alteration of the normal standard for preliminary injunctive relief"); Washington Legal Foundation v. Henney, 56 F. Supp. 2d. 81 (D.D.C. 1999), vacated in part, 202 F.3d 331 (D.C. Cir. 2000). For example, in its seminal Central Hudson decision, the Supreme Court plainly stated that the First Amendment does not protect commercial speech that is "more likely to deceive the public than inform it." See Central Hudson, 447 U.S. at 563.

As briefly discussed further below, the United States' proposed fact findings present

substantial evidence that Defendants' public statements – along with much other conduct undertaken in furtherance of the scheme to defraud – were knowingly and intentionally designed to deceive and mislead. See, e.g., U.S. PFF § IV; U.S. PCL § I.F.3; see also NCEN II, 570 F.2d at 161 n.4 (rejecting NCEN's contention that its statements would be recognized by readers as "merely an expression of opinion" and stating, "It is well established, and critical to the notion of preventing false advertising, that where an advertisement conveys more than one meaning, one of which is false, the advertiser is liable for the misleading variation [citations omitted] . . . . [A]n otherwise false advertisement is not rendered acceptable merely because one possible interpretation of it is not untrue."). Accordingly, Defendants' statements – even if improperly analyzed as commercial speech rather than as conduct central to the scheme to defraud – receive no constitutional protection because they were intended to mislead the public as to the health effects of their products and the nature of their conduct in order to maximize sales of cigarettes and avoid adverse verdicts in smoking and health litigation.

C. Defendants' Claims That Their Public Statements Were "Good Faith" Expressions of Opinion Are False as a Matter of Fact

Defendants cite to many cases that reiterate the well-established principle that liability for fraud requires proof of the wrongdoer's intent. See JD. PFF, ¶¶ 2066, 2073-2074. Intent is, of course, directly relevant to Defendants' liability under RICO. Indeed, it is the proof of fraudulent intent that distinguishes speech worthy of First Amendment protection from speech that, like Defendants' public statements at issue here, properly forms the basis of liability.

Here, Defendants insist that their public statements, advertisements, and other publications reflected their "good faith" beliefs about smoking and health issues in order to claim

that they lacked the requisite unlawful intent to defraud. Whether such communications were made with intent to deceive or were made in good faith is an issue to be decided by the factfinder. See, e.g., United States v. Brown, 147 F.3d 477, 483 (6th Cir. 1998) ("the issue of fraudulent intent is an issue reserved for the trier of fact"). However, Defendants' mischaracterization of their statements as statements of "belief" in no way confers protection from liability for fraud. As the Supreme Court has noted, "expressions of 'opinion' may often imply an assertion of objective fact." Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990) (rejecting notion that allegedly defamatory statements couched as statements of opinion warrant particular First Amendment consideration); see also Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 516 (1991) (rejecting "any special test for falsity for quotations" in libel context). The Second Circuit's recognition that "[i]t would be destructive of the law of libel if a writer could escape liability . . . simply by using, explicitly or implicitly, the words 'I think'" is equally applicable to the law of mail and wire fraud. See Cianci v. New Times Publishing Co., 639 F.2d 54, 64 (2d Cir. 1980) (Friendly, J.).[70]

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[70] On this point, Defendants cite to cases that are irrelevant, that affirm the well-established principle that intent to defraud is a requisite element of liability for fraud, and/or that are wholly distinguishable based on evidence presented by the United States. A few examples are illustrative. Defendants cite to United States v. Amlani, 111 F.3d 705 (9th Cir. 1997) and Midwest Printing, Inc. v. AM Int'l, Inc., 108 F.3d 168 (8th Cir. 1997), two cases in which the defendants claimed their allegedly fraudulent statements were non-actionable "puffing" techniques of salesmanship. See JD. PFF, p. 852. Defendants' reliance on cases regarding the law of puffery is inconsistent with their contention that their public statements were scientific statements on a "product controversy" which was a "matter of public importance." Nevertheless, in Amlani, the Court simply affirmed the district court's jury instruction that "'good faith of a defendant is a complete defense to the charge of wire fraud . . . because good faith . . . is, simply, inconsistent with the intent to defraud'" and that action based on an "'opinion honestly held is not punishable'" as wire fraud. Amlani, 111 F.3d at 717-718 (upholding district court's refusal to give "puffing" instruction as unnecessary). The evidence presented by the United States in

(continued...)

Moreover, this insistence is belied by the substantial evidence to the contrary presented by the United States. To illustrate the lack of merit to Defendants' assertions, the United States briefly addresses each of the two issues on which Defendants focus to support their contentions – disease causation and addiction.

1. Causation

With respect to disease causation, Defendants – as in the public statements they cite as examples – mischaracterize both the nature of the dispute and the nature of the evidence that demonstrates that Defendants intended to mislead the public about the scientific evidence of smoking's harmful effects. The "dispute" is not, contrary to Defendants' claim, simply "about the meaning of the word 'cause.'" See JD. PFF, p. 854 ¶ 2076. The United States' claims concern Defendants' public statements – including statements that used the word "cause" – that intentionally mischaracterized the type and volume of scientific evidence supporting the

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[70](...continued)
this case overwhelmingly demonstrates that Defendants' public statements on smoking and health issues were made not because they were "honestly held" but in order to further their fraudulent scheme, and thus fail the standard articulated in Amlani. Singer v. American Psych. Ass'n, 1993 WL 307782 (S.D.N.Y 1993), is similarly distinguishable on several grounds. There, the district court held that plaintiff's complaint failed to state a civil RICO claim on multiple grounds, including the complaint's failure to allege the elements of a RICO violation based on mail or wire fraud or to establish an economic motive in the alleged racketeering acts. See Singer, 1993 WL 307782 at *6-8, *11-12. Here, unlike in Singer, the United States has adequately pleaded both a substantive RICO and a RICO conspiracy claim, see United States v. Philip Morris Inc., 116 F. Supp. 2d 131 (D.D.C. 2000), and has presented extensive evidence of Defendants' fraudulent intent and economic motive underlying Defendants' racketeering activity. As a final example, Defendants misleadingly quote Bennett Enters., Inc. v. Domino's Pizza, Inc., 794 F. Supp. 434 (D.D.C. 1992), in which the court held that a complaint failed to state a fraud claim. There, the court granted a motion to dismiss a fraud claim because the alleged fraudulent statements were "**legal conclusions and opinions** not actionable in fraud." Bennett Enters., 794 F. Supp. at 437 (emphasis added). Here, the United States' allegations and evidence in its PFF concern a wide range of Defendants' fraudulent statements and conduct, not "legal conclusions and opinions" concerning legal instruments as in Bennett Enters.

conclusions that smoking causes disease. Nevertheless, it is also true – as it must be, since every public statement, issue advertisement, and other publication necessarily utilizes words – that Defendants exploited and manipulated language to accomplish their fraudulent objectives. For example, Defendants quote from a 1979 Tobacco Institute press release, issued fifteen years after the 1964 Surgeon General's Report, that stated:

> Despite millions of dollars spent since that time [1964] both by the Government and the tobacco industry on smoking and health related research, many questions about the relationship between smoking and disease remain unanswered. Now, as in 1964, there are statistical relationships and several working hypotheses, but no definitive and final answers.
>
> Conclusion: The claim that cigarette smoking causes lung cancer has not been scientifically proven. The charge ignores basic unresolved scientific questions concerning cell types, animal experimentation, smoking patterns and lung cancer rates, dietary influence and diagnostic variations. Lung cancer is a complex disease, and a one-sided attack on cigarette smoking as the causal agent does nothing to advance the search for its cause and cure.

JD. PFF, p. 856 ¶ 2083; Racketeering Act No. 43. Like myriad industry statements about the health effects of smoking, this rests on the industry's public position – uniformly expressed from the inception of the Enterprise, see U.S. PFF § I.B(1) ¶ 16 – that a scientific conclusion about whether smoking causes disease could not be made absent "definitive and final answers" about exactly how smoking causes disease. As demonstrated below, each sentence from the TI press release contains misleading statements intended to deceive.

- "Despite millions of dollars spent since that time [1964] . . . by . . . the tobacco industry on smoking and health related research, many questions about the relationship between smoking and disease remain unanswered."

First, per the Gentleman's Agreement, the defendant manufacturers performed limited if any actual in-house biological research designed to discover the health effects of smoking. See

U.S. PFF § I.J. While it was literally true (and remains so) that "many questions about the relationship between smoking and disease remain unanswered," whether smoking was a cause of disease was not one of them – that question had been answered at least by 1964 and was repeatedly re-reaffirmed in the subsequent fifteen years. See U.S. PFF §§ IV.A.2 & IV.A.3(c), 3(e), 3(g). The sentence is also misleading because whatever research the tobacco industry performed or funded that it defined as "smoking and health related," it was not designed to answer any of the unresolved questions about the relationship between smoking and disease. The tobacco industry was well aware of this. As Lorillard's Research Director wrote in a 1974 memorandum to Curtis H. Judge, Lorillard's Chief Executive Officer:

> Historically, the joint industry funded smoking and health research programs have not been selected against specific scientific goals, but rather for purposes such as public relations, political relations, position for litigation, etc. . . . In general, these programs have provided some buffer to public and political attack of the industry, as well as background for litigious strategy.

U.S. PFF § I ¶ 520; see also U.S. PFF § IV.A. ¶ 99 (1958 report of British tobacco industry scientists stated that "the S.A.B. of T.I.R.C. is supporting almost without exception projects which are not related directly to smoking and lung cancer").

Further, Defendants' approach to its public statements on causation was intentional. Soon after the 1964 Surgeon General's Report, Philip Morris executive George Weissman wrote to chairman Joseph Cullman that, "[W]e must in the near future provide some answers which will give smokers a psychological crutch and a self-rationale to continue smoking." Among the "crutches" and "rationales" proposed to be offered to the smokers were questions of medical causation, "that more research is needed," and that there are "contradictions" and "discrepancies." See U.S. PFF § IV.A.3(f) ¶ 165. Similarly, TI recognized internally that

Defendants' approach to its public statements was a carefully chosen strategy. In 1972, an internal memorandum to TI executive Horace Kornegay stated:

> For nearly twenty years, this industry as employed a single strategy to defend itself on three major fronts – litigation, politics, and public opinion.
>
> * * *
>
> [I]t has always been a holding strategy, consisting of
>
> > – creating doubt about the health charge without actually denying it . . .
> > – encouraging objective scientific research as the only way to resolve the question of health hazard . . . .
>
> * * *
>
> As an industry, therefore, we are committed to an ill-defined middle ground which is articulated by variations on the theme that, "the case is not proved" . . . .
>
> 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.

See TIBU0001258-1261. This document recognized the value of countering publications documenting the health effects of smoking with the industry's own publication, proposing a publication that "would be a counter-Surgeon General's Report" and concluding that "best of all, [the proposed publication] would only have to been seen – not read – to be believed . . . just like the Surgeon General's report." Id. The 1979 TI statement demonstrates that the industry "holding strategy" articulated in the 1972 TI memorandum remained in full force seven years later.

- "Now, as in 1964, there are statistical relationships and several working hypotheses, but no definitive and final answers."

This statement misleadingly (1) implies that the scope and nature of scientific evidence concerning smoking's health effects was not significantly greater from that in 1964, (2) omits

information about the strength and consistency of the "statistical relationships" and falsely implies that "statistical relationships" comprise the entirety of the evidence of smoking's causal role, and (3) implies that a conclusive scientific judgment of causation could not occur absent "definitive and final answers." First, the medical and scientific community continued to research the health effects of smoking after 1964, and the evidence strengthened and expanded the evidence of smoking's harms. See, e.g., Reports of the Surgeon General on Smoking and Health of 1967, 1968, 1969, 1971, 1972, 1973, 1974, 1975, 1976, 1979; see also U.S. PFF § IV.A.3(g). Second, the statement deceptively omits any discussion of the strength, nature, and consistency of the evidence of a causal relationship that emerged from the many carefully performed extensive epidemiological studies, and falsely implies that epidemiological evidence alone supported the causal judgment. In fact, the scientific and medical communities considered all relevant evidence from many scientific disciplines – biology, chemistry, pathology, etc. – before reaching the conclusion that smoking caused disease. See U.S. PFF § IV.A.2 & 3.

- "Conclusion: The claim that cigarette smoking causes lung cancer has not been scientifically proven."

This statement was knowingly misleading when made, and rests upon Defendants' misleading use of the phrase "scientifically proven" to exclude all forms of scientific evidence indicting smoking other than a definitive explanation of the precise mechanism by which cigarette smoke causes cancer. By 1976, BATCO senior scientist S.J. Green had acknowledged in an internal memorandum that "The industry has retreated behind impossible demands for 'scientific proof'" and in 1980 BATCO internally conceded that "[i]t is simply incorrect to say, 'There is still no scientific proof that smoking causes ill-health.'" See U.S. PFF § IV.3 ¶¶ 263,

278.

By the early 1960s, Defendants internally recognized that this publicly stated position was inconsistent with the great weight of scientific evidence. Indeed, high ranking scientists of Defendants recognized that, in downplaying the legitimate role of epidemiological data in reaching a scientific conclusion of epidemiology, Defendants themselves referenced other, albeit much weaker, epidemiological data to attack the causation conclusion. In 1962, RJR scientist Alan Rodgman wrote:

> The Evidence to Date: Obviously, the amount of evidence accumulated to indict cigarette smoke as a health hazard is overwhelming. The evidence challenging this indictment is scant. **Attempts to shift the blame to other factors, e.g., air pollutants, necessitates acceptance of data similar to those denied in the cigarette smoke case.**

See U.S. PFF § IV.A. ¶ 98 (emphasis added). Similarly, British tobacco scientists who visited U.S. tobacco companies in 1958 found:

> With one exception (H.S.N. Greene) the individuals whom we met believed that smoking causes lung cancer if by 'causation' we mean any chain of events which leads finally to lung cancer and which involves smoking as an indispensable link. In the U.S.A. only Berkson, apparently, is now prepared to doubt the statistical evidence and his reasoning is nowhere thought to be sound.
>
> In their opinion T.I.R.C. has done little if anything constructive, the constantly re-iterated 'not proven' statements in the face of mounting contrary evidence has thoroughly discredited T.I.R.C., and the S.A.B. of T.I.R.C. is supporting almost without exception projects which are not related directly to smoking and lung cancer.
>
> The majority of individuals whom we met accepted that beyond all reasonable doubt cigarette smoke most probably acts as a direct though very weak carcinogen on the human lung. The opinion was given that in view of its chemical composition it would indeed be surprising if cigarette smoke were not carcinogenic. This undoubtedly represents the majority but by no means the unanimous opinion of scientists in U.S.A. These individuals advised us that although it is not possible to predict unambiguously the effect of any substance on

> man from its effect on experimental animals the generally successful use of animals in other fields as a model for man fully justifies their use in our problem.

U.S. PFF § IV.A. ¶ 99; § IV.A.3(i).

- "The charge ignores basic unresolved scientific questions concerning cell types, animal experimentation, smoking patterns and lung cancer rates, dietary influence and diagnostic variations."

For many of the reasons articulated above, this sentence is similarly false, deceptive and misleading. As noted above, the Surgeon General's reports – reflecting the overwhelming consensus in the scientific and medical communities – considered all available evidence from a variety of scientific disciplines, not simply epidemiology. See U.S. PFF § IV.A.3(c) & 3(e). The sentence further deceptively ignores the overwhelming evidence that, even accounting for many of the factors identified, the epidemiological data supporting a conclusion that smoking causes lung cancer remained robust. And, as RJR's Rodgman had noted by 1962, "Attempts to shift the blame to other factors . . . necessitates acceptance of data similar to those denied in the cigarette smoke case."

2. Addiction

Contrary to Defendants' suggestion, see JD. PFF, pp. 858-861, Defendants' own documents show that their denials of smoking's addictiveness were not based on genuine scientific disagreement, but rather carefully crafted to deceive the public, prevent product regulation, and avoid losses in smoking and health litigation. Thus, their statements contending that smoking and nicotine were not addictive were made to mislead the public in furtherance of the scheme to defraud, and exploited ambiguities in language – including but not limited to the definition of "addiction" – to accomplish their objectives. See, e.g., Nicotine in Cigarettes and

Smokeless Tobacco Is a Drug and These Products are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination, 61 Fed. Reg. 44619, 44707 (1996) (noting that in support of its "traditional definition" of addiction, "The industry cites no medical dictionary, expert panel, or scientific organization for this specific definition; the 'criteria' are instead extracted from portions of a definition developed in the 1950's and used by the editors of the 1964 Surgeon General's Report on tobacco.").

As the United States' evidence shows, from the early 1960s onward Defendants conducted extensive internal study of nicotine – as delivered by cigarettes and independently – and recognized its central role in keeping people smoking. See, e.g., U.S. PFF § IV.B(3). Yet they repeatedly expressed the need to keep from public dissemination evidence of such internal research, and of data that confirmed nicotine's addictiveness in cigarettes. See, e.g., U.S. PFF, § IV.B.(4). Representative examples of evidence include:

- A September 9, 1980 Tobacco Institute internal memorandum recognized that public acknowledgment that smoking was addictive would undermine their litigation defense that a person's decision to smoke is a "free choice": "[T]he entire matter of addiction is the most potent weapon a prosecuting attorney could have in a lung cancer/cigarette case. We can't defend continued smoking as 'free choice' if the person was 'addicted.'" See id. ¶ 623.
- In a November 29, 1977 memorandum, Philip Morris researcher Thomas Osdene stated his concerns with statements by a CTR staff member who had acknowledged that "'Opiates and nicotine may be similar in action,' 'We accept the fact that nicotine is habituating,' [and] 'There is a relationship between nicotine and the opiates.'"

Osdene expressed his "strong feeling" that with the direction CTR was taking with its research into nicotine, "we are in the process of digging our own grave," adding that he feared that "the direction of the work being taken is totally detrimental to our position and undermines the public posture we have taken to outsiders." See id. ¶ 627.

- In a November 3, 1977 memorandum, Philip Morris's Principal Scientist William Dunn described its strategy of concealing unfavorable research results. Regarding a nicotine study to be undertaken by scientist Carolyn Levy, Dunn stated, "If she is able to demonstrate, as she anticipates, no withdrawal effects of nicotine, we will want to pursue this with some vigor. If, however, the results with nicotine are similar to those gotten with morphine and caffeine, we will want to bury it." See id. ¶ 626.
- In March 1980, Dunn produced an internal memorandum discussing Philip Morris research concerning the psychopharmacology of nicotine. The research was "aimed at understanding that specific action of nicotine which causes the smoker to repeatedly introduce nicotine into his body." The internal memorandum noted that such research was "a highly vexatious topic" that company lawyers did not want to become public because nicotine's drug properties, if known, would support regulation of tobacco by the federal Food and Drug Administration ("FDA"). Consequently, the memorandum observed that while Philip Morris would continue its research program "to study the drug nicotine, we must not be visible about it. . . . Our attorneys . . . will likely continue to insist on a clandestine effort in order to keep nicotine the drug in low profile." See id. ¶ 628; see also id. ¶¶ 630-641 (detailing suppression of animal

research by Philip Morris scientists Victor DeNoble and Paul Mele that confirmed nicotine's ability to induce self-administration, one hallmark of a dependence-producing drug).

- At a February 16, 1983 meeting of tobacco company directors, attended by Manny Bourlas of Philip Morris, L.C.E.F. Blackman, a BATCo board member and former head of research, and representatives from several European tobacco companies, the participants discussed how to respond to the impending Independent Scientific Committee on Smoking and Health ("ISC") Report. The participants agreed upon several schemes for the tobacco industry to conceal scientific information and expertise from the government (and indeed, to respond to government requests by falsely stating that it had no relevant expertise), as well as to emphasize the imperative for the industry to avoid any studies of whether "nicotine either was, or was not, associated with perpetuating the smoking habit."

> 3. The effect of nicotine at the levels achieved through smoking. While animal experiments could probably be designed to study the efect [sic] of nicotine (either by itself or as 'spiked' additions) our response to the ISC should be that we have nothing to offer. The little information we have is already in the public domain, and **we have no idea as to a worthwhile research programme.**
>
> * * * *
>
> 5. The role of nicotine, at the relevant lower range of nicotine dosage, in perpetuating the smoking habit. While much information already exists in the literature (Russell, Ashton and Stepney etc) this is a particularly sensitive area for the industry. **If any future study showed that nicotine either was, or was not, associated with perpetuating the smoking habit, industry could well be called upon to reduce or eliminate nicotine from the product. (A heads we lose, tails we cannot win situation!) We must not become involved in any collaborative study with the ISC.**

See id. ¶ 649 (emphases added).

Thus, while it is indeed true that the scientific and medical communities' understanding of addiction evolved after 1964 as research yielded more information about all drugs of dependence, including nicotine – an evolution reflected in the 1988 Surgeon General's Report, which articulated a definition of addiction that represented the medical and scientific consensus – Defendants' decision was motivated by their commitment to their fraudulent scheme. Accordingly, they carefully selected a "genuinely held" scientific position that could serve their unlawful objectives.

In short, Defendants purposefully designed their fraudulent scheme with public communications – including issue ads, product advertisements, press releases, and pamphlets – as the primary mechanism of execution. As the United States' proposed factual findings convincingly demonstrate, Defendants made innumerable public statements with the knowledge that they were false, misleading, and/or contained material misrepresentations or omissions. Accordingly, Defendants' public communications – however characterized – are not protected by the First Amendment.

VIII

THE RELIEF SOUGHT BY THE UNITED STATES DOES NOT CONSTITUTE AN UNCONSTITUTIONAL PRIOR RESTRAINT OR RESTRICTION OF SPEECH

Defendants contend that certain relief sought by the United States would unconstitutionally "severely restrain" their freedom of speech. See JD. PFF, pp. 894-900. They are wrong. First, the United States does not intend to seek much of the equitable relief Defendants complain of; for example, the United States does not seek relief regarding any

warnings on cigarette packages and advertisements that would be inconsistent with any requirement imposed by any Act of Congress or any regulation duly promulgated thereunder. Second, as explained at length above, Defendants' speech has been the primary means for executing the scheme to defraud underlying the mail and wire fraud activities that form the basis for the United States' request for equitable relief. See supra § VII. An injunction prohibiting such unprotected speech does not violate the First Amendment. In addition, none of the relief sought by the United States constitutes a "prior restraint." The Supreme Court has held repeatedly that an injunction against speech will not be considered an unconstitutional prior restraint if it is issued after the finder of fact has evaluated the speech in question and determined that it is not constitutionally protected or that a substantial governmental interest exists for restraining it. See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rel., 413 U.S. 376, 390 (1973). Therefore the Court's imposition, following a trial, of an injunction prohibiting existing and continuing unlawful and/or fraudulent practices does not constitute an unconstitutional "prior restraint".

Similarly, injunctive relief requiring Defendants to make affirmative, accurate statements directly to consumers and the public concerning their past unlawful conduct and their products poses no First Amendment problems because such disclosures are necessary to correct the effects of Defendants' half-century of fraudulent conduct and false and misleading statements. Finally, even assuming arguendo that such relief implicates Defendants' First Amendment rights, the restrictions and corrective statements are nevertheless justified because the United States has a compelling interest in ensuring that Defendants do not fraudulently market cigarettes and that cigarette consumers and potential consumers are not misled as to the actual health risks of

smoking and related matters in the future. See United States v. International Brotherhood of Teamsters, 941 F.2d 1292, 1297 (2d Cir. 1991) (in civil RICO suit for equitable relief brought by the United States, holding that First Amendment rights may be curtailed to further "significant public interest" in preventing future RICO violations).[71]

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[71] See also United States v. International Brotherhood of Teamsters, 19 F.3d 816, 823-24 (2d Cir. 1994) (in civil RICO suit for equitable relief brought by the United States, holding that infringement on First Amendment right of association permitted in furtherance of compelling government interest in preventing corruption); United States v. Carson, 52 F.3d 1173, 1185 (2d Cir. 1995) (same); United States v. Private Sanitation Industry Association, 995 F.2d 375, 377 (2d Cir. 1993) (same). United States v. International Brotherhood of Teamsters, 941 F.2d 1292, 1297 (2d Cir. 1991) (disciplinary sanctions by administrator against union members for knowing associations with members of La Cosa Nostra did not violate First Amendment); United States v. Local 560 Int'l Brotherhood of Teamsters, 974 F.2d 315, 333-346 (3d Cir. 1992) (upholding permanent injunction under RICO barring union member from holding office or position or trust within union was "narrowly tailored to further the compelling governmental interest in eradicating organized crime and corruption from labor unions"); United States v. International Brotherhood of Teamsters, 708 F. Supp. 1388, 1393-94 (S.D.N.Y. 1989) (allegations in civil RICO complaint did not violate defendants' First Amendment rights to association, as allegations addressed "only to alleged violations of RICO, which are not protected by the first amendment"); United States v. International Brotherhood of Teamsters, 742 F. Supp. 94, 99-100 (S.D.N.Y. 1990), aff'd and modified in part, 931 F.2d 177 (2d Cir. 1991) (rules by court-appointed officers providing that accredited candidates for union office could have their campaign literature published in union magazine did not violate First Amendment free speech rights); id. at 103-104 (administrator's finding that union had misused membership lists in attacking court-appointed officers, government, and court by objecting to implementation of consent decree, warranting override of conditional protection against access to membership lists, did not violate First Amendment; "This finding of misuse does not infringe on the free speech rights of the IBT. While the IBT was and is free to speak on any matter concerning the Consent Decree, under labor law official union commentary may influence other statutory rights, including the right to a free election."); United States v. International Brotherhood of Teamsters, 764 F. Supp. 797, 800-801 (S.D.N.Y. 1991), aff'd, 956 F.2d 1161 (2d Cir. 1992) (IBT Independent Administrator's sanction of union official for knowing association with La Cosa Nostra figures did not violate First Amendment); see also United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548, 567 (1973) (upholding ban on political activity by union employees); Hotel & Restaurant Employees Local 54 v. Read, 597 F. Supp. 1431, 1446-51 (D. N.J.1984) (rejecting claim that New Jersey Casino Control Commission's order requiring removal of union officials based upon their organized crime associations violated First Amendment right to freedom of association), aff'd mem., 772 F.2d 893 (3d Cir.1985). See also (continued...)

A. The United States Seeks Injunctive Relief Which Would Prevent and Restrain Continuing and Future RICO Violations

Defendants err, first, by contending that their continued efforts to fraudulently market cigarettes, including to minors, or to mislead consumers as to the health risks of smoking could not constitute RICO violations because "point-of-sale and color advertising, use of logos appealing to youth, or even youth marketing generally are not predicate acts under RICO." See JD. PFF, p. 897. Once again, Defendants miss the point entirely. It is undisputed that mail and wire fraud offenses constitute RICO predicate acts. See 18 U.S.C. § 1961(1). To be sure, marketing (including advertising and other practices) designed to attract underage smokers is part and parcel of Defendants' shared goal of preserving the market for cigarettes through fraudulent means. Even as Defendants falsely deny that they intentionally target youth, Defendants are well aware that the vast majority of smokers begin smoking as minors and are lured into doing so, in part, by Defendants' marketing activities. Defendants also have spent decades falsely denying or obfuscating the health risks of smoking, and while they have recently grudgingly conceded – with attendant equivocations, half-truths, and other misleading statements – some of the health risks on their websites and in litigation, they have not taken adequate steps to inform cigarette consumers directly of the dangers of smoking and to correct for the decades of deceitful advertising and marketing practices that preceded these partial admissions. These actions were taken for the purpose of misleading consumers as to the health risks of Defendants' products in

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[71](...continued)
Alexander v. United States, 509 U.S. 544 (1993) (in criminal RICO prosecution, court-ordered forfeiture of assets used in furtherance of racketeering involving predicate acts of distributing obscene material did not constitute prior restraint on individual's freedom of speech).

order to preserve the market for cigarettes. Such fraudulent, nationwide advertising and marketing practices clearly involve the use of interstate wire transmissions and the United States mails and other carriers covered by 18 U.S.C. § 1341, and hence constitute mail and wire fraud predicate offenses in furtherance of Defendants' ongoing RICO offenses. See U.S. PCL, pp. 39-62. The United States' requested relief which would enjoin such practices would plainly serve the permissible purpose of preventing future or ongoing RICO violations.

B. The United States' Proposed Relief Does Not Constitute "Prior Restraint" of Defendants' Commercial Speech

Defendants contend that the potential injunctive relief identified by the United States enjoining certain marketing practices runs afoul of the prior restraint doctrine, and that the Court cannot determine whether speech "yet to be uttered" is deserving of First Amendment protection. See JD. PFF, pp. 894-95. This is clearly wrong. The United States' proposed restrictions cannot constitute a prior restraint because Defendants have already been engaged in the unlawful practices sought to be enjoined, and any potentially protected speech has in fact already been uttered. Nothing prevents the Court from concluding that Defendants' prior fraudulent speech enjoys no First Amendment protection and from putting an injunction in place to prohibit and prevent such deceptive, fraudulent speech and conduct in the future. To clarify a point that Defendants attempt to obscure, the relief that the United States seeks relates directly to Defendants' scheme to defraud. Defendants reiterate a truism that, in fact, the solitary act of marketing to youth does not per se constitute a predicate act under 18 U.S.C. § 1961(1). However, as detailed extensively in the United States' Proposed Findings of Fact, see generally U.S. PFF § IV.E, Defendants have engaged in, and continue to engage in, a scheme to defraud

through the use of the mails and interstate wire transmissions, which includes their fraudulent denials that they do not target the youth market. Such conduct violates the mail fraud and wire fraud statutes, which constitute predicate acts under RICO. See 18 U.S.C. § 1961(1) and cases cited infra, p. 130. In short, any possible injunctive relief pertaining to marketing to youth necessarily stems from the Court's finding that Defendants have indeed engaged in this aspect of the scheme to defraud.

"The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, **before an adequate determination** that it is unprotected by the First Amendment. . . . [Where] the order is based on a continuing course of repetitive conduct, this is not a case in which the Court is asked to speculate as to the effect of publication." Pittsburgh Press Co., 413 U.S. at 390 (emphasis added); see also SEC v. Wall Street Publishing Institute, 851 F.2d 365, 370 (D.C. Cir. 1988) ("Orders that are carefully focused, address a continuing course of speech, and are imposed after an opportunity for full merits consideration are not properly analyzed as prior restraints.").[72] Accord United States v. Estate Preservation Services, 202 F.3d 1093, 1106 (9th Cir. 2000).[73] Here, as the United States has demonstrated, the activities the United States seeks to enjoin are those designed and executed both to mislead consumers about the health risks of smoking, particularly with respect to so-

[72] See also Hirsh v. Atlanta, 495 U.S. 927, 927 (1990) (Stevens, J., concurring in denial of stay) (distinguishing injunctive relief against "a class of persons who have persistently and repeatedly engaged in unlawful conduct" from "a naked prior restraint against . . . a group that did not have a similar history of illegal conduct").

[73] Cf. Alexander v. United States, 509 U.S. 544, 550-53 (1993) (forfeiture of assets following RICO violations did not constitute a prior restraint of defendant's future speech activities, even though he could not use those assets to fund such activities).

called "light" cigarettes, and to promote smoking among minors contrary to Defendants' denials that they do not target the youth market. See U.S. PFF, pp. 616-37, 762-852. As the relief proposed by the United States is directed at preventing practices already found to be unlawful, it does not constitute a prior restraint. Rather, even if analyzed as a restriction on speech, the relief would address speech which is an integral part of Defendants' scheme to defraud, and therefore undeserving of First Amendment protection. See cases cited supra § VII. See also Central Hudson, 447 U.S. at 564; United States v. Carson, 52 F.3d 1173, 1183-84 (2d Cir. 1995) (noting that the RICO statute specifically authorizes reasonable restrictions on the future activities of violators, including activities that would otherwise enjoy First Amendment protection, and that "[i]n general 'a district court has broad discretion to enjoin possible future violations of law where past violations have been shown.'" (citation omitted)).

C. The United States' Proposed Restrictions Do Not Violate Defendants' First Amendment Rights

Defendants contend that the proposed relief enjoining certain advertising and marketing activities does not meet the standard for restriction of commercial speech set forth in Central Hudson, supra. Even assuming arguendo that Defendants' conduct at issue were "commercial speech" presumptively enjoying First Amendment protection, the United States' proposed restrictions of Defendants' marketing practices do not violate their First Amendment rights. As discussed in Section VII supra, the Supreme Court and lower courts have repeatedly held that in order to qualify for protection under the First Amendment, commercial speech must be lawful and non-misleading. See, e.g., Central Hudson, 447 U.S. at 566; Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 527 U.S. 173 (1999) ("GNOBA"); 44 Liquormart, Inc.

v. Rhode Island, 517 U.S. 484 (1996); Vidal Sassoon, Inc. v. Bristol-Meyers Co., 661 F.2d 272, 276 n.8 (2d Cir. 1981) (noting that the "Lanham Act's content-neutral prohibition of false and misleading advertising does not arouse First Amendment concerns that justify alteration of the normal standard for preliminary injunctive relief"); Washington Legal Foundation v. Henney, 56 F. Supp. 2d. 81 (D.D.C. 1999), vacated in part, 202 F.3d 331 (D.C. Cir. 2000). The Central Hudson decision itself held that the First Amendment does not protect commercial speech that is "more likely to deceive the public than inform it." Central Hudson, 447 U.S. at 563. The United States' Preliminary Proposed Findings of Fact amply illustrate the degree to which Defendants' purported commercial speech has been designed to deceive rather than inform the public, and thus is not entitled to First Amendment protection. See U.S. PFF § IV.

Furthermore, even if Defendants' marketing activities enjoy any First Amendment protection at all, they may lawfully be restrained to achieve a substantial government interest. See supra cases cited p. 123 and n.71. Restrictions on commercial speech are evaluated according to a four-part test set forth in Central Hudson: first, whether the prohibited expression is protected by the First Amendment at all; second, whether it "at least" concerns lawful activity and is not misleading; third, whether the asserted governmental interest in restraining the speech is substantial; and fourth, whether the restriction advances the governmental interest and is narrowly tailored to be no less restrictive than necessary. Central Hudson, 477 U.S. at 566.

Defendants contend that the first prong of the Central Hudson test, whether the speech in question is protected by the First Amendment, is "irrelevant" because the Court cannot "evaluate the nature of speech that Defendants have yet to utter." See JD. PFF, p. 895. This statement misapprehends the nature of the conduct this lawsuit seeks to enjoin. The United States has

shown that Defendants have engaged in particular marketing activities with the intent to defraud consumers and target youth. See U.S. PFF § IV. It is precisely such conduct – that undertaken to further the scheme to defraud – which the requested relief would prevent. See Pittsburgh Press, 413 U.S. at 390 (enjoining newspaper advertising practice which promoted illegal discrimination in hiring and finding that "[b]ecause the order is based on a continuing course of repetitive conduct, this is not a case in which the Court is asked to speculate about the effect of publication"). In light of the expert testimony and other evidence submitted by the United States showing that Defendants' ongoing marketing activities further the objectives of the RICO Enterprise, the Court may enjoin such practices without running afoul of the first prong of Central Hudson. Defendants' position is tantamount to stating that a court can never enjoin fraudulent speech, a contention which flies in the face of numerous courts having done just that. See infra n.75.

Addressing the second prong of the Central Hudson test, Defendants contend that "all of Defendants' speech concerning their products," including the marketing practices addressed by the United States' proposed injunctive relief, "concerns the lawful activity of selling cigarettes". See JD. PFF, p. 894.[74] Nevertheless, commercial speech concerning a lawful activity can

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[74] Defendants also rely on GNOBA, 527 U.S. 173, for the proposition that "the public has the right to hear the [tobacco] industry's messages regarding its products" because those products are "a subject of intense public debate." See JD. PFF, pp. 896-97. GNOBA established only that the public debate associated with the commercial activity at issue was one factor to be considered in determining the first prong of the Central Hudson test. GNOBA, 527 U.S. at 184-85; see also Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 67-68 (1983) (communications can "constitute commercial speech notwithstanding the fact that they contain discussions of important public issues. . . . We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech.") (citing Central Hudson, 447 U.S. at 563, n.5).

promote unlawful activity, and consequently lawfully may be restricted. See Pittsburgh Press, 413 U.S. at 388 (striking down newspaper's categorization system for otherwise lawful employment advertisements because the system promoted unlawful discrimination in hiring); see also U.S. PCL, pp. 48-49. As the United States has shown, see, e.g., U.S. PFF, pp. 910-926, certain of Defendants' promotional and marketing activities have been designed to fraudulently attract youth to smoking and to fraudulently mislead smokers as to the health risks of smoking, and thus promote unlawful activity even though selling cigarettes is itself legal.

In addressing the third Central Hudson prong, Defendants do not contest the substantial nature of the government's interest in preventing a RICO violation; rather, they argue only that marketing to youth does not constitute a RICO violation and thus cannot be enjoined by the Court here. As discussed above, however, this contention is wrong as a matter of law and fact. Defendants' scheme to defraud necessarily involves use of the mails and interstate wire transmissions, and therefore such marketing practices may underlie predicate acts under RICO, even if the marketing practices do not per se constitute a RICO predicate act. Accord, e.g., United States v. Maxwell, 920 F.2d 1028, 1036 (D.C. Cir. 1990); United States v. Computer Sciences Corp., 688 F.2d 1181, 1186-88 (4th Cir. 1983); United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 971 (D.C. Cir. 1998); see generally U.S. PCL, pp. 39-62.

Finally, with respect to the fourth Central Hudson prong, even if Defendants' advertising and other marketing activities were protected speech, the proposed restrictions are not more extensive than necessary to achieve the government's compelling interest in preventing future RICO violations. The Supreme Court has "made it clear that 'the least restrictive means' is not the standard; instead, the case law requires a reasonable fit between the legislature's ends and the

means chosen to accomplish those ends, . . . a means narrowly tailored to achieve the desired objective." See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001) (citations and internal quotation marks omitted; ellipsis in original); Board of Trustees of SUNY v. Fox, 492 U.S. 469, 478-479 (1989).[75] The United States' Preliminary Proposed Findings of Fact demonstrate that certain of Defendants' marketing efforts have been undertaken in furtherance of Defendants' ongoing scheme to defraud, and therefore lawfully may be enjoined. See, e.g., U.S. PFF, pp. 763-767, 929-937. It is irrelevant, therefore, that smoking by adults is a lawful activity that can be promoted by lawful means; the means targeted by the United States promote unlawful activity in furtherance of a massive scheme to defraud. The United States need not show that restriction of these activities is the least restrictive means of achieving its ends. See Fox, 492 U.S. at 476-480 (upholding ban on commercial solicitations in university dormitory rooms); Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328, 344 (1986) (upholding blanket ban on promotional advertising of legal casino gambling activities to

[75] In a variety of contexts, courts have repeatedly enjoined deceptive or fraudulent speech. See, e.g., FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 41-42 (D.C. Cir. 1985) (upholding injunction prohibiting Brown & Williamson from advertising Barclay cigarettes as delivering as a "1 mg tar cigarette" where consumers likely to interpret this claim to mean that Barclay achieved that yield on the FTC method test); Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co., 290 F.3d 578, 598 (3d Cir. 2002) (upholding injunction against false advertisement under Lanham Act); Paramount Pictures, Inc. v. Leader Press, Inc., 106 F.2d 229 (10th Cir. 1939) (product disparagement injunction); FTC v. Kitco of Nevada, Inc., 612 F. Supp. 1282, 1296 (D. Minn. 1985) (upholding FTC order for permanent injunction and consumer restitution for alleged misrepresentations in inducing consumers to enter into business opportunities); Guziak v. FTC, 361 F.2d 700, 705-06 (8th Cir. 1966); FTC v. Pharmtech Research, Inc., 576 F. Supp. 294, 303-04 (D.D.C. 1983) (where FTC demonstrated likelihood of success in demonstrating that defendant's dietary supplements advertising violated the FTC Act, no First Amendment problems with injunction prohibiting such advertising, because "the First Amendment does not prohibit government regulation of false or misleading advertising. . . . Pharmtech, of course, is free to disseminate advertisements which are not false or misleading.").

Puerto Rican residents without first analyzing whether governmental goal of deterring casino gambling could adequately have been served by alternative means of countering such advertising with speech designed to discourage gambling).

D. Requiring Defendants To Make Affirmative Corrective Statements About Smoking and Health Does Not Violate The First Amendment

As discussed above, the United States does not seek injunctive relief which would require Defendants to place warnings on their cigarette packages beyond what is required by any Act of Congress or any implementing regulation.[76] Nevertheless, this Court can and should order injunctive relief which would require Defendants to issue corrective statements to remedy Defendants' fraudulent conduct and otherwise educate cigarette smokers about Defendants' decades-long campaign to mislead and deceive them.

Because the government may regulate – and prohibit entirely – false or deceptive commercial speech, the First Amendment does not preclude government-imposed affirmative disclosures where necessary to prevent consumers from being confused or misled. See generally Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). Thus, Defendants' interests in avoiding compelled speech can be overcome by a sufficiently important state interest in preventing or correcting consumer deception or confusion. See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 (1985) (upholding requirement that attorney who referred to contingent fees in advertising include disclosure that clients could be liable for expenses even under contingency agreement).

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[76] Therefore, Defendants' arguments regarding "graphic health warnings," see JD. PFF, p. 899, are irrelevant.

Consistent with this precedent, this Circuit has expressly held that mandatory disclosures regarding commercial products are consistent with the First Amendment when required to correct a manufacturer's past campaign of deceptive or misleading marketing or to prevent consumer confusion. See Novartis Corp. v. FTC, 223 F.3d 783, 788-89 (D.C. Cir. 2000) (finding "no First Amendment impediment" to requiring drug manufacturer to include corrective statements in advertising upon showing of lingering effect of past false or misleading advertising); Warner-Lambert Co. v. FTC, 562 F.2d 749, 769-70 (D.C. Cir. 1977) (same); Pearson v. Shalala, 164 F.3d 650, 659 (D.C. Cir. 1999) (holding that the FDA can require disclosures and/or disclaimer statements as a narrowly-tailored method of preventing consumer deception or confusion).

Warner-Lambert is particularly instructive. There, the Court of Appeals for the District of Columbia Circuit upheld the FTC's order requiring Warner-Lambert to cease and desist from representing that Listerine mouthwash prevents or alleviates the common cold, and ordering the company to include in future advertising the phrase "Listerine will not help prevent colds or sore throats or lessen their severity." 562 F.2d at 756. The Court rejected a First Amendment challenge to the order, finding that the protection extended to commercial speech in Virginia State Board of Pharmacy expressly permits government regulation of false or misleading advertising. The court also accepted the FTC's position that the affirmative disclosure was necessary because "a hundred years of false cold claims have built up a large reservoir of erroneous consumer belief which would persist, unless corrected, long after petitioner ceased making the claims." Id. The court found:

> To be sure, current and future advertising of Listerine, when viewed in isolation, may not contain any statements which are themselves false or deceptive. But reality counsels that such advertisements cannot be viewed in isolation; they must

> be seen against the background of over 50 years in which Listerine has been proclaimed and purchased as a remedy for colds. When viewed from this perspective, advertising which fails to rebut the prior claims as to Listerine's efficacy inevitably builds upon those claims; continued advertising continues the deception, albeit implicitly rather than explicitly. . . . Under this reasoning the First Amendment presents no direct obstacle. The Commission is not regulating truthful speech protected by the First Amendment, but is merely requiring certain statements which, if not present in current and future advertisements, would render those advertisements themselves part of the continuing deception of the public.

Id. at 769.

Here, similarly, despite Defendants' recent modifications in certain public statements regarding the adverse health effects of smoking cigarettes and their addictiveness, additional affirmative disclosures to consumers and the public are warranted to address the effects of decades of Defendants' false and misleading statements to the contrary. See U.S. PFF, pp. 281-403, 571-602, 616-37; Warner-Lambert, 562 F.2d at 756. Defendants continue to deny that their previous statements were false or misleading, further increasing the likelihood that the "reservoir of erroneous consumer belief" will persist absent the sought relief. See, e.g., U.S. PFF, pp. 369-70, 403, 456-57. The injunctive relief sought here is narrowly tailored to achieve the desired goal, namely, correcting the specific misconceptions promoted by Defendants' past and ongoing deceptive advertising and other public statements by issuing corrective public statements. See Zauderer, 471 U.S. at 651. The record shows that in the absence of the corrective action sought by the United States, the effect of this decades-long attempt to mislead consumers into believing that cigarettes are safer and less addictive than they actually are is "likely to linger" and

perpetuate the goals of the RICO Enterprise. See Novartis, 233 F.3d at 788; Warner-Lambert, 562 F.2d at 769.[77]

IX

THE NOERR-PENNINGTON DOCTRINE DOES NOT IMMUNIZE DEFENDANTS' FRAUDULENT CONDUCT IN VIOLATION OF THE RICO, MAIL AND WIRE FRAUD STATUTES

Defendants contend that the First Amendment, and specifically the Noerr-Pennington doctrine, immunizes their "politically-motivated" false and fraudulent statements "concerning issues of smoking and health" that were made to the public or to government officials because such statements were "genuinely intended to procure favorable Government action". See JD. PFF, pp. 841-43; see also id. at 844-48. Defendants are plainly wrong. Nothing in the First Amendment or the Noerr-Pennington doctrine confers such an expansive immunity bath on Defendants' false, misleading and fraudulent misrepresentations designed to defraud the public. See generally supra § VII. Indeed, to do so would eviscerate the protections of numerous anti-fraud statutes to the substantial detriment of the public. It bears repeating that "it has never been deemed [a violation of the First Amendment] to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed". Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). It is also particularly significant that the Supreme Court made clear that the Noerr-Pennington doctrine does not constitute an exception to the well established doctrine that "false statements are not

[77] While the United States does not seek to compel specific warning statements on cigarette packages or advertisements, it does not agree that FCLAA precludes compulsion of other corrective measures. See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 567 (2001).

immunized by the First Amendment". See Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 743 (1983).

Furthermore, even assuming for the sake of argument that the Noerr-Pennington doctrine were pertinent at all to Defendants' fraudulent and/or misleading statements, its application is limited in this case because the vast majority of Defendants' false and/or misleading statements underlying the RICO offenses were not made to government entities or for the primary purpose of securing government action.

1. The Noerr-Pennington doctrine derives from two antitrust decisions: (1) Eastern Railroad Conference v. Noerr Freight Co., 365 U.S. 127 (1961), which held that a Sherman Act anti-trust conspiracy could not be based on evidence consisting entirely of activities of competitors seeking to influence public officials to pass or enforce the laws, including a deceptive publicity campaign; and (2) United Mine Workers v. Pennington, 381 U.S. 657, 669-672 (1965), which held that it was reversible error to fail to instruct the jury that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." Id. at 670.[78]

In limited circumstances, the Supreme Court and other courts have extended the Noerr-Pennington doctrine to contexts outside the antitrust arena. See, e.g., Bill Johnson's Restaurants, 461 U.S. at 743-44 (Noerr-Pennington barred NLRB from enjoining unfair labor practice lawsuit

[78] Neither case flatly prohibited admission of evidence of such activities, however, and Pennington specifically noted that such evidence could be admitted for purposes other than to establish liability for the petitioning itself. See Pennington, 381 U.S. at 670 n.3 (citing the "established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny." (citations omitted)).

unless the lawsuit was objectively baseless); Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 62 (1993) ("PREI") (Noerr-Pennington barred liability for wrongful copyright infringement litigation where the infringement suit was supported by probable cause, even if the defendant's intent in bringing it was anticompetitive).

Nevertheless, Noerr-Pennington does not confer a blanket grant of absolution for deliberately false statements made in the context of a petition to a government entity. See Whelan v. Abell, 48 F.3d 1247, 1254-55 (D.C. Cir. 1995) (stating that "[w]e see no reason to believe that the right to petition includes a right to file deliberately false complaints" and holding that Noerr-Pennington did not preclude liability for false representations made as part of an administrative claim because "[h]owever broad the First Amendment right to petition may be, it cannot be stretched to cover petitions based on known falsehoods"). The Supreme Court also has noted that "[a] misrepresentation to a court" or "misrepresentations made under oath" to Congress or other government officials are not afforded any protection under Noerr-Pennington. See Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 504 (1988).[79] Likewise, the Supreme Court has stated that "false statements are not immunized by" the Noerr-Pennington doctrine. See Bill Johnson's Restaurants, 461 U.S. at 743. Similarly, Noerr-Pennington does not immunize otherwise unlawful conduct, including mail and wire fraud. See, e.g., In re American

[79] Indeed, the Supreme Court consistently has held in a variety of contexts that a person does not have a constitutional right to lie, commit perjury, or otherwise "use false evidence". See, e.g., Nix v Whiteside, 475 U.S. 157, 173 (1986)(citing cases). Accord Brogan v. United States, 522 U.S. 398, 404-05 (1998); United States v. Dunnigan, 507 U.S. 87, 96 (1993); United States v. Havens, 446 U.S. 620, 626-27 (1980); United States v. Apfelbaum, 445 U.S. 115, 117 (1980); Harrison v. New York, 401 U.S. 222, 225 (1971); United States v. Grayson, 438 U.S. 41, 54 (1978); United States v. Washington, 431 U.S. 181, 189 (1977); United States v. Wong, 431 U.S. 174, 180 (1977); Bryson v. United States, 396 U.S. 64, 72 (1969).

Continental Corp./Lincoln Sav. & Loan Securities Litig., 794 F. Supp. 1424, 1448 (D. Ariz. 1992) ("A rule of law which excused misrepresentations when it is the truth of the information which is fundamentally at issue would undermine the fabric of both systems. Whatever the ultimate breadth of Noerr-Pennington, it is not a shield for fraud."); Service Engineering Co. v. Southwest Marine, Inc., 719 F. Supp. 1500, 1506 (N.D. Cal. 1989) (Defendants' filing false reports with the Small Business Administration and the Navy constituted mail fraud violations, which were not protected by the Noerr-Pennington doctrine, because "[t]his privilege does not apply to the furnishing of false information to an agency or adjudicatory body – the First Amendment has not been interpreted to preclude liability for false statements."), vacated, 825 F. Supp. 891 (N.D. Cal. 1989); see also Whelan, 48 F.3d at 1254-55 (holding that neither the Noerr-Pennington doctrine nor the First Amendment more generally protects petitions predicated on fraud or deliberate misrepresentation); Hydranautics v. Filmtec Corp., 70 F.3d 533, 538-39 (9th Cir. 1995) (Noerr-Pennington does not immunize anticompetitive patent infringement litigation where underlying patent was obtained by fraud); United States v. Goldberg, 906 F. Supp. 58, 63-64 (D. Mass. 1995) (right to influence government does not include right to provide illegal gratuities to members of legislature). See also supra § VII.A. & B.

2. It is clear that the vast majority of Defendants' false, misleading and deceptive statements underlying the RICO offenses and scheme to defraud involved here, unlike in Noerr, Pennington, and their progeny, were not made to government bodies or public officials in order to influence the passage or enforcement of laws, but rather were made to defraud millions of consumers and potential consumers. Hence, under the foregoing authority these statements

derive no protection whatsoever from the First Amendment or the Noerr-Pennington doctrine.[80] Indeed, Defendants do not cite a single decision holding that the Noerr-Pennington doctrine precludes causes of action based upon false, deceptive and fraudulent representations made to the public pursuant to a scheme to defraud the public as involved here. To the contrary, such intentional fraudulent conduct does not serve any legitimate societal interest and does not enjoy any protection under the Noerr-Pennington doctrine. Accord cases cited supra, pp. 136-38.

Moreover, although Defendants also made false, deceptive and misleading statements about smoking and health issues to Congress and other governmental bodies, those statements were inextricably intertwined with Defendants' deliberate scheme to defraud the public,[81] and any intent to influence the passage of legislation or the enforcement of laws was, at best, a secondary objective. Hence these statements are not immunized by the Noerr-Pennington doctrine.

For example, in Allied Tube, petitioner, an association of individuals and groups, conceded that it had conspired with others to exclude respondent's product from a code that

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[80] Defendants demonstrate the illogic of their argument by stating (JD. PFF, p. 842-845) that **all** of their public statements regarding smoking and health issues – including press releases made when there were no government proceedings, as well as advertising promoting their products – were intended to influence governmental bodies. This argument, by its analysis, would allow any petitioner of government to commit countless acts of defrauding the public with impunity.

[81] Obviously, Defendants' scheme to defraud would have been exposed if they made truthful representations to governmental bodies that they reasonably expected would be disseminated to the public, but that were contrary to their fraudulent representations to the public. Moreover, and more importantly, the gravamen of this case is the fraudulent representations disseminated to the **public** – including those disseminated to the public during televised broadcasts of testimony of Defendants' representatives. As the United States has repeatedly reminded Defendants, this is not a "fraud on the government" case.

petitioner published which established product and performance requirements. Petitioner argued that its anti-competitive activities were entitled to immunity under the Noerr-Pennington doctrine because its activities "were incidental to a valid effort to influence governmental action." 486 U.S. at 502. The Court rejected this argument. The Supreme Court explained that although a form of "indirect" petitioning of governmental bodies could conceivably be entitled to Noerr-Pennington immunity, the Court "cannot agree with petitioner's absolutist position that the Noerr doctrine immunizes every concerted effort that is genuinely intended to influence governmental action." Id. at 503. Rather, the Supreme Court stated that the scope of Noerr-Pennington immunity depends on the activity's "impact . . . [and] on the context and nature of the activity." Id. at 504. The Court added that:

> The ultimate aim is not dispositive. A misrepresentation to a court would not necessarily be entitled to the same anti-trust immunity allowed deceptive practices in the political arena . . . simply because the odds were very good that the court's decision would be codified – nor for that matter would misrepresentations made under oath at a legislative committee hearing in the hopes of spurring legislative action.

Id. at 504. Accord California Transport v. Trucking Unlimited, 404 U.S. 508, 513 (1972) ("Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process").

Under the teachings of Allied Tube, examination of the the "impact", "context" and "nature" of Defendants' false, deceptive and fraudulent statements to allegedly influence governmental bodies confirms that they do not enjoy any Noerr-Pennington protection. First, the Defendants' alleged petitioning activities were part of a massive scheme to defraud the public of hundreds of billions of dollars and caused substantial financial harm to the United States as well

as incalculable harm to the health of the American people. See supra, p. 40. Therefore, the adverse "impact" of Defendants' fraudulent activities is enormous.

Moreover, the "nature" of Defendants' fraudulent activities do not further legitimate societal interests. See generally Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibed, robust, and wide open' debate on public issues") (citing New York Times v. Sullivan, 376 U.S. 255, 270 (1964)). In re American Continental Corp./Lincoln Sav. & Loan Securities Litig., 794 F. Supp. 1424, 1448 (1992). To be sure, Defendants' intentional false, misleading and deceptive representations to the public and to governmental bodies enjoy no constitutional protection. Accord cases cited supra § VII and pp. 136-38 and n.79.

Furthermore, the primary "context" of Defendants' activities was not the political arena as they claim, but rather was pursuant to a massive scheme to defraud the public; this context weighs heavily against Noerr-Pennington immunity. Cf. Allied Tube, 486 U.S. at 504; PREI, 508 U.S. at 61 n.6; California Transport, 404 U.S. at 513.

In sum, conduct which is otherwise unlawful, such as the acts of mail and wire fraud established in this case, cannot be converted to protected activity under Noerr-Pennington merely because Defendants plead a subjective intent to seek favorable legislation or to influence governmental actions. Cf. National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla., 468 U.S. 85, 101 n.23 (1984) ("good motives will not validate an otherwise anticompetitive practice"); PREI, 508 U.S. at 59. See also supra § VIII. Indeed, if Defendants' unduly expansive interpretation of the Noerr-Pennington doctrine were accepted, wrongdoers

would be able to easily immunize their schemes to defraud the public simply by coupling such fraud schemes with efforts to influence governmental bodies regarding relating legislation or enforcement activities.[82]

3. Moreover, Defendants mischaracterize the United States' allegations in this action, juxtaposing statements from different places in the First Amended Complaint to assert that "the Government contends that Defendants' national public relations campaign," along with their false and misleading statements to governmental agencies, officials, and courts, were intended to forestall regulation of their products. See JD. PFF, pp. 841-42. In fact, as the United States' Preliminary Proposed Findings of Fact show (U.S. PFF § IV), the purpose of Defendants' statements was to preserve and expand the market for cigarettes by deceiving current and future consumers as to the health consequences of smoking, and other matters. Defendants' public statements, including those made to governmental entities, were made for the purpose of maintaining the fiction of the "open controversy" about smoking and health and that addicted

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[82] Defendants contend that their activities "give rise to a presumption of Noerr-Pennington immunity" and that therefore RICO liability does not attach unless the United States establishes that their activities "amounted to 'sham' petitioning" of governmental bodies, which it cannot do because their petitioning of the government was largely successful. See JD. PFF, pp. 846-47. Defendants are wrong. The "sham" exception to the Noerr-Pennington doctrine provides that "action that is not genuinely aimed at procuring favorable government action is a mere sham that cannot be deemed a valid effort to influence government action", and hence is not immunized by the Noerr-Pennington doctrine. Allied Tube, 486 U.S. at 500 n.4. However, the United States need not rely on the "sham" exception because as demonstrated above, even to the limited extent that Defendants' fraudulent activities involved petitioning the government, those activities are inextricably intertwined with Defendants' overarching purpose in defrauding the public. It is irrelevant, therefore, whether the petitioning activities were successful in achieving or preventing legislation. Defendants' fraudulent and misleading statements are not entitled to any protection under the Noerr-Pennington doctrine because Defendants' purported petitioning activities were carried out for the purpose of and in the context of their scheme to defraud the public. Accord Allied Tube, 486 U.S. at 503-05 and cases cited supra, pp. 136-38. See also cases cited supra § VII.

smokers freely "choose" to smoke as adults. See, e.g., U.S. PFF, pp. 48-65, 281-298, 322-338, 352-402, 448-458, 547-552, 658-682, 724-748, 752-762, 1023-1036.[83]

Likewise, Defendants mistakenly claim that "the Government's allegations that Defendants misrepresented their activities related to alleged youth marketing can make sense **only** as an effort to forestall greater Government regulation." See JD. PFF, p. 845 (emphasis added). On the contrary, Defendants' fraudulent representations in that regard had a natural tendency to influence the likely actions of parents of youths who were targeted by the Defendants. See U.S. PCL, pp. 45-46.[84]

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[83] Defendants' reliance (JD. PFF, p. 843, ¶ 2053) upon International Brotherhood of Teamsters v. Philip Morris Inc., 196 F.3d 818 (7th Cir. 1999), is misplaced. The Seventh Circuit merely assumed without deciding that Defendants' public misstatements of the relationship between smoking and health were designed to influence Congress and not for any other purpose. The court stated: "To the extent the manufacturers' statements were designed to influence Congress – to get favorable laws and ward off unfavorable ones – they cannot be a source of liability directly under the Noerr-Pennington doctrine. "196 F.3d at 826. As the United States has demonstrated, however, Defendants' actions, including their publicly made false and misleading statements, were designed to deceive the public into consuming cigarettes. More fundamentally, the Seventh Circuit went on to hold that the private plaintiffs did not prove the requisite proximate cause to injury in their business or property, and therefore the court dismissed plaintiff's RICO suit for treble damages. Hence, Defendants mistakenly rely on mere dictum. Defendants similarly err by relying on Bath Petroleum Storage, Inc. v. Market Hub Partners, L.P., 2000 WL 1508873 (2d Cir. Oct. 11, 2000), an unpublished decision from the Second Circuit. That case held only that Noerr-Pennington precluded liability for the defendant's false statements made to various regulatory agencies made with the goal of influencing those agencies to act in a manner which would have the effect of undermining a competitor's business, as long as the defendant's conduct was not "objectively baseless." Here, as discussed above, Defendants' primary intent was not to influence the Congress or other governmental bodies but to defraud the public.

[84] For that reason, it is irrelevant to Defendants' liability whether Congress would have acted differently in the absence of Defendants' fraudulent conduct. Consequently, Defendants' reliance on PREI, 508 U.S. at 58, Buckman v. Plaintiffs' Legal Committee, 531 U.S. 341, 354 (2001) (Stevens, J., concurring), Pittston Coal Group, Inc. v. United Mine Workers of America, 894 F. Supp. 275 (W.D.Va 1995), Klinger v. Yamaha Motor Corp., 738 F. Supp. 898 (E.D. Pa. (continued...)

Moreover, Defendants' claim that numerous racketeering acts are immunized by the Noerr-Pennington doctrine is baseless. See JD. PFF, p. 848. Only 16 of the racketeering acts referenced by Defendants relate to Defendants' communications to government entities. Of those, six racketeering acts – Nos. 105 and 109 through 113 – charge that Defendants' representatives made false statements under oath to Congress and these statements were publicly transmitted via the wires and broadcasts. These statements do not enjoy Noerr-Pennington protection at all. See Allied Tube, 486 U.S. at 504 (observing that "misrepresentations made under oath at a legislative committee hearing in the hopes of spurring legislative action" are not entitled to the same Noerr-Pennington immunity as deceptive practices in the political arena); see also North Shore Medical Center, Ltd. v. Evanston Hosp. Corp., 1995 WL 723761, *6 (N.D. Ill. Dec. 5, 1995) (denying motion to dismiss mail fraud complaint alleging that corporation made statements to government falsely claiming to be in compliance with zoning laws because there was "no authority for the proposition that the First Amendment immunizes businesses, or anyone else, from liability for fraudulent misrepresentations made to the government"). It bears repeating that there is no constitutional right to lie or commit perjury. See supra, n.79. Indeed, 18 U.S.C. § 1621 makes it a crime to commit perjury before Congress and other tribunals. See, e.g., United States v. Debrow, 346 U.S. 374 (1953); United States v. Reinecke, 524 F.2d 435 (D.C. Cir. 1975). Under Defendants' misguided argument, 18 U.S.C. § 1621 violates the First Amendment as applied to perjury before Congress whenever the Noerr-Pennington doctrine

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[84](...continued)
1990), and Sizemore v. Georgia-Pacific Corp., 1996 WL 498410 (D.S.C. 1996), aff'd 114 F.3d 1177 (4th Cir. 1997) is misplaced, because Defendants' liability does not rest on "speculation" as to what governmental entities might have done "in a counterfactual situation." See Buckman, 531 U.S. at 354 (Stevens, J., concurring).

arguably would apply. Not surprisingly, no court has reached this absurd result that is dictated by the Defendants' argument.

Therefore, only Racketeering Act Nos. 3, 132, and 133 (concerning press releases addressing statements or reports by the U.S. Surgeon General); 13 and 14 (concerning recruiting witnesses to testify before Congress); 28 (concerning Defendants' concerted efforts to prevent the National Cancer Institute from funding a study likely to produce results harmful to the tobacco industry's fraudulent "open controversy" position); and 86 and 125-127 (concerning letters to public officials) implicate activities arguably covered by Noerr-Pennington. Even here, however, as demonstrated above, statements made to governmental entities with the knowledge and intent that such statements likely would be disseminated to the public and in furtherance of Defendants' ongoing scheme to defraud the public are not immunized from liability for that fraud merely because the statements were made to governmental entities and/or influenced government actions. See, e.g., cases cited supra, pp. 136-38.

The remaining racketeering acts do not implicate Noerr-Pennington. Racketeering Act Nos. 5-7, 10, 12, 23, 24, 27, 29, 34, 35, 42, 43, 46, 49, 56, 61, 64, 65, 79, 81, 87, 91, 93, 100, and 117 describe press releases intended to further a scheme to defraud consumers and potential consumers of cigarettes into believing that cigarettes had not been shown to be harmful or addictive and that Defendants were supporting independent research intended to determine the truth about smoking and health.[85] Racketeering Act Nos. 71, 72, 74, and 75 concern Defendants'

[85] Although the press release described in Racketeering Act No. 35 noted that then-Tobacco Institute Chairman Joseph Cullman III had testified before a Senate Commerce Subcommittee in 1969 concerning tobacco companies' marketing practices, the purpose of the press release was to deceive the public into believing that tobacco companies do not market their (continued...)

attempts to intimidate former Philip Morris scientists Victor DeNoble and Paul Mele to prevent their disclosure of research supporting the conclusion that nicotine is addictive.[86] Racketeering Act No. 130 concerns a statement made over the public airwaves by a Tobacco Institute representative which falsely asserted that the defendant Cigarette Companies actively discouraged smoking by persons under age 21. There is no evidence that these statements were made with the primary purpose of influencing legislation rather than deceiving the public, or that even if securing favorable government action were a subsidiary purpose, such a subjective intent would negate the overall fraudulent purpose. See NCAA v. Board of Regents of Univ. of Okla., 468 U.S. at 101 n.23.

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DEFENDANTS' EQUITABLE DEFENSES FAIL AS A MATTER OF LAW AND FACT

Defendants contend that the United States was "deeply involved" in the conduct at issue in this case, thereby subjecting the United States' claims to several equitable defenses. These defenses include waiver, laches, equitable estoppel, unclean hands, and in pari delicto. See JD. PFF, pp. 808-830. As explained below, however, Defendants' affirmative defenses are legally without merit and factually baseless. The United States is not subject here to these defenses as a

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[85](...continued)
products to youth, thus perpetuating the myth that smoking is a free "adult choice" rather than an addiction largely induced in minors.

[86] Defendants apparently contend that because these attempts to intimidate Drs. DeNoble and Mele included threats of litigation, they are completely immunized, see JD. PFF, p. 844, but they are wrong. See Cardtoons, L.C. v. Major League Baseball Players Ass'n, 208 F.3d 885, 891 (10th Cir. 2000) (prelitigation threats communicated solely between private parties are not afforded immunity from suit by Noerr-Pennington doctrine or the First Amendment right to petition.).

matter of law, and even if they could apply to this case, Defendants have failed to establish the necessary elements of any of the defenses.

A. The United States is Not Subject Here to the Defense of Waiver

Defendants argue that the United States has waived its RICO claims "because, for decades, it has closely monitored the activity of which it now complains without attacking it as wrongful . . . [and] it has participated in the challenged conduct and sometimes required it." See JD. PFF, p. 812 (emphasis is original). As a matter of law, Defendants cannot assert the affirmative defense of waiver in this case because the United States' claims affect the public interest and waiver of such claims would contravene RICO's statutory policy of protecting the public. However, even if the United States could waive its RICO claims, the defense fails since there is no evidence that the United States intentionally relinquished or abandoned its right to seek equitable relief for Defendants' fraud on the public. Moreover, Defendants' claim that the United States "participated in the challenged conduct and sometimes required it" is entirely unfounded.

1. The United States' RICO Claims Cannot Be Waived

Although under some circumstances a private party may waive certain statutory rights, such rights may not be waived when doing so would frustrate the public policies of the statute, particularly when the party is the United States acting in its sovereign capacity to protect public interests. See Thompkins v. United Healthcare of New England, Inc., 203 F.3d 90, 97-98 (1st Cir. 2000). As the Supreme Court has explained:

> Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be

> allowed where it would thwart the legislative policy which it was designed to effectuate.

Brooklyn Savs. Bank v. O'Neil, 324 U.S. 697, 704 (1945). RICO vests the Attorney General with the exclusive authority to bring civil RICO suits for injunctive and equitable remedies, such as the RICO claims involved here, to vindicate the public's paramount interests in eliminating corruption from the channels of commerce. See 18 U.S.C. § 1964. The public interest vindicated by RICO claims cannot be understated. The Congressional Statement of Findings and Purpose underlying RICO explains that, among other things, RICO was designed to combat criminal activities that

> weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens . . . .

Pub. L. No. 91-452, 84 Stat. at 922, 923. Indeed, Congress created RICO to provide new and expanded remedies to vindicate the public's interest in combating criminal activity and "to free the channels of commerce" from illegal activity:

> Where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from the organization . . . through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity.

S. Rep. No. 617, 91st Cong., 1st Sess. at 160 (1969); see also Russello v. United States, 464 U.S. 16, 26-28 (1983) (discussing important purposes of RICO); United States v. Turkette, 452 U.S. 576, 585-90 (1981) (same). Consequently, there can be no serious dispute that the United States' right to maintain a civil RICO action is "charged or colored with public interest," Brooklyn Savs. Bank, 324 U.S. at 704, and as a result, such a right cannot be waived as a matter of law.

Defendants present no case law demonstrating that the United States can waive its right to commence a civil RICO claim for equitable relief. Rather, Defendants cite only to American Medical Assoc. v. United States, 688 F. Supp. 358 (N.D. Ill. 1988) ("AMA") (see JD. PFF, p. 811 ¶ 1965), but the waiver concept discussed in that case is significantly different than the waiver which Defendants ask the Court to find here. In AMA, the United States filed a motion for reconsideration of a previous order, raising a new argument not raised in previous briefings. 688 F. Supp. at 359-60. The court concluded that the United States had waived its argument by not presenting it earlier in the proceedings. Id. at 362. Thus, the issue addressed in AMA was one of **procedural** default for failing to timely raise an argument. Nothing in that case even remotely suggests that the doctrine of waiver can apply to prevent the United States from maintaining a cause of action at all, much less exercise its express statutory right to bring a civil RICO action under § 1964(a) to protect the public.

In sum, as a matter of law, the United States' right to maintain a civil RICO action for the benefit of the American public cannot be waived.

2. Defendants Have Failed to Establish A Waiver

Even assuming arguendo that the right of the United States to bring a civil RICO claim could be waived, Defendants fail to establish that the United States has waived its right to maintain this action. "A waiver 'is ordinarily an intentional relinquishment or abandonment of a known right or privilege.'" United States v. Robinson, 459 F.2d 1164, 1168 (D.C. Cir. 1972) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)); see also United States v. Olano, 507 U.S. 725, 733 (1993); Britamco Underwriters, Inc. v. Nishi, Papagjika & Assocs., Inc., 20 F. Supp. 2d 73, 77 n.2 (D.D.C. 1998). The elements of waiver are: (1) an existing right, benefit, or

advantage; (2) knowledge, actual or constructive, of the existence of that right, benefit, or advantage; and (3) actual intent to relinquish the right, benefit, or advantage. See FDIC v. Niblo, 821 F. Supp. 441, 451 (N.D. Tex. 1993) (citing First Interstate Bank of Arizona, N.A. v. Interfund Corp., 924 F.2d 588, 595 (5th Cir. 1991)).

Defendants make no claim that the United States has expressly waived its right to bring a civil RICO lawsuit against them. Therefore, the waiver, should one exist, would have to be implied. In the case of an implied waiver, there must be "'a **clear, unequivocal and decisive** act . . . showing a purpose to abandon or waive the legal right.'" United States v. Mottolo, 695 F. Supp. 615, 628 (D.N.H. 1988) (emphasis added) (quoting Groves v. Prickett, 420 F.2d 1119, 1125 (9th Cir. 1970) and United States v. Chichester, 312 F.2d 275, 282 (9th Cir. 1963)); see also United States v. Amwest Surety Ins. Co., 54 F.3d 601, 602-03 (9th Cir. 1995) (requiring "clear, decisive and unequivocal" conduct to find implied waiver). Proof of an implied waiver requires conduct that is "so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right **that no other reasonable explanation of his conduct is possible**." Irons v. FBI, 811 F.2d 681, 686 (1st Cir. 1987) (emphasis added) (quoting Bechtel v. Liberty Nat'l Bank, 534 F.2d 1335, 1340 (9th Cir. 1976)).

Defendants have not deduced any evidence that the United States manifested an unequivocal intention to forgo its right to enforce RICO against them. Rather, they argue expansively that waiver has occurred because, over time, the United States has developed "a comprehensive regulatory regime to govern the marketing and sale of cigarettes." See JD. PFF, p. 815; see also id. p. 816 (showing purported examples of Government involvement in and regulation of industry as basis for waiver argument). At best, Defendants' argument shows that

the United States regulated certain activities concerning tobacco and tobacco products. Yet there is no merit to the suggestion that regulation of ostensibly legal activity under a regulatory scheme constitutes waiver of the United States' rights to enforce the laws to prevent and restrain RICO violations. It cannot be seriously claimed that the regulation of a legal product constitutes "a clear, unequivocal and decisive act showing a purpose to abandon or waive the legal right" to address violations of particular laws. See Mottolo, 695 F. Supp. at 628.

To further bolster their waiver argument, Defendants contend that their fraudulent conduct "was known to the Government contemporaneous with its occurrence," JD. PFF, p. 815, yet they provide no evidence whatsoever to support such an allegation. In fact, Defendants are just plain wrong. Much of the evidence confirming the unlawful nature of Defendant's conduct upon which the United States relies in this case came to light only during the 1990s. As explained in detail in the United States' Preliminary Proposed Findings of Fact, Defendants have suppressed, concealed, and destroyed documents and other information throughout the existence of the RICO Enterprise. See U.S. PFF § I.K. Indeed, Defendants continue with such misconduct to this very day. See U.S. PFF § VIII.A. Thus, Defendants' argument that the United States "knew all along" of their fraudulent conduct is wholly unsupported by the facts.

In any event, this argument is irrelevant. The United States is under no duty to take immediate action, or even any action at all, if it is aware of violations of law. See DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 195 (1989) ("nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors"); Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917) ("As a general rule, laches or neglect of duty on the part of officers of the

government is no defense to a suit by it to enforce a public right or protect a public interest.");[87] Beaver v. United States, 350 F.2d 4, 8 (9th Cir. 1965) (rejecting defendants' claim of "implied acquiescence" to improvement of lands as defense to suit brought by United States); Walker-Hill Co. v. United States, 162 F.2d 259, 263 (7th Cir. 1947) (letter from Alcohol Tax Unit of Treasury Department informing plaintiff that eggnog manufactured was a food product unfit for beverage purposes, so that plaintiff was entitled to recovery of taxes due to provisions of Revenue Code, did not estop government from thereafter asserting that eggnog was a beverage); Trapper Min., Inc. v. Lujan, 923 F.2d 774, 781 (10th Cir. 1991) (Secretary of Interior not estopped from readjusting coal lease after ten years on date established by Federal Coal Leasing Amendments Act, despite advice from Bureau of Land Management that readjustment would occur twenty years later); SEC v. Gulf Western Industries, Inc., 502 F. Supp. 343, 348 (D.D.C. 1980) (denying defense as a matter of law because "estoppel may not be raised against the [Securities and Exchange] Commission in enforcement actions." (citing cases)); United States v. Michael Schiavone & Sons, Inc., 430 F.2d 231, 233 (1st Cir. 1970) ("it is not true that once a government agency smells a rat, the agency must exterminate it forthwith or allow it the run of the public's house in perpetuo." (citing cases)); Estate of Jones v. C.I.R., 795 F.2d 566, 574-75 (6th Cir. 1986).

Indeed, the Supreme Court has rejected this same species of argument that Defendants advance here. In United States v. California, 332 U.S. 19 (1947), the Court considered a dispute

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[87] In this same vein, the United States is afforded considerable discretion to decide when, if ever, to bring an enforcement action. See, e.g., United States v. Lovasco, 431 U.S. 783, 790-91 (1977); United States v. Marion, 404 U.S. 307, 317 (1971).

between a state and the federal government over ownership and control of submerged coastal land. The state argued, inter alia, that the federal government's policies, decisions and actions, as well as the "conduct of its agents" served to waive the United States' claim to the lands. See id. at 39. The Court squarely rejected this analysis:

> even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. **The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes . . . .**

Id. at 39-40 (emphasis added).

Defendants also contend waiver occurred because of the United States' supposed involvement in their fraudulent activities, but Defendants allege only conduct involving the development of "safe" and "less hazardous" cigarettes, low tar marketing, and the marketing of cigarettes to youth. See JD. PFF, p. 816. Yet, to the extent the United States was involved with the tobacco industry regarding such matters, the United States never participated in the fraud with which Defendants are now charged. For example, Defendants contend that the United States at one time worked "hand-in-hand" with Defendants in the Tobacco Working Group to develop a "safer" cigarette. This allegation is a red herring. Defendants participated in the Tobacco Working Group for their own strategic reasons and, at times, their involvement was obfuscatory. See United States' Reply to Defendants' Preliminary Proposed Findings of Fact § III.A ("U.S. R. JD. PFF"). Also, Defendants' own collusion to protect the market for conventional cigarettes, and Defendants' coordinated efforts to prevent the underlying admission that conventional cigarettes were hazardous, motivated Defendants' failure to conduct

meaningful research and pursue the development of a potentially less hazardous cigarette for decades. See U.S. PFF § IV.G; U.S. R. J.D. PFF § III.

Similarly, regarding Defendants' marketing of low tar and "light" cigarettes, Defendants contend that the United States required them for years to report tar and nicotine levels using the FTC Method, but now alleges such conduct to be fraudulent. This argument mischaracterizes the United States' claims in this case, which do not allege that the FTC Method is fraudulent or that Defendants' reporting of tar and nicotine levels themselves has been per se fraudulent. Rather, the claims are based upon Defendants' false and misleading statements, including in advertising "light" and "low tar" cigarettes; their intentional engineering and design of cigarettes to register low tar when machine tested but to permit human smokers to obtain varied, and much higher tar and nicotine yields; and their extensive knowledge, which they suppressed and concealed from the public, about smoker compensation. Defendants also point out that at one time the United States encouraged consumers to switch to low tar cigarettes as "safer". Yet, while the United States at one point may have conditionally made such statements because it believed them to be true, the claims of fraud in this case are based upon the fact that Defendants made representations – particularly in their marketing of low tar cigarettes that such cigarettes were "safer" **despite knowing that such a claim was false**. See U.S. R. JD. PFF § II; U.S. PFF § IV.D. Defendants have adduced no evidence establishing that the United States participated in this aspect of their scheme to defraud the public.

Defendants finally allege that the United States, through the FTC, has closely monitored its marketing activities, but "has never shown Defendants to have engaged in youth marketing." See JD. PFF, p. 816. Even if Defendants' recounting of events were accurate (which it is not), it

is hard to imagine how such regulatory conduct could constitute a "clear, decisive, and unequivocal" action to abandon a RICO enforcement action. The United States has established that Defendants devised and executed a scheme and artifice to defraud the public by deceiving consumers, particularly parents and children, by claiming that they did not market to children, while engaging in marketing and advertising with the intent of addicting children into becoming lifetime smokers. See U.S. PFF § IV.E. Defendants have adduced no evidence establishing that the United States participated in this aspect of their scheme to defraud the public.[88]

Furthermore, the United States' evidence of Defendants' fraudulent conduct goes well beyond the matters of "less hazardous" cigarettes, low tar cigarette design and marketing, and youth marketing. Thus, even if Defendants were at all correct that waiver could bar liability or relief for their conduct in these three areas – which they are not – this defense would not address other important aspects of Defendants' fraudulent scheme. For example, as established in detail in U.S. PFF § IV.A, Defendants devised and executed a scheme and artifice to defraud the public by deceiving consumers into starting and continuing to smoke cigarettes by misrepresenting and concealing 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 health effects (see U.S. PFF § IV.A); Defendants fraudulently committed to fund independent research, while pre-selecting researchers and directing funds to

[88] In any event, given its status as an independent regulatory agency, see Order No. 64 (June 5, 2001) and Humphrey's Executor v. United States, 295 U.S. 602, 628-29 (1935), any actions, or inactions, by the FTC cannot serve as the basis of waiver, estoppel, or any other defense against the "United States" in this action. Therefore, Defendants' efforts to ascribe FTC regulation or decisions as somehow estopping the Attorney General's ability to enforce the RICO statute are ill-founded.

irrelevant research and research that supported Defendants' positions on smoking and health issues and suppressing research that revealed the connection between smoking and disease (see U.S. PFF § IV.F, § I.K); Defendants devised a fraudulent scheme to deceive consumers into becoming or staying addicted to cigarettes by maintaining that, contrary to their internal acknowledgment, smoking is not addictive and denying that nicotine is the component in cigarettes primarily responsible for that addictiveness, (see U.S. PFF § IV.B), and by manipulating the design of cigarettes and the delivery of nicotine to smokers, while at the same time denying that they were engaged in such manipulation. See U.S. PFF § IV.C. Defendants have adduced no evidence establishing that the United States participated in any of these aspects of their scheme to defraud the public.

In sum, even assuming arguendo that the United States' right to bring this enforcement action could be waived, Defendants have failed to prove that the United States unequivocally intended to waive the right to seek equitable relief as a remedy for Defendants' RICO violations.

B. The United States Is Not Subject to Equitable Estoppel in this Action Because Defendants Have Not Established the Extraordinary Circumstances Necessary to Impose this Defense Upon the United States

Defendants contend that the doctrine of "equitable estoppel" bars the RICO claims here on the ground that the United States induced Defendants to act in reliance upon alleged misrepresentations by the United States, and that precluding the RICO claims would not result in injury to the public interest. See JD. PFF, pp. 817-19. The United States is not subject to the defense of equitable estoppel unless, at the very least, it has engaged in substantial affirmative, intentional misconduct. Defendants have presented no evidence of such affirmative misconduct on the part of the United States, so the defense fails as a matter of law and fact. Furthermore,

Defendants' evidence fails to establish the requirements of even the traditional elements of equitable estoppel.

1. No Affirmative Misconduct

It is settled law "that equitable estoppel will not lie against the Government as it lies against private litigants." Office of Personnel Management v. Richmond, 496 U.S. 414, 419 (1990); see Graham v. SEC, 222 F.3d 994, 1007 n.24 (D.C. Cir. 2000). The Supreme Court has succinctly stated the rationale for this rule: "When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." Heckler v. Community Health Servs. of Crawford County, Inc., 467 U.S. 51, 60 (1984). Therefore, the application of equitable estoppel against the United States "must be rigid and sparing." ATC Petroleum, Inc. v. Sanders, 860 F.2d 1104, 1111 (D.C. Cir. 1988). Indeed, courts disfavor the application of estoppel against the United States and should not invoke it if doing so would "frustrate the purpose of the statutes expressing the will of Congress or unduly undermine the enforcement of the public laws." FDIC v. Hulsey, 22 F.3d 1472, 1489 (10th Cir. 1994). Here, applying equitable estoppel to the United States' civil RICO claim clearly would be inappropriate. Doing so would frustrate the express will of Congress that the Attorney General pursue civil RICO claims, 18 U.S.C. § 1964(b), and, in the process, undermine the Government's sovereign authority to enforce the public laws. Cf. Alacare Home Health Servs. Inc. v. Sullivan, 891 F.2d 850, 855 (11th Cir. 1990) (equitable estoppel should not apply when Government acting in its sovereign, rather than proprietary, function); Air-Sea Brokers, Inc. v. United States, 596 F.2d 1008, 1011 (C.C.P.A. 1979) (same).

Moreover, before estoppel can lie against the United States, there also must be significant "affirmative misconduct" on the part of the Government. See INS v. Hibi, 414 U.S. 5, 8 (1973); Montana v. Kennedy, 366 U.S. 308, 314-15 (1961); Long v. Area Manager, Bureau of Reclamation, 236 F.3d 910, 916 (8th Cir. 2001); Drozd v. INS, 155 F.3d 81, 90 (2d Cir. 1998); City of New York v. Shalala, 34 F.3d 1161, 1168 (2d Cir. 1994). Such "affirmative misconduct" must consist, at minimum, of active and intentional concealment; negligent, indifferent, or passive conduct by the Government will not suffice. See, e.g., United States v. Marine Shale Processors, 81 F.3d 1329, 1348-51 (5th Cir. 1996); United States v. Harvey, 661 F.2d 767, 775 (9th Cir. 1981); United States v. City of Toledo, 867 F. Supp. 603, 607 (N.D. Ohio 1994); United States v. City of Menominee, 727 F. Supp. 1110, 1121 (W.D. Mich. 1989). For example, in Alaska Limestone Corp. v. Hodel, 614 F. Supp. 642, 647 (D. Alaska 1985), the court rejected an estoppel claim even though Government officials had failed to comply with certain congressionally mandated deadlines. In so doing, the Alaska Limestone court concluded that the party claiming estoppel had offered nothing to show that the Government had "intentionally ignored" its responsibilities or "affirmatively sought to deceive or mislead" others. Id. at 648.

Defendants cannot establish the affirmative defense of equitable estoppel because they have utterly failed to present evidence of active and intentional concealment on the part of the United States that deceived or misled Defendants. Defendants rely upon the fact that the United States regulated certain aspects of the sale of cigarettes for many years. See JD. PFF, p. 817-18. Yet, the exercise by the United States of its sovereign powers to regulate **legal** activity cannot, by any stretch of the imagination, be considered "misconduct" that would prevent the United States from prosecuting **illegal** activity. Moreover, Defendants' estoppel defense is woefully deficient

for essentially the same reasons that Defendants' waiver claim fails. Given the stringent standards by which courts measure equitable estoppel claims against the United States, Defendants have failed, as a matter of law, to meet their heavy burden of proving this defense. See, e.g., Westinghouse Elec. Corp. v. United States Dept. of Navy, 894 F. Supp. 204, 210 (W.D. Pa. 1995).

2. Defendants Fail to Establish the Traditional Elements of Equitable Estoppel

Even assuming that the United States were subject to the traditional concept of equitable estoppel, Defendants still fail to establish this defense. "The case for estoppel against the government must be compelling," ATC Petroleum, 860 F.2d at 1111, and, at a minimum, requires proof of (1) a false representation of fact; (2) a purpose to invite action by the party to whom the representation as made; (3) ignorance of the true facts by that party; (4) reasonable reliance; (5) a showing of injustice; and (6) lack of undue damage to the public interest. Id.; cf. Graham, 222 F.3d at 1007 (setting forth similar requirements for equitable estoppel); Moore v. Blue Cross & Blue Shield of the National Capital Area, 70 F. Supp. 2d 9, 31 (D.D.C. 1999) (same). Defendants must demonstrate that all these elements are satisfied in order for equitable estoppel to apply. See Trustees of Michigan Laborers' Health Care Fund v. Gibbons, 209 F.3d 587, 591 (6th Cir. 2000); Kennedy v. United States, 965 F.2d 413, 417 (7th Cir. 1992). Viewing the facts of this case against these requirements, Defendants have failed to prove any case for equitable estoppel, much less a compelling one.

a. Misrepresentation of fact

First, with respect to a misrepresentation, Defendants fail to even identify any fact or facts the United States allegedly misrepresented. Instead, Defendants baldly assert that the

"misrepresentation" occurred as a result of the United States' alleged participation in Defendants' fraud, and its regulation of the industry. Plainly, the United States' role in regulation of the tobacco industry does not constitute an affirmative misrepresentation of fact, and Defendants offer no plausible basis for concluding otherwise. To support the claim that the United States participated in the fraud, Defendants only refer to "the Government's role in light cigarettes and in development of 'safer' cigarettes." See JD. PFF, p. 818. As noted supra, the United States established that the Defendants devised and executed a scheme to defraud the public concerning "light" cigarettes and "safer" cigarettes, without any fraudulent participation by the Government. See U.S. PFF §§ IV.D & IV.G. Moreover, Defendants do not even argue (nor could they) that the United States was involved in their other fraudulent activity concerning the adverse health effects of smoking, the myth of independent research, marketing to youth, nicotine manipulation, and the addictiveness of nicotine. See U.S. PFF § IV. In short, for substantially the same reasons that Defendants' waiver defense fails, the evidence fails to support their allegation that the United States was a participant in Defendants' fraud.

Similarly, Defendants fail to demonstrate how the United States' regulation of the tobacco industry establishes any misrepresentation of fact. Defendants' claim, see JD. PFF, p. 818, that the RICO charges here seek to impose liability on them for their "compliance with the Government's own regulations" is baseless argumentative rhetoric, and it is nothing more than another version of Defendants' specious pre-emption claims. See supra § I. Moreover, Defendants did not "comply" with any regulation when they engaged in extensive deceptive and fraudulent conduct for five decades about the adverse health effects of cigarettes. Defendants did not "comply" with any regulation when they lied to the public about the addictiveness of

nicotine. Defendants did not "comply" with any regulation when they lied about their commitment to conduct independent research dedicated to discovering the health effects of smoking. And Defendants did not "comply" with any regulation when they marketed their products to youth while claiming otherwise. Defendants have provided no proof of any misrepresentation by the United States, so their defense of equitable estoppel must fail. See, e.g., InSITE Servs. Corp. v. American Elec. Power Co. (In re InSITE Servs. Corp.), 287 B.R. 79, 86 (S.D.N.Y. 2002).

b. Invitation to Act

Defendants argue that the United States "invited" and "compelled" them to act and "accuses them of fraud for abiding by" this compulsion. See JD. PFF, p. 818 (emphasis in original). This argument, however, is based upon the same flawed reasoning discussed above. Government regulation did not "invite" Defendants to conceive and carry on a plan to deceive and defraud consumers and potential consumers for at least fifty years. Defendants provide no evidence to support their argument. For example, they provide no evidence of an invitation from the United States to lie to the public about the adverse health effects of cigarettes. They provide no evidence of an invitation from the United States to mislead consumers as to the addictiveness of smoking and nicotine, or to misrepresent their manipulation of nicotine and nicotine delivery. They provide no evidence of an invitation from the United States to market cigarette products to children and adolescents while denying doing so. Defendants have failed to present evidence showing that the United States invited, much less compelled, their fraud.

c. Defendants' Ignorance

Defendants have failed to establish that they were ignorant of the true facts. On the contrary, Defendants were aware of and concealed the true facts regarding their scheme to defraud the public. See U.S. PFF §§ IV and VIII.

d. Reasonable Reliance

Defendants' argument that their reliance was "reasonable" is based upon their contention that their "compliance" with government regulations underlie the United States' claims in this case. JD. PFF, p. 818. As already explained above, this argument is flawed. Defendants' liability in this action arises not from any compliance with the laws, but rather from their illegal fraudulent conduct. Furthermore, any reliance on an alleged offer by the United States that Defendants would not be subject to prosecution for their illegal fraudulent conduct would be unreasonable. Thus, Defendants cannot show reasonable reliance.

e. Injustice

Defendants argue that "[i]t would be unjust – and it is unnecessary – to subject" them to the relief the United States seeks in this case, apparently because they have agreed to pay more than $200 billion in settlement with the States. See JD. PFF, p. 818-19. To the contrary, injustice would occur if Defendants were allowed to profit from their decades-long fraud on the public. In this case, the United States seeks disgorgement of the proceeds Defendants gained from their unlawful conduct. These proceeds, in effect, constitute "contraband", and Defendants do not have any cognizable legitimate interest in their unlawfully obtained proceeds. Disgorgement of unlawful proceeds merely requires the wrongdoer to "give up only his ill-gotten gains" to which he has no right. See supra § II.C; see also U.S. PFF §§ III and IV. Since

Defendants have no legitimate interest in the unlawful proceeds which the United States seeks to have disgorged, they have failed to make a showing of injustice in order to justify the application of equitable estoppel. Indeed, the only unjust outcome would be that suffered by the public if the United States were estopped from pursuing its civil RICO claim against Defendants for their fraudulent conduct.

f. Public Interest

Even if Defendants were able to establish the other elements of equitable estoppel, Defendants cannot succeed with their defense since estoppel in this case would do violence to the public interest. Contrary to Defendants' arguments, the United States is not attempting to penalize Defendants "for their compliance with, and reliance on" Government policies. See JD. PFF, p. 818. Rather, the United States seeks to enforce the law to remedy Defendants' massive scheme to defraud the public. The public has an overriding, compelling interest in the enforcement of laws, especially RICO, which is designed to free the channels of commerce from unlawful activity, as involved here. See supra, p. 148. The public interest would be significantly harmed if the United States were prohibited from exercising its express authority under 18 U.S.C. § 1964(b) to pursue a civil RICO action against Defendants for their massive fraud. Thus, the public interest weighs heavily against estoppel. See supra § II.C. and U.S. PCL, pp. 92-94, 98-102, 136-138.

In sum, Defendants have failed to meet their heavy burden of establishing a compelling case that the doctrine of equitable estoppel applies to preclude the United States from maintaining this action.

C. The United States Is Not Subject to the Doctrine of Laches as a Matter of Law

Defendants also mistakenly argue that the doctrine of laches bars the RICO claims here. See JD. PFF, pp. 819-24. Defendants' affirmative defense of laches fails because the United States, as a matter of law, is not subject to laches when it brings an enforcement action for equitable relief, as involved here. And even assuming that the defense could be asserted, Defendants have not presented evidence to establish its requirements.

1. The Defense of Laches is Inapplicable to the United States

The Supreme Court has repeatedly held that the United States is not bound by a statute of limitations or subject to the defense of laches when it brings a lawsuit in its sovereign capacity to enforce a public right or to protect the public's interest, as in this RICO lawsuit. See, e.g., Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917) ("As a general rule, laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest."). Accord Nevada v. United States, 463 U.S. 110, 141 (1983); United States v. California, 332 U.S. 19, 40 (1947); United States v. Summerlin, 310 U.S. 414, 416 (1940); Board of County Commissioners v. United States, 308 U.S. 343, 351 (1939); Guaranty Trust Co. of New York v. United States, 304 U.S. 126, 132 (1938); Davis v. Corona Coal Co., 265 U.S. 219, 222 (1924); Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123, 125 (1919); United States v. Insley, 130 U.S. 263, 266 (1889); United States v. Thompson, 98 U.S. 486, 489 (1878); United States v. Kirkpatrick, 22 U.S. 720, 735-37 (1824). Accord United States v. Angell, 292 F.3d 333, 338 (2d Cir. 2002); Herman v. South Carolina Nat'l Bank, 140 F.3d 1413, 1427 (11th Cir. 1998); United States v. Arrow Transp. Co., 658 F.2d 392, 394 (5th Cir., Unit B, Oct. 1981); United States v. Weintraub, 613 F.2d 612, 618-19 (6th

Cir. 1979). "This principle protects public rights vested in the government for the benefit of all from 'the inadvertence of the agents upon which the government must necessarily rely.'" Herman, 140 F.3d at 1427 (quoting United States v. Alvarado, 5 F.3d 1425, 1427 (11th Cir. 1993)); accord SEC v. Rind, 991 F.2d 1486, 1491 (9th Cir. 1993).

Defendants concede (JD. PFF, p. 820), that the RICO statute itself does not contain any time limitations upon the United States' ability to bring this RICO suit. Indeed, Congress recognized in RICO's legislative history that "there is no general statute of limitations applicable to civil suits brought by the United States to enforce public policy, **nor is the doctrine of laches applicable**." S. Rep. No. 617, 91st Cong., 1st Sess. at 160 (1969) (emphasis added). Therefore, it is clear that Congress did not intend to, and affirmatively decided not to, apply a statute of limitations or the doctrine of laches to civil RICO suits for equitable relief brought by the United States.

In accordance with the foregoing authority, every court that has considered the issue has held that the doctrine of laches does not apply against claims of the United States to obtain injunctive and equitable relief under RICO, as involved here. See United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 793 F. Supp. 1114, 1152 (E.D.N.Y. 1992); United States v. International Bhd. of Teamsters, 708 F. Supp. 1388, 1402 (S.D.N.Y. 1989); United States v. Bonanno Organized Crime Family, 695 F. Supp. 1426, 1430-31 (E.D.N.Y. 1988). Moreover, courts in other analogous enforcement contexts similarly have held that the doctrine of laches does not apply against actions of the United States to enforce the securities

laws,[89] antitrust laws,[90] or fair trade laws.[91] Likewise, in various other civil enforcement actions, courts have concluded that limitations periods will not be imposed on suits brought by the United States. See Dole v. Local 427, Int'l Union of Elec. Radio & Mech. Workers, 894 F.2d 607, 610-16 (3d Cir. 1990) (no statute of limitations applies when Secretary of Labor sues under Labor-Management Reporting and Disclosure Act ("LMRDA") to enjoin local union from refusing to allow one of its members to review collective bargaining agreements); Donovan v. West Coast Detective Agency, Inc., 748 F.2d 1341, 1343 (9th Cir.1984) (Secretary of Labor suit to compel filing of requisite reports under LMRDA); Donovan v. Square D Co., 709 F.2d 335, 341 (5th Cir. 1983) (Secretary of Labor's anti-retaliation suit under Occupational Safety and Health Act); Marshall v. Intermountain Elec. Co., 614 F.2d 260, 263 (10th Cir. 1980) (same); Nabors v. NLRB, 323 F.2d 686, 688-89 (5th Cir. 1963) (National Labor Relations Board enforcement of National Labor Relations Act); see also United States v. Ali, 7 F.2d 728 (E.D. Mich. 1925) (laches inapplicable to denaturalization proceeding brought by the government); United States v. Brass, 37 F. Supp. 698 (E.D.N.Y. 1941) (same).

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[89] See, e.g., SEC v. Rind, 991 F.2d 1486, 1491 (9th Cir. 1993); SEC v. McCaskey, 56 F. Supp. 2d 323, 327 (S.D.N.Y. 1999); SEC v. Gulf & Western Indus., Inc., 502 F. Supp. 343, 348-49 (D.D.C. 1980); SEC v. Willis, 777 F. Supp. 1165, 1174 (S.D.N.Y. 1991); SEC v. Penn Central Co., 425 F. Supp. 593, 599 (1976).

[90] See, e.g., United States v. Firestone Tire & Rubber Co., 374 F. Supp. 431, 433 (N.D. Ohio 1974).

[91] See, e.g., FTC v. Verity Int'l, Ltd., 194 F. Supp. 2d 270, 286 (S.D.N.Y. 2002); FTC v. Crescent Pub. Group, Inc., 129 F. Supp. 2d 311, 324 (2001); United States v. Reader's Digest Ass'n, Inc., 464 F. Supp. 1037, 1043 (D. Del. 1978).

None of the cases that Defendants cobble together on this point support their argument. Defendants invoke NLRB v. P*I*E Nationwide, Inc., 894 F.2d 887 (7th Cir. 1990), which stated that government agencies can be subject to the defense of laches. That case does not help them.

First, P*I*E is not the law of this circuit, and it has never been. As Judge Urbina recently noted in United States v. MWI Corporation, ___ F. Supp. 2d ___, 2003 WL 1498382 (D.D.C. March 25, 2003), "[t]his circuit has adopted the Summerlin rule." Id. at *4 n.2 (citing Mount Vernon Mortgage Corp v. United States, 236 F.2d 724, 725 (D.C. Cir. 1956) and contrasting it with P*I*E). Though noting the Seventh Circuit's decision in P*I*E, Judge Urbina rejected the defendant's contention that the United States' "equity claims 'are also barred by the doctrine of laches.'" See id. at *4 n.2. As noted supra, the Summerlin rule refers to United States v. Summerlin, 310 U.S. 414 (1940), which held that "It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights." 310 U.S. at 416.

Second, in reaching its decision in P*I*E, the Seventh Circuit referenced "dictum" in Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977), a case which Defendants also rely upon for the proposition that laches is available against the United States. Occidental Life, however, only suggested in dictum that "unexcused conduct" by the EEOC may affect the relief it is able to obtain against a private party in court. Id. at 373. That case did not even say, much less hold, that conduct by a government agency could give rise to laches so as to preclude it from bringing any claim at all. Indeed, if Defendants were correct that laches applies against the United States, especially when acting as sovereign, then the Supreme Court's long line of cases holding otherwise would necessarily have been overruled. But nothing in Occidental Life expressly or

implicitly overrules any Supreme Court decision on laches, including Summerlin, Nevada v. United States, Utah Power & Light Co., Guaranty Trust, United States v. California, and Board of County Commissioners, nor have Defendants identified any other Supreme Court case that does so.[92]

Finally, in Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), upon which Defendants mistakenly rely (see JD. PFF, p. 811), the Court suggested that the United States could be subject to laches in a commercial suit, noting that in such circumstances, "'[t]he United States does business on business terms.'" 318 U.S. at 369 (quoting United States v. National Exchange Bank, 270 U.S. 527, 534 (1926)). Unlike Clearfield Trust, where "[t]he United States as drawee of commercial paper stands in no different light than any other drawee," id. at 369, the

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[92]Judge Posner, author of the P*I*E opinion, has remarked in a later decision that even in the Seventh Circuit, it "seems unlikely[] that the [laches] doctrine applies with undiminished force to all types of government suit." See United States v. Administrative Enterprises, Inc., 46 F.3d 670, 673 (7th Cir. 1995). Judge Posner suggested that one possible limiter "is to draw a line between government suits in which the government is seeking to enforce either on its own behalf or that of private parties what are in the nature of private rights, and government suits to enforce sovereign rights, . . . and to allow laches as a defense in the former class of cases but not the latter." Id. Nevertheless, in that case (as in P*I*E), the court of appeals noted that it need not decide that question because the elements of laches were not met. Id.

It is also notable that P*I*E involved the United States' suit to enforce a private right, rather than, as in the instant case, a suit to enforce the sovereign right vested in the Attorney General. The same is true in Occidental Life, 432 U.S. 355 (1977), upon which Defendants also rely. See 432 U.S. at 383 (Rehnquist, J., dissenting in part) ("Since here the suit is to recover backpay for an individual that could have brought her own suit, it is impossible to think that the EEOC was suing in the sovereign capacity of the United States."). As the Supreme Court has recognized, in such instances, the United States is not the real party in interest, and the suit is one to enforce a private right rather than to vindicate the public interest; accordingly, laches will run against the United States in such circumstances. See United States v. Beebe, 127 U.S. 338, 346-347 (1888). By contrast, as the Beebe Court noted, "[t]he principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right, or to assert a public interest, **is established past all controversy or doubt.**" Id. at 344 (emphasis added).

instant case does not involve commercial claims where the United States is acting in its proprietary capacity. Rather, the United States is acting as sovereign in bringing its claims against Defendants, thereby precluding the defense of laches.

2. Defendants Have Failed To Establish Laches

Even assuming arguendo that laches could be asserted against the United States in this case, Defendants have failed to establish the doctrine's requirements. For laches to apply, Defendants must establish two elements: (1) unreasonable delay in bringing the claim; and (2) prejudice caused by the delay. See, e.g., Trustees of Centennial State Carpenters Pension Trust Fund v. Centric Corp. (In re Centric Corp.), 901 F.2d 1514, 1519 (10th Cir. 1990); Independent Bankers Ass'n of America v. Heimann, 627 F.2d 486, 488 (D.C. Cir. 1980); Allen v. Carmen, 578 F. Supp. 951, 962-63 (D.D.C. 1983). Defendants have not established either requirement.

a. Defendants Cannot Establish Unreasonable Delay

Defendants note that there is no express statute of limitations for civil RICO actions. See JD. PFF, p. 820. Yet, in arguing that the United States has unreasonably delayed bringing this civil RICO action, Defendants contend that "reasonableness of delay for purposes of laches is gauged by reference to the statute of limitations that would govern an action at law premised on the same conduct." See JD. PFF, p. 820. In trying to apply this principle to the United States, however, Defendants' argument flatly contradicts the law of this Circuit. Specifically, in Illinois Central R.R. Co. v. Rogers, 253 F.2d 349 (D.C. Cir. 1958), the District of Columbia Circuit was faced with the question of whether a claim that accrued in 1941, which the United States had acquired in 1942 under the Trading with the Enemy Act, was subject to a statute of limitations since the Government did not commence a civil action to enforce it until 1956. The Trading with

the Enemy Act itself provided no time limitation, but the defendant in that case argued that the limitation contained in the Interstate Commerce Act applied. Id. at 351. In concluding that the United States was barred by neither a statute of limitations nor the doctrine of laches, the court explained: "In asserting sovereign governmental rights, the United States is not bound by statutes of limitations unless Congress has clearly manifested such intention." Id. at 352. Since the relevant act did not contain a statute of limitation, the court concluded that the United States' claim was not barred. Id. at 353.

The reasoning of Illinois Central applies with full force in this case to defeat Defendants' argument. Congress must clearly manifest its intent to bind the United States to a time limitation. See id. at 352. As RICO contains no statute of limitations for civil claims brought by the United States, Congress has manifested its intent that civil RICO claims of the United States cannot be time barred. Indeed, as already noted above, Congress has acknowledged that the United States is not subject to statutes of limitations or the doctrine of laches in civil RICO actions. See S. Rep. No. 617, 91st Cong., 1st Sess. at 160 (1969) (noting that "there is no general statute of limitations applicable to civil suits brought by the United States to enforce public policy, nor is the doctrine of laches applicable."). Relying upon statutes of limitations from other laws to determine that the United States' acted with "unreasonable delay" for the purposes of laches would violate congressional intent.[93]

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[93] Defendants' argument that the Court should look to other statutes of limitations to determine if the United States has unreasonably delayed bringing this action also runs counter to RICO's statutory scheme which recognizes that an enterprise's activity can span decades. Specifically, Defendants ask the Court to find laches in this case by judging the United States' "delay" against other four- and five- year statutes of limitations. See JD. PFF, p. 821. But in defining the term "pattern of racketeering activity", RICO requires:

(continued...)

Defendants' efforts to rely (JD. PFF, p. 821) upon the four-year statute of limitations that applies to private RICO suits for treble damages fails for a number of reasons. First, the Supreme Court's opinion in Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143 (1987), involved a civil RICO dispute between private parties under 18 U.S.C. § 1964(c), and not a claim brought by the United States under § 1964(b), so its reasoning is inapposite. Accord United States v. International Bhd. of Teamsters, 708 F. Supp. 1388, 1402 (S.D.N.Y. 1989).[94]

Second, for private civil RICO actions, the four-year limitations period begins to run from the time the private plaintiff knew or should have known of his injury. See Rotella v. Wood, 528 U.S. 549 (2000). But that rationale cannot apply here because, as this Court already has held, there is no requirement of an injury to the United States in this case. See United States v. Philip Morris, 2002 WL 1925881, at *2.

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[93](...continued)
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**; . . .

18 U.S.C. § 1961(5) (emphasis added). Given that RICO addresses unlawful activity that can span decades, with up to a decade between each individual racketeering act, Defendants' reliance upon four- or five- year statutes of limitations to determine whether a party may be guilty of laches in bringing an action is highly misplaced and inconsistent with RICO's purposes.

[94] The Ninth Circuit faced an analogous situation in SEC v. Rind, 991 F.2d 1486 (9th Cir. 1993), and concluded that civil enforcement actions brought by the SEC were not subject to a statute of limitations even though similar actions by private parties were. The court reasoned that different interests were at stake between private and government enforcement actions, with the latter promoting "economic and social policies independent of the claims of" private parties. Id. at 1490; see also id. at 1491 (noting rule that "actions by government officials are not subject to state, or indeed any other, limitations periods" when the United States "sues to vindicate a public right or interest, absent a clear showing of congressional intent to the contrary").

Again assuming arguendo the need to apply a statute of limitations, the statute of governing criminal cases would make more sense because the elements of a criminal RICO case apply to this action. See U.S. PCL, p. 12. A criminal substantive RICO offense is timely brought when an indictment is returned within five years from the date that the last racketeering act was committed and a criminal RICO conspiracy offense is timely brought when an indictment is returned within five years of the date all the objectives of the RICO conspiracy were achieved. See, e.g., United States v. Starrett, 55 F.3d 1525, 1550-51 (11th Cir. 1995); United States v. Wong, 40 F.3d 1347, 1367 (2d Cir. 1994); United States v. Persico, 832 F.2d 705, 714 (2d Cir. 1987). The United States has established that Defendants not only committed racketeering acts up to the time the Complaint was filed, but continued to commit racketeering acts and unlawful conduct in furtherance of the RICO conspiracy up to the present. See U.S. PCL, pp. 64, 68, 86-92; U.S. PFF §§ V and VIII. Therefore, this Complaint was timely brought and there has been no unreasonable delay.[95]

Moreover, Defendants' argument that the United States has committed unreasonable delay in bringing this action must fail, because Defendants' own conduct is the cause of the delay about which they now complain. See Natural Resources Defense Council v. Pena, 147 F.3d 1012, 1026 (D.C. Cir. 1998). Much of the evidence upon which the United States relies in this case came to light during the mid to late 1990s. The United States has established that Defendants have suppressed, concealed, and destroyed documents and other information all throughout the existence of the Enterprise. See U.S. PFF § I.K. Indeed, Defendants continue

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[95] Defendants' claim, see JD. PFF, p. 812, that the statute of limitations has run on "virtually all of the Government's allegations of mail and wire fraud" is flatly wrong. See supra § II.A and B.

with such misconduct to this very day. See U.S. PFF § VIII.A. In view of the fact that Defendants concealed and destroyed evidence of their unlawful activity, they cannot now seriously argue that the United States' inability to bring this action earlier was the result of "unreasonable delay" for purposes of laches. In fact, Defendants' conduct in concealing and destroying evidence over the years precludes them from even asserting a laches defense:

> If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time.
>
> Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant from setting up such a fraudulent defense, as it interposes against other forms of fraud. . . .

Holmberg v. Armbrecht, 327 U.S. 392, 396-97 (1946); see also Natural Resources Defense Council, 147 F.3d at 1026 ("[I]f the defendant is responsible for the delay, or if it has acted to deprive the plaintiff of effective relief, the district court should weigh that in providing a remedy"). Given Defendants' own role in causing a delay in bringing a civil RICO action, they cannot now rely upon the doctrine of laches.

b. Defendants Cannot Establish the Requisite Prejudice

Defendants have not and cannot establish prejudice caused by the alleged delay. See Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, 215 (1963) ("test of laches is prejudice to the other party"); Gardner v. Panama R.R. Co., 342 U.S. 29, 31 (1951) ("where no prejudice to the defendants has been ensued from the mere passage of time, there should be no bar to relief."). Specifically, Defendants contend that they have "tailored their conduct for decades in accordance with Government suggestions, compulsion, and scrutiny and now are being hailed into court with

the accusation that this conduct amounts to criminal fraud." See JD. PFF, p. 822. Again, Defendants attempt to argue that the United States is the source of their own fraudulent conduct. That the United States regulated legal activity, however, cannot seriously be contended as the source of Defendants' fraud which has been set forth in detail in the United States' Proposed Findings. See U.S. PFF § IV. For example, the United States did not suggest or compel Defendants to lie to the public for decades denying the adverse health effects of smoking; to lie to the public for decades by representing they would conduct independent research into the health effects of smoking; to lie about the addictive nature of smoking and nicotine; to manipulate the design of cigarettes for the delivery of nicotine and to misrepresent having done so; to lie about their efforts to market to children and adolescents; or to misrepresent the hazardous nature of certain products, such as low tar or "light" cigarettes. Indeed, Defendants cannot seriously contend that they have been prejudiced by being able to continue their fraud upon the public for decades.

Defendants also argue that they have been prejudiced because certain evidence and witnesses are no longer available over time. See JD. PFF, p. 822-23. First, to the extent any information is unavailable due to Defendants' own efforts to conceal and destroy evidence over the years, see U.S. PFF § I.K, § VIII.A, they cannot now claim prejudice. Cf. Holmberg, 327 U.S. at 396-97; Natural Resources Defense Council, 147 F.3d at 1026. Second, Defendants have been involved in tobacco-related litigation for several decades. See U.S. PFF, Appendix F. As a result, they have been preparing defenses over the years and have had the opportunity to preserve relevant evidence and testimony. Cf. United States v. Ewell, 383 U.S. 116, 122 (1966); Bernard v. Gulf Oil Co., 596 F.2d 1249, 1257-58 (5th Cir. 1979) ("A party cannot assert the

defense of laches merely because it has failed to preserve evidence despite knowledge of a pending claim."). Also, even if Defendants were to experience problems with the availability of evidence as a result of the alleged delay, the United States would face the same problems. Consequently, Defendants cannot claim prejudice since they would be no worse off than the United States. See Ewell, 383 U.S. at 122-23.

Moreover, Defendants' claim of "evidentiary" prejudice – that various persons as well as certain records no longer exist, see JD. PFF pp. 822-23 – is premised upon Defendants' ipse dixit claim that such information is relevant to this litigation. However, this Court has characterized such evidence of the United States' knowledge, as well as "whether the government should have better, or more effectively, regulated the activities of the Joint Defendants" is "of minimal, if any, relevance to whether the Joint Defendants were themselves participating in the conspiracy and committing the acts of which they are accused." See Order No. 100 at p. 6. Indeed, since such information is not relevant to the instant case, the possible unavailability of such information cannot serve as the basis of a laches defense. See also Tobacco Workers Int'l Union, Local 317 v. Lorillard Corp., 448 F.2d 949, 958-59 & n.18 (4th Cir. 1971) (where court's sole issue was to determine arbitrability of claim, Defendants' claim of unavailable evidence relating to underlying issue in arbitration not considered for laches defense); accord Trafalgar Shipping Co. v. International Milling Co., 401 F.2d 568, 572 (2d Cir. 1968) ("[O]n a motion to compel arbitration a district court may consider only claims of laches which relate to issues which the court must decide."); Halcon Int'l, Inc. v. Monsanto Australia Ltd., 446 F.2d 156 (7th Cir. 1971).

Defendants further claim prejudice on account that the alleged passage of time "has caused the Government's inflated disgorgement request to spiral into the hundreds of billions of

dollars." See JD. PFF, p. 823. The United States' claim for disgorgement is based upon the profits Defendants unlawfully obtained from their fraud. Thus, Defendants' argument, in effect, is that they have been prejudiced by being able to reap billions of dollars in profits over the years from their fraudulent conduct. Such an argument is absurd. Moreover, as already discussed above, Defendants' proceeds from their illegal conduct constitutes "contraband", and they have no cognizable legitimate interest in such unlawfully obtained proceeds. Disgorgement of unlawful proceeds merely requires the wrongdoer to give up only his ill-gotten gains to which he has no right. See supra § II.A and C; U.S. PCL, pp. 94-102.

In sum, Defendants' laches defense fails since, as a matter of law, the defense is inapplicable to the United States acting in its sovereign capacity, as it is here. Furthermore, even if laches could be applied, Defendants cannot show unreasonable delay or prejudice.

D. Defendants' Defenses of "Unclean hands" and In Pari Delicto Fail

Defendants further assert the related defenses of unclean hands and in pari delicto, see JD. PFF, pp. 824-30, but neither defense operates to preclude the United States from bringing this civil RICO action.

1. The United States is not Subject to the Defense of Unclean Hands

The doctrine of unclean hands derives from the equitable maxim that one "who comes into equity must come with clean hands." See, e.g., Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945). The doctrine generally may not be invoked against the United States when it is "attempting to enforce a congressional mandate in the public interest." SEC v. Gulf & Western Indus., Inc., 502 F. Supp. 343, 348 (D.D.C. 1980); accord Kelley v. Thomas Solvent Co., 714 F. Supp. 1439, 1451 (W.D. Mich. 1989); United States v.

Vineland Chemical Co., Inc., 692 F. Supp. 415, 423-24 (D.N.J. 1988). As already demonstrated supra, pp. 147-49, the United States is pursuing this civil RICO claim pursuant to its express statutory authority against Defendants for their fraud on the public. Thus, the United States here is "enforc[ing] a congressional mandate in the public interest," Gulf & Western, 502 F. Supp. at 348, thereby precluding the application of the doctrine of "unclean hands" against it.

2. The United States Is Not Subject to the Doctrine of In Pari Delicto as a Matter of Law

Defendants contend that the doctrine of in pari delicto, which "literally means 'of equal fault'" Pinter v. Dahl, 486 U.S. 622, 632 (1988), is "closely related to the defense of 'unclean hands.'" See JD. PFF, p. 825. This defense not only fails for the reasons discussed above, but for other legal reasons as well. In order for in pari delicto to apply, "[t]he plaintiff must be an active voluntary participant in the unlawful activity that is the subject of the suit." Id. at 636. However, the United States is not a "person" within the meaning of the RICO statute. See United States v. Bonanno Organized Crime Family, 879 F.2d 20, 21-27 (2d Cir. 1989). Thus, even assuming arguendo that this defense were true as a matter of fact – which it is not – the United States cannot, as a matter of law, participate in a RICO Enterprise under 18 U.S.C. § 1962(c) ("It shall be unlawful for any **person** . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs. . . .") (emphasis added), or participate in a RICO conspiracy to violate 1962(c) under 18 U.S.C. § 1962(d) ("It shall be unlawful for any **person** to conspire to violate [the RICO statute].")(emphasis added). Thus, because the United States is not a person within the meaning of RICO, it may not be held liable for a violation of RICO. Moreover, an action can only be barred by in pari delicto "if preclusion of suit does not offend the underlying statutory policies." Pinter, 486 U.S. at 637-38. It is beyond question that

preclusion of a RICO suit brought by the United States to prevent and restrain violations of RICO and thus protect the American public would offend the statutory policies behind RICO.

3. Defendants Have Failed to Establish the Required Factual Basis for Either Defense

"The doctrine of unclean hands is designed to preserve the integrity of the Court by protecting it from exercising its powers to aid those who are before the Court as a result of their own fraudulent behavior." Rubin v. Estate of Warner, 881 F. Supp. 23, 25 (D.D.C. 1995).

> [T]he primary principle guiding application of the unclean hands doctrine is that the alleged inequitable conduct must be connected, i.e., have a relationship, to the matters before the court for resolution. We will not refuse relief to a party merely because it has engaged in misconduct which is unrelated to its claims before the court. Only when "some unconscionable act of one coming for relief has immediate and necessary relation to the equity that" the party seeks, will the doctrine bar recovery.

New Valley Corp. v. Corporate Prop. Assocs. 2 & 3 (In re New Valley Corp.), 181 F.3d 517, 525 (3d Cir. 1999) (quoting Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245 (1933)). The evidence Defendants use to support their "unclean hands" defense is neither "inequitable conduct" nor "connected . . . to the matters before the court." Rather, Defendants repeat the spurious argument that the United States' regulation of certain aspects of the cigarette industry and its purported involvement in Defendants' fraudulent conduct related to the marketing of "low tar" cigarettes and the development of "safe" and "less hazardous" products. JD. PFF, pp. 824, 826. As previously discussed, Defendants' argument shows that the United States regulated certain activities concerning tobacco and tobacco products. Yet, there is no merit to the claim that the exercise of a sovereign power to regulate legal activity under a regulatory scheme constitutes "inequitable conduct" that dirties the hand of the United States so as to prevent it from enforcing the laws to prevent and restrain RICO violations.

Moreover, the United States' regulation of legal activity is not so connected to Defendants' illegal fraud so as to give the United States "unclean hands." Defendants do not even attempt to adduce any evidence that the United States was somehow involved in many of its frauds on the public, such as their public denials of the adverse health effects of smoking, despite their internal knowledge otherwise; their public representation that they would conduct independent research, while instead pre-selecting researchers who would perform favorable research and funding irrelevant research; their public denials that smoking and nicotine are addictive, despite the fact Defendants knew otherwise; their manipulation of the design of cigarettes and the delivery of nicotine to smokers, while denying at the same time that they engaged in such manipulation; and their marketing of cigarettes to children while claiming not to do so. See generally U.S. PFF § IV. As such, Defendants have utterly failed to present any basis upon which the Court could conclude that the United States participated in these frauds upon the public, and therefore is subject an "unclean hands" defense.

Defendants' further argument that the United States profited from Defendants' fraudulent conduct, see JD. PFF, pp. 827, 829, in no way supports these two equitable defenses. In particular, the fact that the United States has sold a large number of cigarettes to members of the military is completely irrelevant to the issue involved in this action, namely, whether Defendants executed a scheme to defraud the public in violation of RICO and the mail and wire fraud statutes. Moreover, the fact that the United States is also a retailer of cigarettes does not make the United States a participant in Defendants' fraud. Defendants' arguments provide no bases to support their equitable defenses. As such, they should be denied.

XI

DEFENDANTS ARE PRECLUDED FROM RELYING ON THE MSA AND THE RICO CLAIMS ARE NOT RENDERED MOOT BY DEFENDANTS' SETTLEMENTS OF STATE LAWSUITS

Defendants contend that their settlement of state lawsuits in the Master Settlement Agreement ("MSA") and other suits and their alleged changes in policy render the RICO claims here moot. See JD. PFF, pp. 836-841. However, Defendants are precluded from relying on the MSA by the terms of the MSA itself, and in any event, for the reasons stated in the U.S. PCL, pp. 82-94, this claim is totally without merit.

A. Defendants Are Precluded From Replying Upon the MSA

The MSA provides in relevant part that:

> § XVIII(f) Non-Admissibility. The settlement negotiations resulting in this Agreement have been undertaken by the Settling States and the Participating Manufacturers in good faith and for settlement purposes only, and no evidence of negotiations or discussions underlying this Agreement shall be offered or received in evidence in any action or proceeding for any purpose. **Neither this Agreement nor any public discussions, public statements or public comments with respect to this Agreement by any Settling State or Participating Manufacturer or its agents shall be offered or received in evidence in any action or proceeding for any purpose other than in an action or proceeding arising under or relating to this Agreement.**

(emphasis added). Thus, the terms of the MSA itself preclude Defendants from relying upon the MSA as a defense in this proceeding. Defendants' argument premised upon the MSA is simply another example of Defendants' failure to abide by the MSA and is indicative of its lack of effectiveness in restraining Defendants' misconduct. See JD. PFF, p. 840. Since Defendants' reliance upon the injunctive relief in the MSA to argue the mootness of the United States' claims for injunctive relief is **itself** a violation of the MSA, Defendants lack "clean hands" to rely upon

the MSA. Cf. Mullins v. Kaiser Steel Corp., 642 F.2d 1302, 1312 n.11 (D.C. Cir. 1980) ("Ordinarily, one thinks of the doctrine of unclean hands as the sin of the plaintiff who 'comes to the court with unclean hands.' But the doctrine can also apply when the plaintiff establishes a right at law and the defendant attempts to interpose a defense which, like the defense of illegality is overlaid with equitable considerations"), rev'd on other grounds, 455 U.S. 72 (1982). This disregard for the MSA is merely another example of the misconduct of Defendants that will remain unchecked absent the granting of relief sought by the United States.

Therefore, this Court should not consider any argument asserted by Defendants premised upon the alleged effectiveness of any injunctive relief Defendants may have agreed to with the Settling States. Notwithstanding Defendants' clear breach of their contractual obligations under the MSA, Defendants' arguments, nonetheless, lack merit.

B. Defendants' Reliance Upon the MSA Is Without Merit

1. The United States' claims for equitable relief in this civil RICO action are not mooted by the existence of the MSA, the four other State settlements, and alleged unilateral change in Defendants' corporate policies. This Court has previously found that the MSA does not render moot the United States' request for injunctive relief and rejected Defendants' assumptions that Defendants have or will comply with the MSA, and that the MSA has adequate enforcement mechanisms in the event of noncompliance. See United States v. Philip Morris, 116 F. Supp. at 149. See also U.S. PCL, p. 84.[96]

[96] Moreover, Defendants Philip Morris Companies, Inc., and BATCo are not signatories to the MSA.

The Court's mootness inquiry should focus on whether the "allegedly wrongful behavior [can] reasonably be expected to recur." See Friends of the Earth, Inc. v. Laidlaw Environmental Services, 528 U.S. 167, 189 (2000). It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." Id. (citing City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982)). See also County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979); DeFunis v. Odegaard, 416 U.S. 312, 318 (1978) (per curiam); Allee v. Medrano, 416 U.S. 802, 810-11 (1974); SEC v. Medical Committee For Human Rights, 404 U.S. 403, 406 (1972). See also U.S. PCL § III.

Furthermore, the Supreme Court in Friends of the Earth reiterated that a party arguing that a cause of action is moot "bears a heavy burden", especially where the argument is based on voluntary cessation of conduct. See Friends of the Earth, 528 U.S. at 189 (citing United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968)); Pharmachemie B.V. v. Barr Labs., Inc., 276 F.3d 627, 631 (D.C. Cir. 2002)(party urging mootness must demonstrate that there is no reasonable expectation that alleged violations will occur and interim relief or events have "irrevocably eradicated the effects of the alleged violations"); National Black Police Ass'n v. District of Columbia, 108 F.3d 346, 349 (D.C. Cir. 1997)(generally voluntary cessation of challenged activity does not moot a case). "[C]ourts have refused to apply the mootness doctrine if there is 'some cognizable danger of recurrent violation.'" Monzillo v. Biller, 735 F.2d 1456, 1460 (D.C. Cir. 1984)(quoting United States v. W.T. Grant, 345 U.S. 629, 633 (1953)); Exxon Corp. v. FTC, 589 F.2d 582, 587 n.10 (D.C. Cir. 1978)(same). See also U.S. PCL, p. 84 and n.75.

Moreover, cessation of unlawful activity is especially suspect where, as here, the wrongdoers' alleged cessation is designed to minimize its liability in response to 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."). See also U.S. PCL, p. 84. Although Defendants argue that changes in their corporate policies and behavior were not initiated in response to **this** litigation, as they entered into the MSA prior to the filing of the United States' action, the alleged alterations in Defendants' policies and behavior **were** undertaken in response to the various lawsuits filed and/or threatened by the various states. Thus, the Supreme Court's holding in Parke Davis applies with full force here.

Defendants' mootness argument also fails because United States seeks other equitable remedies not covered by the MSA. See U.S. PCL, pp. 84-85. First, the United States seeks disgorgement of Defendants' past ill-gotten gains. Such equitable relief under civil RICO is distinct from the payments of **future** profits that Defendants are obligated to tender to the Settling States under the terms of the MSA. Unlike the equitable disgorgement sought here, the purpose of the payments under the MSA is not to deprive Defendants of their past unlawful profits. Rather, the MSA payments from the signatory Defendants are based on a percentage of future sales and are allocated by market share. See MSA § IX(b)-(c); MSA § II(mm), at 12. Moreover, a Defendant whose market share falls is entitled to reduced – or even possible exemption – from payments under the MSA. See MSA § IX(d), at 58. The disgorgement sought by the United States serves as a deterrent to future wrongdoing and cannot be frustrated by

Defendants' settlement under the MSA. Second, the MSA fails to address any issue with respect to injunctive relief 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. Third, the MSA does not require any funding of medically approved nicotine replacement therapy for smokers, or the appointment of court officers to monitor and implement the relief granted. See Complaint § VII.B(2). Fourth, 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 association with any other person who is engaged in such acts of racketeering. Fifth, the MSA does not enjoin certain of Defendants' marketing practices that they have used to target the youth market pursuant to their scheme to defraud.

Thus, the United States seeks distinct relief designed to vindicate highly significant sovereign interests that cannot be thwarted by 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).

Thus, the totality of the evidence, particularly Defendants' intentional, extensive pattern of unlawful conduct spanning nearly 50 years, warrants the imposition of equitable relief.

2. Moreover, Defendants' argument is based on a demonstrably false premise – i.e., that they ceased their unlawful conduct. On the contrary, the evidence, including numerous judicial findings, establish that Defendants' unlawful pattern of deliberate, unlawful deceit, fraud and concealment continues to the present. See U.S. PCL, pp. 86-92; U.S. PFF § VIII. Indeed, as noted above, Defendants' reliance upon the MSA is itself a violation of the MSA.

Furthermore, even if the United States were not entitled to a permanent injunction, the United States nonetheless is entitled to disgorgement of Defendants' ill-gotten gains derived from their past unlawful conduct because disgorgement vindicates significant public interests independent from those served by an injunction against Defendants at hand. As discussed above in Section II above, 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 U.S. PCL, pp. 92-93.

For the foregoing reasons, Defendants' mootness claim is totally without merit.

XII

THE RICO CLAIMS ARE NOT PRECLUDED BY PRINCIPLES OF RES JUDICATA OR ACCORD AND SATISFACTION

A. Defendants' Affirmative Defense of Res Judicata is Meritless As A Matter of Law

Defendants contend that the RICO claims are "precluded on res judicata grounds by the Master Settlement Agreement ("MSA") entered into between Defendants and the States in 1998 in settlement of numerous independent lawsuits." See JD. PFF, pp. 863-67. This claim is meritless as a matter of law.[97]

"Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Allen v. McCurry, 449 U.S. 90, 94 (1980) (citing Cromwell v. County of Sac, 94 U.S. 351, 352 (1876)). The doctrine is intended to relieve parties of burdensome multiple lawsuits, prevent inconsistent decisions, and encourage reliance on adjudication. Id.; Nevada v. United States, 463 U.S. 110, 129-30 (1983). To prevail on a defense of res judicata, a defendant has the burden of establishing: (1) a final judgment on the merits in the prior action, (2) the claims raised in the subsequent action were identical to those decided in the prior action, and (3) the prior action involved the same parties or their privies. See, e.g., Drake v. Federal Aviation Administration, 291 F.3d 59, 66 (D.C. Cir. 2002). Defendants fail to establish any of these requirements, much less all of them. Accordingly, this affirmative defense must be rejected.

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[97] At the outset, the United States notes that Defendants are precluded from relying on the MSA for the reasons stated supra § XI.

1. The MSA Is Not A Final Judgment

First, the MSA is not a final judgment for purposes of res judicata because it is in the nature of a compromise, with neither findings of fact nor conclusions of law. See Lawlor v. National Screen Service Corp., 349 U.S. 322, 327 (1955) (judgment unaccompanied by findings does not bar the parties on any issue). The Supreme Court has further stated, "A judgment entered with the consent of the parties may involve a determination of questions of fact and law by the court. But unless a showing is made that that was the case, the judgment has no greater dignity, so far as collateral estoppel is concerned, than any judgment entered only as a compromise of the parties." United States v. International Building Co., 345 U.S. 502, 506 (1953); see also I.A.M. Nat'l Pension Fund, Benefit Plan v. Industrial Gear Mfg. Co., 723 F.2d 944, 949 n.7 (D.C. Cir. 1983) ("the instant decree was not accompanied by a judicial determination of questions of fact or conclusions of law (citation omitted) . . . [and] this decree appears to be nothing more than a pro forma acceptance by the court of an agreement by the parties to settle their controversy"). Neither the MSA nor the consent decrees entered pursuant to the MSA contain findings of fact or conclusions of law.

Moreover, the MSA specifically states that "No portion of this Agreement shall provide any rights to, or be enforceable by, any person or entity that is not a Settling State or a Released Party." See MSA §XVIII(p). The MSA applies to "Participating Manufacturers" and "Settling States." "Settling States" are defined as "any State that signs this Agreement on or before the MSA execution date". The United States is not a "Settling State" under the MSA, see MSA § II(qq)-(rr), "Definitions", because it was not a party to any of the lawsuits settled by the MSA, and did not sign it. Thus, by the very terms of the MSA itself, the United States can claim no

interest in the settlement between the Defendants and the settling States. See Ethnic Employees of the Library of Congress v. Boorstin, 751 F.2d 1405, 1409 (D.C. Cir. 1985) ("persons who are not parties to an action ordinarily are not bound by the judgment in the action"). Accordingly, the MSA has no preclusive effect with respect to the United States' civil RICO claims.[98]

2. The Causes of Action Are Not The Same

Second, the causes of action asserted in the United States' federal civil RICO suit are not identical to the causes of action asserted in the various settling States' suits. Therefore, res judicata does not apply. The Supreme Court has recognized that "[u]nder res judicata, a final judgment on the merits bars further claims by the parties or their privies based on the same cause of action." Montana v. United States, 440 U.S. 147, 153 (1979) (citations omitted). The Supreme Court made clear that the defense of res judicata is inapplicable where the subsequent action involves different parties, because a cause of action involving different parties "differs by definition" from the earlier action. Id. at 154 (finding res judicata analysis inappropriate even

[98] Nor do the cases cited by Defendants support their arguments that the MSA is a final judgment that binds the United States here. See JD. PFF, p. 864 ¶ 2101. In Peters v. National R.R. Passenger Corp., 966 F.2d 1483 (D.C. Cir. 1992), the D.C. Circuit merely held that the settlement in a class action would be given res judicata effect against a member of the class action, despite class counsel's allegedly negligent failure to notify the class member of the class action, thus depriving the him of an opportunity to opt out of the class. 996 F.2d 487. Thus, Peters stands for the unremarkable proposition that if a class member fails to opt out of a class action, he will be bound by any subsequent class settlement. In Reiter v. Universal Marion Corp., 299 F.2d 449 (D.C. Cir. 1962), the D.C. Circuit affirmed the dismissal of a shareholder's derivative suit because a prior judgment in New York was res judicata as to a subsequent action brought in Washington, D.C. In Reiter, the D.C. Circuit noted that the settlement achieved in New York was accomplished after a hearing pursuant to a Stipulation of Settlement to determine whether the settlement was fair, reasonable and adequate, with notice given to all interested parties including the appellants in the Washington, D.C. action. Id. at 451. Here, the United States had no opportunity to participate in any determination with respect to the fairness, reasonableness or adequacy of the MSA. Thus, Reiter is easily distinguished, and has no applicability to this action.

where a party in the later case had effectively assumed control, though as a nonparty, for the defense or prosecution of the earlier case.). See also Lawlor, 349 U.S. at 329 (a prior judgment is res judicata only as to suits involving the same cause of action). The District of Columbia Circuit in I.A.M. Nat'l Pension Fund, supra, analyzed a consent decree to define the cause of action in light of the injuries alleged and the rights asserted. 723 F.2d at 948. The D.C. Circuit found that claim preclusion was not appropriate in circumstances where the cause of action differed from the cause of action in the previous litigation. Id. at 949.[99]

In Drake v. Federal Aviation Administration, supra, 291 F.3d 59, the D.C. Circuit found that the district court erred in dismissing a second case brought by plaintiff on res judicata grounds when the second case did not "share the same 'nucleus of facts'" for those advanced in the previous litigation, and the defendant did not demonstrate that the second case turned on issues that were or could have been raised in the first case. Id. at 66 (citing Page v. United States, 729 F.2d 818, 820 (D.C. Cir. 1984)). In Drake, the first suit challenged the constitutionality of the Federal Aviation Administration's ("FAA") drug testing regulations, whereas the second suit challenged both the FAA's subsequent determination that the plaintiff's employer did not violate those regulations, and the FAA's refusal to disclose the basis for that determination to the plaintiff. The court held that res judicata did not bar an action based on facts not yet in existence at the time of the original action, i.e., the two causes of action were distinct actions. Id. Similarly, the United States' civil RICO claims are not only premised upon facts that pre-date the execution of the MSA, but are also premised upon facts that post-date the execution date of the

[99] "Res judicata" literally means "the thing decided" and is also commonly known as "claim preclusion."

MSA. Thus, the claims brought by the settling States and the United States' civil RICO action are separate causes of actions for purposes of determining the applicability of res judicata. See Stanton v. District of Columbia Court of Appeals, 127 F.3d 72, 79 (D.C. Cir. 1997) (litigation over the validity of one past course of conduct is not the same "claim" over validity of conduct that occurred after the initial litigation) (citing Lawlor, 349 U.S. at 328); I.A.M. Nat'l Pension Fund, 723 F.2d at 949 (single contract gave rise to two different causes of action for res judicata purposes – one cause of action for inaccurate payments, and a subsequent action for delinquent payments); cf. United States v. Rashed, 234 F.3d 1280, 1283 (D.C. Cir. 2000) (under doctrine of dual sovereignty one sovereign's right to enforce criminal law cannot be classified as the same "cause of action" as another's, and double jeopardy bar is more akin to claim preclusion than issue preclusion) (citing Montana, 440 U.S. at 154 (1979)).

Here, the various causes of actions alleged by the settling States (claims for monetary damages and equitable relief under various state laws, including consumer protection and antitrust laws, see MSA § I "Recitals") differ substantially in their elements as well as their underlying facts from the civil RICO claims asserted by the United States. The United States claims are premised upon the racketeering activities of Defendants under RICO and the wire and mail fraud statutes. Furthermore, contrary to the suggestion of Defendants, the United States does not seek – and has never sought in this action – a right to recoup **Medicaid** expenditures for smoking-related disease. While the United States originally sought reimbursement for **Medicare** expenditures for smoking-related diseases (and similar expenditures made by other limited federal health care programs) under two different federal statutes, those claims were dismissed by this Court. See United States v. Philip Morris, 116 F. Supp. 2d at 144-46 (D.D.C. 2000). Rather,

the United States seeks purely equitable relief, including disgorgement of past ill-gotten gains based upon Defendants' racketeering activities, which gains are distinct from the payments of future profits that Defendants will make to the settling States under the terms of § VII.B(1) of the MSA. Thus, the instant cause of action is not the "same" as the State lawsuits.[100]

3. The United States Is Not A Party To The MSA Or In Privity With The States

Third, the United States is neither a party to the MSA nor in privity with the settling States under the applicable decisional law of the Supreme Court and the D.C. Circuit Court of Appeals.[101] As a general matter, "state and federal governments are separate parties for res judicata purposes, so that litigation by one does not bind another." United States v. Power Engineering Co., 303 F.3d 1232, 1240 (10th Cir. 2002) (quoting 18 Wright, et al., Federal Practice and Procedure, § 4458 at 503); cf. Rashed, 234 F.3d at 1283. The Supreme Court has recognized the general limitation that collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the issue in the earlier case. Allen v. McCurry, 449 U.S. at 95. Here, the United States is not a party

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[100] Defendants, citing two collateral estoppel cases (Allen v. McCurry, 449 U.S. 90, and Hall v. Clinton, 285 F.3d 74) and Appalachian Power Co. v. EPA, 251 F.3d 1026 (D.C. Cir 2001), argue, based only on asserted privity arising out of the purported common interest in recovering tobacco-related Medicaid expenditures, that the United States was required to present all of its claims, including all equitable RICO claims, **in the State cases to which it was not a party**. Since the cited cases concerned whether a party to the earlier action was precluded from litigating other matters as a party in the later action, and since Defendants have not and cannot provide any evidence that the United States controlled the settling States litigation so that it would be in privity with them for res judicata purposes, Defendants' attempt to stretch res judicata doctrine to invalidate the instant cause of action is wholly without merit.

[101] Moreover, Defendants Philip Morris Companies, Inc., and BATCo are not signatories to the MSA.

to the state lawsuits that culminated in the MSA and thus had no opportunity to litigate any issues addressed in that settlement.

Nor was the United States in privity with the settling States, and its interests were not so identified with the settling States so as to be in privity with those States. In Montana, the Supreme Court recognized that preclusion of nonparties who are in privity with one of the parties in the earlier litigation occurs when the "nonparties assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved." 440 U.S. at 974. The Supreme Court found privity because "although not a party, the United States plainly had a sufficient 'laboring oar' in the conduct of the [earlier] state-court litigation to actuate principles of estoppel." Id. See also Schell v. Eckrich & Sons, 365 U.S. 260, 261 n.4 (1961) (by openly controlling defense of a suit in which a party has an interest, the party will be bound by a final judgment and precluded by res judicata from relitigating same issues) (citing Souffront v. La Compagnie Des Sucreries De Porto Rico, 217 U.S. 475 (1910)); Drummond v. United States, 324 U.S. 316, 318 (1945) ("If the United States in fact employs counsel to represent its interest in a litigation or otherwise actively aids in its conduct, it is properly enough deemed to be a party and not a stranger to the litigation and bound by its results (internal citations omitted). . . . But to bind the United States when it is not formally a party, it must have a laboring oar in a controversy.").

Here, Defendants have failed to offer any evidence – because there is none – that the United States participated in, directed, or controlled the litigation that ultimately resulted in the MSA. Accordingly, no privity exists between the United States and the settling States that would give rise to res judicata or collateral estoppel here. See, e.g., Holland v. National Mining Ass'n,

309 F.3d 808, 813 (D.C. Cir. 2002) (unless a nonparty "exercised control of the litigation on behalf of a party," the nonparty is not bound by judgment, and res judicata will not bar that nonparty in subsequent litigation); Ethnic Employees of the Library of Congress v. Boorstin, 751 F.2d 1405, 1409 (D.C. Cir. 1985) (no privity unless a person claimed an interest in the subject matter through or under one of the parties either by inheritance, succession or purchase); Novak v. World Bank, 703 F.2d 1305, 1310 n.11 (D.C. Cir. 1983) ("In most situations where privity has been held to exist, one or more of the following relationships between the privies are present: concurrent relation to the same right of property; successive relationship to the same right of property; or representation of the interests of the same person.").[102]

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[102] Defendants' argument regarding privity is as fatally flawed as the other parts of Defendants' res judicata defense, because under none of the various formulations of privity that courts have articulated to capture the "elusive concept" of privity could the United States be considered in privity with the States in connection with the lawsuits that resulted in the MSA. See Gill and Duffus Services, Inc., v. A.M. Nural Islam, 675 F.2d 404, 405 n.3 (D.C. Cir. 1982) (listing different definitions of privity) & 406 (finding no privity based on "traditional" definition privity because the two parties in issue were not persons "who claim[ed] an interest in the subject-matter affected by the judgment **through or under one of the parties**, i.e., either by inheritance, succession, or purchase." (emphasis added)); Jefferson School of Social Services, 331 F.2d at 83 (characterizing privity as an "elusive concept"); Defendants' **sole** asserted basis for privity rests entirely on their contention that the United States had an abstract "interest" in "'the same legal right'" as the states in recovering Medicaid funds expended to treat smoking-related diseases. See JD. PFF, p. 865. Notably, Defendants do not – because they could not – claim that this alleged common "interest" satisfies the actual privity standard from Jefferson School of Social Services, from which they selectively quote: "**so identified in interest** with a party to former litigation that he represents **precisely** the same legal right" (emphasis added). Any asserted common interest related to that issue – an irrelevant issue unnecessary to discuss here – is far too slender a reed to support a finding of privity, let alone such privity that, in the aftermath of the State lawsuits based largely on **state law**, res judicata could preclude United States' right to pursue this **federal civil RICO action for injunctive relief** to vindicate federal interests entirely distinct from the interest on which Defendants' privity argument depends. As the United States neither was "so identified in interest" with the states nor represents "precisely the same legal right" in this action, no privity exists.

B. Defendants Have Not Established Release or Accord And Satisfaction

Defendants' contention that the United States' claim for disgorgement in this civil RICO action was released by the MSA is meritless. See JD. PFF, p. 867. The discharge of a claim by release generally involves a unilateral act, whereby a party immediately disclaims a right or obligation. See McLain Plumbing & Elec. Service Inc. v. United States, 30 Fed. Cl. 70, 79 (1993) (quoting Adler Construction Co. v United States, 191 Ct.Cl. 607, 613, 423 F.2d 1362, 1265 (1970), cert. denied, 400 U.S. 933 (1971)). Defendants have failed to demonstrate with any evidence that the United States released any federal civil RICO claims by virtue of MSA §§ II(nn)(1), XII. The United States cannot be held to have released claims by operation of a settlement agreement to which it was not a signatory.

For the same reasons, Defendants' assertion – made without discussion or support – that "the Government's claims are barred by the doctrine of accord and satisfaction" must be rejected as a matter of law and fact. See JD. PFF, p. 867. "Accord and satisfaction requires both a contract, known as the accord, and performance of that contract, known as satisfaction." See, e.g., Johnson v. Mercedes-Benz, USA, LLC, 182 F. Supp. 2d 58, 64-65 n.9 (D.D.C. 2002) (internal quotation and citations omitted). A party asserting accord and satisfaction bears the burden of demonstrating "proper subject matter, competent parties, meetings of the minds of the parties, and consideration." See, e.g., Nevada Half Moon Mining Co. v. Combined Metals Reduction Co., 176 F.2d 73, 76 (10th Cir. 1949), cert. denied, 338 U.S. 943 (1950); Brock & Blevins Co. v. United States, 170 Ct. Cl. 52, 59, 343 F.2d 951, 955 (1965) (same).

Here, Defendants can not satisfy any of the four required elements. First, the MSA is not a contract between the United States and Defendants, and as described above, the subject matter

of the MSA differs in substantial respects from the legal claims and facts at issue here. See supra § XII.A. Indeed, the only potential stated basis for Defendants' farfetched assertion to the contrary – that the United States was in privity with the States based on their common interest in recouping Medicaid expenditures for smoking-related illness, see JD. PFF, p. 865 – is frivolous. Second, the United States was not a "competent party" for purposes of negotiating or binding the United States to the United States because it was not a party to the lawsuits or the settlement.

Third, Defendants present no evidence, either in the text of the MSA or by extrinsic evidence, that there was any "meeting of the minds" between Defendants and the United States that Defendants' mere entry into the MSA (let alone its full performance of its continuing obligations under the MSA) would effect a full "satisfaction" of any legal claims the United States might have regarding Defendants' fraudulent conduct.

Fourth, Defendants have not and could not demonstrate that any consideration has been tendered to the United States in exchange for the purported discharge of the United States civil RICO claims. As noted supra, the MSA limits any rights to or enforceable by the MSA to a settling State or a Released Party, see MSA § XVIII(p), and the United States is neither. Thus, it is clear that the United States can neither share in any settlement proceeds nor enforce any aspect of the rights granted to the settling States or Released Parties under the MSA.

In sum, Defendants' accord and satisfaction assertion is legally and factually meritless in every respect.

XIII

DEFENDANTS' ARGUMENT THAT CERTAIN RELIEF WOULD BE AN UNCONSTITUTIONAL TAKING IS IRRELEVANT AND INCORRECT

Defendants argue that certain aspects of relief potentially sought by the United States in this action would violate the Fifth Amendment as an unconstitutional taking of Defendants' private property. Defendants specifically refer to potentially available relief concerning ingredient disclosure and health warnings that cover a larger percentage of space on cigarette packaging than current packaging. See JD. PFF, pp. 901-902.

Defendants' takings contention is of no consequence, because the United States does not seek to have this Court grant the relief about which Defendants complain – disclosure of cigarette ingredients and additives, and modifications to warning label content or size, beyond what is required by any Act of Congress or any regulation duly promulgated thereunder. See supra, pp. 17-18. However, even if the United States were to seek such relief, the particular types of ingredient disclosure and warnings that the United States previously identified as potentially available relief would not violate the Just Compensation Clause of the Fifth Amendment.

The Just Compensation Clause of the Fifth Amendment states: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Governmental action does not run afoul of this provision unless both requisite conditions are met: (1) the action constitutes a "taking", and (2) "just compensation" is due and has not been tendered. See, e.g., Brown v. Legal Foundation of Washington, 538 U.S. ____, 2003 WL 1523550 at * 11 (Mar. 26, 2003).

With respect to the first part of the analysis, evaluation of whether an unconstitutional regulatory taking of Defendants' "trade secrets or other proprietary information" has occurred properly proceeds under the three-part inquiry articulated by the Supreme Court in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978). That fact-based test examines the economic impact of the governmental action, whether that action interferes with reasonable "distinct investment-backed expectations," and the character of the government action. Penn Central, 438 U.S. at 124.[103]

Defendants' contention that the ingredient disclosures requested by the United States constitutes an unconstitutional taking is incorrect. Defendants gloss over the particular forms of ingredient disclosure that the United States previously indicated that it might seek: (1) the disclosure to consumers, on cigarette packaging and advertisements, a list of "all known or suspected **toxic** chemicals, ingredients or additives in tobacco smoke or products, including the levels of such chemicals and their known or suspected health effects"; and (2) disclosure of brand-by-brand formula information only "to an appropriate regulatory authority." See U.S. Resp. to JD. Fourth Set of Continuing Interrog. to Plaintiff at 24-25 (emphasis added).[104]

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[103] Defendants suggest, without expressly stating, that the sorts of ingredient disclosures previously identified by the United States would work a physical per se taking. See JD. PFF, pp. 901-902 (asserting a regulatory taking in the alternative). The tobacco companies raised the same argument in Philip Morris Inc. v. Reilly, 312 F.3d 24 (1st Cir. 2002), and the First Circuit, noting that the Supreme Court has not resolved whether trade secrets can be the subject of a physical taking, declined to proceed under the per se takings analysis utilized for physical takings. See 312 F.3d at 33-36.

[104] Importantly, the United States has never indicated that it might seek to require Defendants to publicly disclose all ingredient information on a brand-by-brand basis.

The first form of disclosure would further the United States' objective of correcting Defendants' past false and misleading public statements concerning the contents and health effects of their products, and to prevent and restrain Defendants' ability to make such misleading or deceptive statements in the future. As noted above, this form of disclosure would require that the manufacturing Defendants publicly reveal only the disclosure of **toxic** ingredients or additives in cigarettes, not the entire product formula.[105] In Philip Morris Inc. v. Reilly, 312 F.3d 24 (1st Cir. 2002), the First Circuit referred favorably to this limited disclosure, suggesting that partial disclosure of ingredients "which create health risks" would not unduly interfere with the cigarette companies' investment-backed expectations. See 312 F.3d at 39-40 (suggesting disclosure of particular ingredients would not run afoul of the Takings Clause under "fair information" standard of Corn Products Ref. Co. v. Eddy, 249 U.S. 427 (1919)).[106]

The second form of ingredient disclosure identified by the United States was brand-by-brand formula information only "to an appropriate regulatory authority" – **not** to the public. In light of statutes that prohibit the unauthorized disclosure of trade secrets, such information, if sought, could be adequately protected from improper disclosure to the public or to competitors. See, e.g., Reilly, 312 F.3d at 28 (citing approvingly Texas cigarette ingredient disclosure law, which protects against public disclosure of trade secret information submitted to state health

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[105] This approach is consistent with that taken by the State of Minnesota, which requires the public reporting of only certain additives to cigarette products. See Minn. Stat. § 461.17.

[106] See also Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011 n.15 (1984) (noting that decline in profits stemming from public disclosure of trade secret data that reveals "the harmful side effects" of a product "cannot constitute the taking of a trade secret" because the decline derives from a decrease in the product's value to the consumer, not from the loss of an edge over competitors, wherein lies the value of a trade secret).

department). Such disclosure to public health authorities would significantly enhance researchers' ability to investigate how the various components in cigarettes interact to produce deleterious health effects, how the various additives and ingredients affect addiction to cigarettes primarily caused by nicotine, and how to develop more effective smoking cessation therapies. Accordingly, contrary to Defendants' suggestion that the requested disclosure "lacks any appreciable nexus" to the subject of this case, such a full disclosure to appropriate federal health authorities, with appropriate safeguards against disclosure, would help counter the effects of Defendants' past and ongoing cigarette design, manufacturing, and marketing practices designed to enhance and maintain cigarette consumption.

Indeed in Reilly, the court assessed the Massachusetts Disclosure Act in part in comparison to the two forms of disclosure previously identified as potential relief by the United States, as reflected in the Minnesota and Texas disclosure laws. The court found that, compared to the Massachusetts law under challenge, both alternative approaches preserved defendants' reasonable investment-backed expectations and would at least as effectively serve the strong public health interests underlying the action. See 312 F.3d at 28, 40, 45 ("There is no evidence that suggests that regimes similar to those adopted by Texas and Minnesota, or some combination thereof, would not achieve" the public health goals that motivated the Massachusetts disclosure law) & n.17.[107]

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[107] And while the court acknowledged that under the Massachusetts Disclosure Act "public disclosure of the [companies'] ingredient lists, even in part, will make it much easier to reverse engineer" product formulae, thus presenting potential economic adverse impact, Defendants have complied with precisely such a partial disclosure scheme in Minnesota. See Reilly, 312 F.3d at 41, 45. The Reilly court stated that Defendants have also complied with the brand-by-brand disclosure mandated in Texas, and have not challenged the validity of either

(continued...)

Even assuming arguendo that the forms of ingredient disclosure identified by the United States were to constitute a regulatory taking, Defendants have failed to demonstrate how any "just compensation" would be due them. The Supreme Court has recently confirmed that "'[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.'" Brown v. Legal Foundation of Washington, 538 U.S. at ____, 2003 WL 1523550 at * 11 (quoting Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1985)). The measure of "just compensation" is "the property owner's loss rather than the government's gain." Id. (finding no violation of the Just Compensation Clause where property owner suffered no pecuniary loss even if taking occurred). Defendants do not explain how the specific types of ingredient disclosure previously identified by the United States – public disclosure of toxic constituents and brand-by-brand disclosure to an appropriate federal agency with adequate protections against improper disclosure or use – would cause them compensable pecuniary loss. See Monsanto, 467 U.S. at 1011 n.15.

In short, Defendants fail to adequately explain or support, factually or legally, how the particular forms of disclosure identified by the United States would "eliminate the manufacturer's right to exclude others from making use of their property" and violate the Fifth Amendment.[108] Nevertheless, the United States does not intend to pursue through this action

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[107](...continued)
state's law. See id. at 28.

[108] Similarly unsupported is Defendants' assertion that an order requiring health warning labels to comprise a larger percentage of available packaging area than currently required would constitute an impermissible regulatory taking because it would "go too far." See JD. PFF, p. 902 ¶ 2186.

relief in the form of ingredient disclosure or warning labels beyond what is required by any Act of Congress or any regulation duly promulgated thereunder.

CONCLUSION

For the foregoing reasons, and those presented in the United States' Preliminary Proposed Findings of Fact, the United States' Preliminary Proposed Conclusions of Law, and the United States' Response to Joint Defendants' Preliminary Proposed Findings of Fact and Conclusions of Law Regarding Affirmative Defenses, Defendants' affirmative defenses should be rejected as a matter of law and fact.

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General

Sharon Y. Eubanks
SHARON Y. EUBANKS (D.C. Bar No. 420147)
Director, Tobacco Litigation Team

Stephen D. Brody /dye
STEPHEN D. BRODY (D.C. Bar No. 469263)
Deputy Director, Tobacco Litigation Team

Renée Brooker /dye
RENÉE B. BROOKER (D.C. Bar No. 430159)
Assistant Director, Tobacco Litigation Team

Frank J. Marine
FRANK J. MARINE
Senior Litigation Counsel,
Organized Crime and Racketeering Section

MICHAEL DUCLOS
Trial Attorney

MICHELLE GLUCK
Senior Trial Counsel

ANDREW N. GOLDFARB (D.C. Bar No. 455751)
Trial Attorney

GREGORY C.J. LISA (D.C. Bar No. 457739)
Trial Attorney

BURKE M. WONG (D.C. Bar No. 319475)
Trial Attorney

United States Department of Justice
Post Office Box 14524
Ben Franklin Station
Washington, DC 20044-4524
(202) 616-4185

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