UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, and TOBACCO-FREE KIDS ACTION FUND, *et al.* Intervenors, v. PHILIP MORRIS USA INC., f/k/a PHILIP MORRIS INC., *et al.*, Defendants.	Civil No. 99-CV-02496 (GK) Next court appearance (none scheduled)

CORRECTED POST-TRIAL BRIEF OF JOINT DEFENDANTS

Dated: September 13, 2005

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I. INTRODUCTION

Since the beginning of this trial, the Government has struggled to squeeze recycled accusations from prior tobacco litigation into the unique and limited confines of civil RICO. The uncomfortable tension between the requirements of the RICO statute and the facts of this case became manifest as Government witness after witness conceded away the most basic elements of RICO – leaving only a patchwork quilt of largely unrelated alleged individual frauds. The parties' post-trial submissions confirm the Government's complete failure of proof on indispensable elements of their RICO claim.

In addition, the overwhelming weight of the evidence – including the dismantling of the alleged "enterprise" during the past decade – demonstrates the absence of a reasonable likelihood of future RICO violations, which is a jurisdictional prerequisite to any relief under 18 U.S.C. § 1964(a). Moreover, in contravention of the D.C. Circuit Court of Appeals' opinion, *United States v. Philip Morris*, 396 F.3d 1190 (D.C. Cir. 2005), the Government remains steadfast in its attempt impermissibly to seek relief that is solely remedial, designed to cure the effects of alleged past misconduct. Finally, the violation of due process guarantees by the Government's tardy and still incomplete "notice" of its requested remedies – many of which were not identified or specified until weeks after the close of evidence – provides additional intractable obstacles to any relief in this case.

Indeed, the Government's remedies case is in such a state of disarray that it opens its post-trial brief with a plea that the Court hold its remedies findings in abeyance and essentially enter a post-trial bifurcation order. Gov. Br. at 2-3. But the Court provided the Government with ample opportunities in the midst of trial to correct course to comply with the appellate court opinion – over Defendants' repeated objections and despite the fact that it was the Government

that insisted the case proceed to trial in the face of the uncertainty over the pending interlocutory appeal. Even after the appellate court ruling, the Government insisted time and time again that the Court expedite the trial of its allegedly revamped remedies case – often seeking to deny Defendants' discovery requests on that very basis. *See, e.g.,* Gov. 4/15/05 Mem. in Opp. to Defs.' Mot. for Discovery re Remedies Witnesses at 1 [Dkt. No. 5231]. Neither justice nor efficiency would be served by delaying a remedies ruling now.

A. The Government Has Failed to Satisfy Specific RICO Requirements

To resolve this lawsuit, this Court must focus on the very specific requirements of the RICO statute. This case is *not* a legitimate means to advance public health goals, however laudable. It is not an appropriate vehicle for the executive branch to attempt to wrest from this Court relief that it was unable to procure from Congress in 1997. Nor is it an appropriate way to resolve the variety of social policy or scientific issues that vex the public health community, such as (1) whether additional health warnings should be required for cigarettes beyond those that Congress has already deemed adequate to warn consumers of the health risks, (2) whether routine marketing practices (such as price discounts) should be circumscribed to avoid attracting youth to smoking, or (3) scientific issues such as whether low tar cigarettes offer any health benefit or whether environmental tobacco smoke causes disease. These public policy and public health matters should be resolved either in the marketplace of ideas or by appropriate legislative or regulatory bodies; they should not (and cannot) be resolved by an Article III Court.

Rather, this Court's jurisdiction is strictly confined by the language of the RICO statute, 18 U.S.C. § 1961 *et seq*. Faithful application of the language of the statute, including the essential elements of a RICO violation, requires judgment for the Defendants on a number of grounds.

No Reasonable Likelihood of Future Violations. The jurisdiction of any court under 18 U.S.C. § 1964(a) is strictly limited to "preventing and restraining" future RICO violations, as the Court of Appeals recently affirmed in *United States v. Philip Morris,* 396 F.3d 1190 (D.C. Cir. 2005). *See* § IV.A *infra*. This means that an essential prerequisite for awarding any relief — and an essential element of the Government's claim — is proof that Defendants are reasonably likely to engage in *future* RICO violations. Yet the Government's case — which centers on a 1953 meeting at the Plaza Hotel in New York City — is firmly rooted in the distant past. The Government has failed to adduce any convincing evidence that Defendants are currently violating RICO or are likely to do so in the future.

Critically, the Government has utterly failed to prove a currently existing "enterprise," a basic element of any RICO claim. Indeed, the essence of a RICO violation is for a defendant "associated" with an "enterprise" to "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). *See* § IV.B.1 *infra*. The Government claims that the Defendants formed an "association-in-fact" enterprise in 1953 when they agreed to form the Council for Tobacco Research ("CTR"), then known as the Tobacco Industry Research Committee ("TIRC"). That claim is refuted below. But even if true, CTR was dissolved in 1998 and, under the terms of the Master Settlement Agreement ("MSA") between the Defendants and the states, cannot be reconstituted. *See* § III.A *infra*. And each of the other various organizations through which the Government contends that the Defendants historically acted as an enterprise — *i.e.*, the Tobacco Institute ("TI"), the Center for Indoor Air Research ("CIAR") and others — has also been dissolved. *Id.* In fact, the Government has not pointed to a single extant organizing mechanism for a current "enterprise," even though it is undisputed that such organization or structure is an essential element of an

enterprise. *E.g., United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 13, 18 (D.D.C. 2004). Nor has the Government offered any current evidence that could possibly satisfy the additional "enterprise" requirements of "common purpose" and "continuity." *See* §§ III.B-C *infra*. The inability to identify a current "enterprise" — or proof of the likelihood of one being organized in the near future — is fatal to the Government's contention that Defendants are likely to engage in future RICO violations.

Moreover, even apart from the lack of any "enterprise," this Court cannot properly issue any ruling that fails to account for the fact that the world in which Defendants operate today is dramatically different from the world in which they operated 50 (or even 10) years ago. This is well illustrated by examining, as of today, the various "schemes" or "pillars" of "fraud" alleged by the Government. *See generally* § V *infra*. For example, the Government's core contention is that the Defendants in the past misrepresented the causal link between smoking and disease. But each defendant now freely concedes and does not publicly challenge the causal relationship between smoking and disease. *See* § V.B.2 *infra*. Indeed, the MSA specifically *prohibits* any misrepresentation about the causal relationship between smoking and disease. *Id.* The same is true with the addiction, low tar, youth smoking, and other "pillars" identified by the Government; there is no evidence of any current misrepresentation or fraud and future frauds are specifically foreclosed by the MSA. *See* § V.B.3-7 *infra*.

There is no going back. Not only the MSA but monitoring by public health groups, public pressure and internal changes at the companies make any reversion to Defendants' now-abandoned historical positions virtually inconceivable. *See* § IV.C *infra*. Certainly, there is no showing that any such reversion is "reasonably likely," as required by the "prevent and restrain" standard. *Id.*

The Government's claims that the MSA is not effectively policed by the state Attorneys General — because a few alleged violations have occurred (and then been resolved) and because the MSA does not provide the same staggering panoply of remedial relief requested by the Government in this case — are all beside the point. In the words of the D.C. Circuit, the relevant issue is whether the "totality of the circumstances" demonstrates that Defendants are reasonably likely to commit future RICO violations. *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1228 (D.C. Cir. 1989). *See* § IV.B *infra*. The record makes clear that the Attorneys General have aggressively, indeed expansively, enforced the MSA. Any disputes have arisen from good faith disagreements over the scope of some MSA provisions (*e.g.*, whether advertising on matchbooks is permitted, or prohibited as "branded merchandise"), not on anything remotely approaching a RICO violation. The evidence plainly shows that the changed circumstances now constraining the Defendants' conduct make future RICO violations unlikely**.** *See* § IV.B *infra*.

No Historical Enterprise. As noted above, the concept of "enterprise" is a *sine qua non* of a RICO violation, and the Government has no argument at all that Defendants currently constitute such an "enterprise." But the Government's historical argument fares no better. The core of the Government's case — that the Defendants organized an illegal enterprise in late 1953 to create a "myth of independent research" — was flatly disproven at trial. *See* § III.B *infra*. As the Government's own expert (Dr. Allan Brandt) conceded, there is no proof that the Defendants had any fraudulent intent when they made their 1953-54 statements about planned joint independent research. In fact, the record plainly shows that the Defendants *did* jointly fund objective, independent scientific research. *See* § V.B.1 *infra*. Accordingly, the Government failed to prove that the Defendants organized an illegal enterprise in 1953-54, and therefore the unifying principle of the Government's case — the only thing that it alleged connecting its seven

disparate "pillars" of fraud — collapsed. Nor can the Government conjure an enterprise from any of the other evidence at trial. It is well established that any enterprise requires common purpose, organization, and continuity. But, as shown below (*infra* at § III.C), the Government's evidence on each of these points fails as well.

No Scheme to Defraud in Violation of the Mail or Wire Fraud Statutes. The Government must show that each defendant engaged in a "pattern of racketeering activity" under 18 U.S.C. § 1962(c). Such a pattern must consist of at least two "predicate acts" of racketeering — *i.e.*, violations of the mail and wire fraud statutes, which in turn require (1) a scheme to defraud; (2) a specific intent to defraud; (3) involving a matter material to consumers' decisions to purchase cigarettes; (4) with the intent to defraud these consumers and thereby obtain money or property from them; and (5) that the defendant caused a mailing (or wire transmission) for the purpose of furthering or executing the fraud. *See* 18 U.S.C. §§ 1341, 1343; *infra* at § II.B. Here, the Government alleges seven "schemes" or "pillars" of fraud. But each fails one or more of the above requirements.

As an overarching matter, each of the Government's schemes fail to satisfy the element of "specific intent" to defraud. The case law is clear that, in the case of a corporate defendant, the Government must prove that a specific responsible employee or agent of the defendant harbored such a specific intent with respect to each predicate act. *See, e.g., Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 670 n.6 (D.C. Cir. 1996). *See* § II.B.2 *infra*. But here the Government has proved nothing of the kind. For most of the predicate acts it has not even identified who the responsible agents of the Defendants are, much less proven that they possessed a fraudulent state of mind. *See generally* § V.B. *infra*. Instead, the Government's whole case rests on the flatly incorrect assertion that it can prove "collective intent" by

aggregating knowledge or beliefs of disparate individuals employed by Defendants, even if they had nothing to do with the predicate acts. This theory of "collective intent" has expressly been rejected by numerous courts, including the D.C. Circuit. *Saba*, 78 F.3d at 670; § II.B.2 *infra*.

In addition, each of the independent schemes to defraud alleged by the Government fails to satisfy additional essential prerequisites of RICO and the underlying mail or wire fraud statutes.

- **The "Myth" of Independent Research.** The Government's principal theory — that the Defendants formed an enterprise in 1953-54 to falsely claim that they would jointly fund independent research — disintegrated at trial. The evidence plainly shows that the Defendants *did* fund independent, scientifically objective research. *See* § V.B.1 *infra*.
- **Causation.** The Government has not shown that Defendants' representatives intended to defraud consumers when they conveyed their opinions that no causal link between smoking and disease had been proven. There was once a legitimate scientific controversy on this point, and Defendants now accept the scientific consensus that has emerged since the 1964 Surgeon General's Report. Likewise, Defendants' statements concerning ETS were the legitimate expression of opinion, were not accompanied by specific intent to defraud, and were not material to smokers' purchasing decisions. *See* § V.B.2 *infra*.
- **Addiction.** The evidence showed that the Defendants expressed the good faith opinion that cigarette smoking, although often hard to quit, was not addictive under the traditional scientific understanding of that term. Moreover, the Government did not show that Defendants' statements concerning "addiction" were material in light of the widespread knowledge, and Defendants' own admission, that quitting could be difficult.

Finally, Defendants' statements were largely directed toward influencing legislative decisionmakers and regulators and were constitutionally protected. *See* § V.B.3 *infra*.

- **Nicotine Manipulation.** The evidence demonstrates that the Defendants' denials that they engaged in nicotine manipulation in order to addict smokers were neither false nor accompanied by fraudulent intent. Moreover, such statements were protected by the First Amendment given their legislative context, and they were neither material to consumers' purchasing decisions nor intended to deprive consumers of money or property. *See* § V.B.4 *infra*.
- **Youth Marketing.** This alleged subscheme collapsed at trial. The Government failed to present evidence at trial regarding the mechanics of this subscheme, how it was adopted, effected or continued. The Government's original claim that Defendants falsely promised not to market to legal age smokers under 21 is beyond resuscitation. The Government has never attempted to demonstrate how the alleged predicate acts were a manifestation of this subscheme. Its own witness conceded that there is no evidence that statements about who Defendants marketed to were ever material to consumers. There is no evidence in the record that any statement regarding marketing policies was in fact knowingly false and made with an intent to deceive consumers and obtain money or property. (Obviously, the Government's claim that the Ad Code was adopted to avoid regulation, even if true, does not satisfy the Government's burden of proof under RICO.) As to whether Defendants in fact marketed to youth historically (even though it is beyond debate that such acts do not violate RICO), the Government fared no better. According to the Government's own experts, Defendants' marketing plans target adult smokers 18 and/or older. Whether marketing may appeal to, or even cause, some youths

to smoke in combination with other factors, as the Government claims, is beside the point absent fraudulent contrary statements with an intent to deprive consumers of money or property in furtherance of the alleged enterprise — and the evidence to support that charge is not in the record, the Government's proposed findings or its trial brief. *See* § V.B.6 *infra*.

- **Suppression.** Even if proven, none of the Government's alleged schemes of "suppression" would violate RICO. None of them involved a scheme to defraud. Rather the Government attacks alleged agreements not to compete, alleged improper document destruction, and censorship — none of which amount to mail or wire fraud. In any event, the evidence shows that Defendants had no fraudulent intent and that the conduct did not occur as alleged. *See* V.B.5 *infra*.
- **Low Tar.** The Government failed to prove that low-tar cigarettes had anything to do with any enterprise or joint activity among the Defendants; on the contrary, the evidence demonstrated that Defendants unilaterally competed with one another by developing and marketing low-tar cigarettes. The Government also failed to prove that the alleged implicit health claims pertaining to low-tar cigarettes were false or that any responsible employee had a specific intent to defraud consumers with respect to low tar cigarettes. To this day, the science is unclear on whether low-tar cigarettes reduce health risks *vis-à-vis* conventional cigarettes. Moreover, the record and law demonstrate beyond cavil that Defendants' actions with respect to low-tar cigarettes were taken with the full knowledge and direction of the Federal Trade Commission. *See* § V.B.7 *infra*.

Additional Defects. This is only the tip of the iceberg. As described below, the Government has also failed, among other things, to satisfy other basic elements of RICO, such as

the "pattern" requirement (§§ VI.A, D), the requirement that a defendant conduct the affairs of the enterprise (§ VI.B), its specific claims against certain defendants (§ VIII), and its conspiracy claim under Section 1964(d) (section VII).

B. The Government's Remedies Case Fails to Satisfy the Statutory Requirements of RICO, the D.C. Circuit's Clear Directives, and Due Process and Other Constitutional Requirements

The remedies sought by the Government do not come close to satisfying the requirements of RICO, of equity, or of the federal Constitution. Most of the remedies proposed are defective on multiple grounds, which are more thoroughly addressed below. But even an overview of the most salient points reveals the extent to which the Government disregards the law and seeks to transform this lawsuit into a public health crusade.

Perhaps the most pervasive defect — which is separately addressed in Defendants' pending Rule 52(c) motion — is the Government's refusal to take appropriate steps to assure its remedies are lawful in the aftermath of the "body blow" to its case inflicted by the Court of Appeals' decision in *United States v. Philip Morris*, 396 F.3d 1190 (D.C. Cir. 2005), *pet. for cert. filed*, 74 U.S.L.W. 3050 (U.S. July 18, 2005) (No. 05-92). In rejecting disgorgement as a potential remedy under 18 U.S.C. § 1964(a), the Court of Appeals held that this Section 1964(a) permits only *forward-looking* remedies that are aimed at preventing future violations. *See* § IX.A.2 *infra*. It does not authorize remedies designed to correct or ameliorate the effects of RICO violations — either past violations or those that the Government predicts may occur in the future. *Id.* The fact that such remedies might, in some cases, theoretically "deter" future RICO violations was *not*, in the Court of Appeals' view, sufficient to satisfy the "prevent or restrain" requirement. *Id.* Despite the express holdings of the appellate court, the Government's proposed remedies fail to comport with the appellate court's directives. *See generally* § IX.B *infra*.

In addition to this fundamental and overarching defect, the individual remedies proposed by the Government also suffer from a host of other problems, including the following:

- **Smoking Cessation.** The Government violated *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001) and due process by drastically reformulating this proposed remedy after trial and premising it (for the first time) on a request for a judicial finding that Defendants will necessarily violate RICO for at least a year after imposition of any judgment by this Court. That issue was not litigated and Defendants never had the opportunity to present any evidence to the Court on it. The cessation remedy also bears an insufficient causal relationship to the allegedly illegal conduct, is not "narrowly tailored" to prevent and restrain violations, was not proven "effective" to prevent and restrain violations, and amounts to an unconstitutional assumption of legislative functions. *See* § IX.B.1 *infra*.

- **Gruber Remedy.** This remedy, which would impose per-smoker penalties on Defendants if annual "youth" smoking exceeds target levels proposed by the Government, does not prevent and restrain defendants from committing future RICO violations under *United States v. Philip Morris.* It is not a RICO violation for youth to smoke or for Defendants to market tobacco products to youth. Nor does the Government make any such claim. Instead, the Government claims that lying about marketing to youth is a RICO violation. But the Gruber remedy does not even purport to remedy that alleged violation. Indeed, the Gruber remedy is not directed at any action by *defendants* at all, because it is tied to whether individual smokers decide to smoke. In all events, the Gruber remedy — ordering cash payments purportedly to punish wrongdoing — is plainly a remedy at law, which can be entered only after a jury trial and not pursuant to this bench trial. *See* § IX.B.2 *infra*.

- **Public Education/Countermarketing.** This remedy is not sufficiently connected to any unlawful conduct, is not "narrowly tailored" to potential future RICO violations, was not sufficiently disclosed during trial as required by *Microsoft*, amounts to an arrogation of legislative power, would violate the First Amendment, and was unsupported by empirical evidence that it would even reduce smoking, much less prevent and restrain RICO violations. *See* § IX.B.3 *infra*.

- **Corrective Communications.** This remedy would compel Defendants to sponsor and distribute affirmative statements on a wide range of smoking and health and other issues. The Government's failure to provide timely notice of the details of this extensive remedy violate due process and *Microsoft*. The compelled speech provisions, conflict with the FCLAA, and brazen intrusion into the FTC's jurisdiction regarding cigarette marketing offer further reasons to reject this remedy. *See* § IX.B.4 *infra.*

- **Prohibitory Injunctions.** This proposed remedy violates Rule 65(d) because it inadequately defines the prohibited acts, would violate the First Amendment, and would intrude upon the jurisdiction of the FTC. Insofar as it relates to youth

marketing – which is not a RICO violation – it is not designed to prevent and restrain RICO violations. *See* § IX.B.5 *infra*.

- **Disclosure Requirements.** The Government's proposed disclosure of confidential disaggregated marketing data would improperly and unnecessarily disclose highly confidential and competitively sensitive material. Such disclosure would not "prevent and restrain" future violations or be "narrowly tailored" to do so, and the remedy was not adequately disclosed during trial as required by *Microsoft*. The second category of disclosures — primarily documents produced in litigation — is inappropriate because it is backward-looking and is not designed (or narrowly tailored) to prevent and restrain RICO violations, it duplicates relief available under the MSA, and it was not adequately disclosed as required by *Microsoft*. *See* § IX.B.6 *infra*.

- **Court Monitors.** The Government's proposed use of an Independent Investigation Officer ("IO") and an Independent Hearing Officer ("IHO") is barred by *Microsoft* because it was not adequately disclosed during trial. Moreover, the Government's proposed monitors would violate Rule 53, the requirement that a remedy be judicially manageable, the requirement that an injunctive decree identify with specificity those acts which are prohibited, the requirements of Article III under *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003) (role of monitors cannot extend beyond superintending compliance with the Court's decree), and would amount to an unconstitutional delegation of Article III powers. Finally, the hearing procedures proposed would violate Defendants' right to trial by jury, their right to confront witnesses, their right to a presumption of innocence, their right to due process, and their right not to be subjected to excessive fines, as well as their rights under the Federal Rules of Evidence. *See* § IX.B.7 *infra*.

In sum, the remedies proposed by the Government run roughshod over basic legal principles.

II. THE ELEMENTS OF RICO AND THE PREDICATE ACTS OF MAIL AND WIRE FRAUD

A. Basic Elements of a RICO Claim

In order to prove a violation of 18 U.S.C. § 1962(c) the Government must prove five elements — (1) the existence of what RICO calls an "enterprise"; (2) that the "enterprise" was engaged in, or that its activities affected, interstate or foreign commerce; (3) that the defendant was either employed by or associated with the enterprise; (4) that the defendant conducted or participated in the "conduct of such enterprise's affairs"; and (5) that the defendant did so

through a "pattern of racketeering activity." 18 U.S.C. § 1962(c); *see also Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496-97 (1985); *United States v. Philip Morris, Inc.*, 327 F. Supp. 2d 13, 17 (D.D.C. 2004).

1. Enterprise

With respect to the first requirement (*i.e.*, "enterprise"), the RICO statute contemplates that an enterprise can consist, *inter alia*, of a "group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Here the Government alleges that the Defendants in the aggregate comprised an association-in-fact enterprise. The Supreme Court has held that proof of an "enterprise" demands proof of "an ongoing organization" and that the "various associates function as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583 (1981). Moreover, it is clear that mere joint wrongful conduct between individuals cannot amount to an enterprise: an enterprise "must be an entity separate and apart from the pattern of activity in which it engages." *Id*. In addition, an association-in-fact enterprise of the sort alleged by the Government must combine three elements: (1) common purpose; (2) organization; and (3) continuity. *Philip Morris, Inc.*, 116 F. Supp. 2d at 152 (citing *United States v. Perlholtz*, 842 F.2d 343, 362 (D.C. Cir. 1988)).

2. Interstate or Foreign Commerce

The second element (interstate or foreign commerce) demands that the enterprise itself engage in interstate or foreign commerce, not simply that the entities that are members of the enterprise engage in such commerce. *See, e.g., United States v. Groff*, 643 F.2d 396, 400 (6th Cir. 1981) (under RICO, "[i]t is the enterprise, not the individual defendant, which must engage

in or affect interstate commerce");[1] *United States v. Conn*, 769 F.2d 420, 423-24 (7th Cir. 1985) ("it is the affairs of the enterprise, not the person charged with violating the section, that must affect interstate commerce"). In its proposed findings (§ 2, ¶¶ 1-81), the Government seeks findings that each of the Defendants is individually engaged in interstate or foreign commerce, but fails to marshall any evidence that the "enterprise" itself was engaged in such conduct. Of course, given that no "enterprise" exists, or ever existed, no such entity could possibly be engaged in interstate or foreign commerce.

3. Association With the Enterprise

The third element (that the defendant "associate" with the enterprise) requires a deliberate decision by the defendant to associate with the enterprise. *See United States v. Bledsoe*, 674 F.2d 647, 663 (8th Cir. 1981) ("association with an enterprise is distinct from participation in the conduct of an enterprise through a pattern of racketeering activity."). RICO violations cannot attach to "looser associations not characterized by conspiratorial consent." *Id*. at 664. Thus, association with an enterprise must be "purposeful." *United States v. Griffith*, 660 F.2d 996, 1000 (4th Cir. 1981); *see also United States v. Console*, 13 F.3d 641, 653 (3d Cir. 1993) (defendant must have "knowingly agreed" to be associated with the enterprise).

4. Participation in the Conduct of the Enterprise

The fourth element (conduct or participation in the conduct of the affairs of the enterprise) requires more than mere association or involvement with the enterprise. As the Supreme Court held in *Reves v. Ernst & Young*, 507 U.S. 170 (1993), mere involvement in, or

[1] The "foreign" commerce specified by the RICO statute refers to the foreign commerce of the United States. As detailed below, *see infra* § VIII.A.2, foreign activities that do not affect U.S. commerce are outside the scope of RICO.

assistance to, an enterprise does not satisfy this requirement. Rather, a defendant must be shown to have to taken part in "directing the enterprise's affairs." *Id*. at 179. This means that the defendant must "participate in the operation or management of the enterprise itself." *Id*. at 185. Thus, liability depends upon a "showing that the defendant conducted or participated in the conduct of the '*enterprise*'s affairs,' not just its *own* affairs." *Id*. Contrary to the Government's contention, this standard applies both to so called "insiders" (*i.e.*, members of the enterprise) and to "outsiders." *See BCCI Holdings (Luxembourg) Societe Anonyme v. Khalil,* 56 F. Supp. 2d 14, 59 (D.D.C. 1999) ("*Reves* suggests that some form of actual control must be exercised . . . by *insiders* carrying out the enterprise's day to day business"), *rev'd in part on other grounds,* 214 F.3d 168 (D.C. Cir. 2000); *see also Handeen v. LeMaire*, 112 F.3d 1339, 1349 n.12 (8th Cir. 1996) (noting that *Reves* did not recognize a distinction between "insiders" and "outsiders"); *Doe I v. The Gap, Inc.*, No. CV-01-0031, 2001 WL 1842389, at *8 n.11 (D.N. Mar. I. Nov. 26, 2001) ("The Court's ruling [in *Reves*] was not explicitly or implicitly limited to persons outside the enterprise. In fact, the Court noted the test had equal applicability to employees (insiders) of the enterprise as it did to those 'associated with' (outsiders) the enterprise.") (citation omitted)).[2]

The "operation or management" requirement of *Reves* "is a very difficult test to satisfy." *Amsterdam Tobacco, Inc. v. Philip Morris, Inc.*, 107 F. Supp. 2d 210, 216 (S.D.N.Y. 2000). It is not satisfied by substantial "persuasive power to induce the alleged enterprise to take certain actions." *Id*. at 217 (quoting *Morin v. Trupin*, 835 F. Supp. 126, 135 (S.D.N.Y. 1993)). Rather,

[2] The Government relies on two First Circuit cases for a contrary view, but those decisions are incompatible with *BCCI* and have been expressly rejected in other decisions. *Reynolds v. Condon*, 908 F. Supp. 1494, 1527-29 (N.D. Iowa 1996) (rejecting the First Circuit cases and noting that the *Reves* decision itself "indicates the applicability of the test to insiders."); *Fidelity Funding of Cal., Inc. v. Reinhold*, 79 F. Supp. 2d 110, 128 (E.D.N.Y. 1997) (same).

some sort of actual decision-making power is required. *See Reves*, 507 U.S. at 177 ("As a verb, 'conduct' means to lead, run, manage, or direct."). Mere participation in a scheme to defraud does not satisfy the requirement. *Stone v. Kirk*, 8 F.3d 1079, 1092 (6th Cir. 1993); *see also Goldfine v. Sichenzia*, 118 F. Supp. 2d 392, 404 (S.D.N.Y. 2000) (that defendant may have "intentionally assisted in the purported scheme [is] insufficient as a matter of law" to satisfy *Reves*); *Chisholm v. Charlie Falk Auto Wholesalers, Inc.*, 851 F. Supp. 739, 763 (E.D. Va. 1994) (one who merely participates "in the operation and management of the scheme" does not necessarily conduct the affairs of the enterprise), *vacated on other grounds*, 95 F.3d 331 (4th Cir. 1996).

5. The "Pattern of Racketeering Activity"

The fifth and final element is that any such conduct or participation in the conduct of the enterprise's affairs by a defendant must have been achieved "through a pattern of racketeering activity." 18 U.S.C. § 1962(c). *See, e.g., Yellow Bus Lines v. Drivers, Chauffeurs and Helpers Local Union 639*, 913 F.2d 948, 954-55 (D.C. Cir. 1990). The mere existence of such a pattern does not constitute a RICO violation; instead, such a pattern must be the vehicle through which a defendant directs the affairs of the enterprise. A "pattern" must include "at least two acts of racketeering activity [also known as 'predicate acts'] the last of which occurred within ten years after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5). Plainly, however, the mere commission of two predicate acts does not amount to a "pattern." Rather, the key feature of a pattern is "continuity plus relationship." *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14, 528 (1985). For those purposes, "relatedness" is normally shown by such things as "similar purposes, results, participants, victims, or methods of commission." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240 (1989). "Continuity" must carry "with it an

implicit threat of continued criminal activity." *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1022-23 (7th Cir. 1992); *Hindes v. Castle*, 937 F.2d 868, 872 (3d Cir. 1991). Ultimately, "[i]t is not the number of predicates but the relationship that they bear to each other or some external organizing principle that renders them 'ordered' or 'arranged.'" *H.J., Inc.*, 492 U.S. at 238 (quoting 18 U.S.C. § 1962(c)).

RICO defines "predicate acts" (or "racketeering activity") as violations of one or more of the specific criminal statutes listed in 18 U.S.C. § 1961(1). The only statutes listed in that section that the Government contends that Defendants violated in this case are 18 U.S.C. §§ 1341 and 1343 — also known as the mail fraud statute and the wire fraud statute. Because mailings and wire transmissions are so common in our society, the Court of Appeals has noted that RICO claims premised on mail and wire fraud must be particularly scrutinized because of the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon closer scrutiny, do not support it. *W. Assocs., Ltd. v. Mkt. Square Assocs.*, 235 F.3d 629, 637 (D.C. Cir. 2001). A mere "multiplicity of mailings does not necessarily translate into a 'pattern of racketeering activity.'" *Lipin Enters., Inc. v. Lee*, 803 F.2d 322, 325 (7th Cir. 1986) (Cudahy, J., concurring). Because the mail and wire fraud statutes have their own detailed requirements, we examine them in subsection (B) below.

B. Basic Elements of the Mail and Wire Fraud Statutes

For each mail or wire fraud predicate act, the Government must prove (1) a scheme to defraud; (2) a specific intent to defraud or deceive; (3) involving a matter material (in this case) to consumers' decisions to purchase cigarettes; (4) with the intent to defraud these consumers and thereby obtain money or property from them; and (5) that the defendant caused a mailing (or wire transmission) for the purpose of furthering or executing the fraudulent scheme. 18 U.S.C.

§§ 1341, 1343; *see also United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 131, 15 n.31 (D.D.C. 2000). Certain aspects of each of these elements are explained more fully below:

1. Scheme to Defraud

The mail and wire fraud statutes encompass any "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343. Thus, a scheme to defraud cannot rest upon truthful statements; instead it requires statements that are false or deceptive. Moreover, the honest expression of an opinion — even if later proved to be incorrect — cannot amount to mail or wire fraud. *See de Magno v. United States*, 636 F.2d 714, 720 n.9 (D.C. Cir. 1980) ("A statement of opinion cannot constitute fraud"); *Bennett Enters., Inc. v. Domino's Pizza, Inc.*, 794 F. Supp. 434, 437 (D.D.C. 1992) ("opinions" are "not actionable in fraud"); *see also United States v. Amlani*, 111 F.3d 705, 717-18 (9th Cir. 1997) (misrepresentation cannot be based on expression of opinion); *Singer v. American Psychological Ass'n*, No. 92 Civ. 6082, 1993 WL 307782, at *11 (S.D.N.Y. 1993) ("[w]hen parties were 'engaged in heated debate as to the scientific validity of the theory . . . [expressing] their views to others over the telephone and through the mails . . . does not transform those acts into fraud constituting a RICO conspiracy'"). Indeed, such expression of opinions — particularly when, as here, made in the context of a public debate — is fully protected by the First Amendment to the United States Constitution. *See Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Senart v. Mobay Chem. Corp.*, 597 F. Supp. 502, 506 (D. Minn. 1984) ("taking a particular view in a scientific debate" is protected by the First Amendment).

2. Specific Intent

Mail and wire fraud are "specific intent" crimes. *United States v. Walker*, 191 F.3d 326, 334 (2d Cir. 1999). For example, in *United States v. Lemire*, 720 F.2d 1327, 1341 (D.C. Cir. 1983) the Court approved a jury instruction in a mail fraud case requiring a finding that the defendant acted "willfully" and with "the specific intent to deceive or cheat." The Court of Appeals for this Circuit imposes a high standard for specific intent, which "requires more than a mere general intent to engage in certain conduct and to do certain acts." *United States v. Rhone*, 864 F.2d 832, 834 (D.C. Cir. 1989). Rather, in order to satisfy the requirements of specific intent, the Government must show that a person "knowingly does an act which the law forbids, intending with bad purpose either to disobey or disregard the law." *Id*. *See also United States v. North*, 910 F.2d 843, 884 (D.C. Cir. 1990) (approving specific intent instruction in obstruction of justice case requiring "that a person not only acted knowingly, voluntarily, and deliberately, but that he acted with a bad purpose, having decided in his mind that he would do and that he then did something prohibited"), *other portions of opinion withdrawn*, 920 F.2d 940 (D.C. Cir. 1990); *cf. Arthur Andersen LLP v. United States*, 125 S. Ct. 2129, 2136 (2005) (obstruction of justice statute requires proof of consciousness of wrongdoing, which is the level of 'culpability . . . we usually require in order to impose criminal liability"). Good faith is a complete defense to a charge of mail fraud or any other specific intent crime. *E.g., United States v. Young*, 470 U.S. 1, 31 (1985); *see also S. Atl. Ltd. v. Riese*, 284 F.3d 518, 531 (4th Cir. 2002).

Specific intent must be proven with respect to specific predicate acts. *See, e.g., Genty v. Resolution Trust Corp.*, 937 F.2d 899, 908 (3rd Cir. 1991) (RICO violation requires "possession of the specific intent associated with the various underlying predicate offenses"); *Lancaster Cnty. Hosp. v. Antelope Valley Hosp. Dist*., 940 F.2d 397, 404 (9th Cir. 1991) ("A specific intent

to deceive is an element of the predicate act"); *Does I v. The Gap, Inc.*, No. CV-01-0031, 2002 WL 1000068, at *11 (D. N. Mar. I. May 10, 2002) (must "properly plead[] the requisite *mens rea* as to each predicate act alleged"). It must be determined by focusing on a particular predicate act related to a misrepresentation and focusing on a person responsible for the misrepresentation and his/her state of mind.

A particularly critical, and related, aspect of specific intent in this case is that the Government must prove that particular individuals acting as agents of the Defendants possessed the requisite specific intent. A corporate defendant, as an entity, cannot possess a "specific intent" separate from the specific intent of an individual employee or agent. In other words, the Government may not stitch together a "corporate" specific intent by selectively aggregating the knowledge, statements, and actions of multiple agents or employees of a defendant. A corporation does not possess an "intent" independent of the intent of actual flesh and blood employees. *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 642 F. Supp. 781, 803 (E.D. La. 1986). For example, because the Government never proved that PM USA Chairman James Bowling personally believed that cigarette smoking was addictive (and intended to defraud consumers) when he stated that it was not "addictive" in a 1973 interview with 60 Minutes, GFOF § 2216, his statement cannot amount to mail or wire fraud. The fact that others employed by PM USA may have believed that smoking was addictive cannot substitute for proof of Mr. Bowling's specific intent. *Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio*, 900 F.2d 882, 886 n.2 (6th Cir. 1990) (in a RICO/mail fraud case, "a *specific* corporate employee must be found to have intent") (emphasis added); *see also Southland Securities Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 366-67 (5th Cir. 2004) (for purposes of determining corporate scienter it is "appropriate to look to the state of mind of the individual corporate official or

officials who make the statement (or order or approve its making or issuance, or who furnish information or language for inclusion therein, or the like) rather than generally to the collective knowledge of all the corporation's officers and employees acquired in the course of their employment.").[3]

At trial, the Government never proved specific intent to defraud on the part of any individual employee associated with particular predicate acts or fraudulent statements, and now it erroneously invokes the so-called "collective knowledge" doctrine as set forth in *United States v. Bank of New England*, 821 F.2d 844 (1st Cir. 1987).[4] But the Government fails to acknowledge that *Bank of New England refused* to apply the "collective knowledge" doctrine to the issue of corporate intent. Although it allowed aggregation on the issue of *knowledge*, on the separate issue of *intent* the Court's instruction stated that the "bank is deemed to have acted willfully if *one of its employees* in the scope of its employment acted willfully." 821 F.2d at 855 (emphasis added).[5] Indeed, the D.C. Circuit has expressly *rejected* the Government's

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[3] *First Equity Corp. v. Standard & Poors Corp.*, 690 F. Supp. 256, 259-60 (S.D.N.Y. 1988) ("a corporation can be held to have a particular state of mind only when that state of mind is possessed by a single individual"; rejecting argument that corporation could be deemed to have the requisite intent due to inconsistencies in knowledge of various employees); *Higginbotham v. Baxter, Int'l*, No. 04 C 4909, 2005 WL 1272271, at *8 (N.D. Ill. May 26, 2005) (corporate scienter must be shown through scienter of "corporate employees responsible for issuing the alleged misrepresentations or by a responsible senior officer")

[4] From the outset of the case, the Government's position was that it did not need to focus on evidence that a particular representative knew or believed a particular statement to be false. Tr. 9/21/04 (a.m.) 38:16-39:12 (Government Opening Statement). This is the way that the Government chose to try the case, and now it must live with that decision. The Government belatedly tries to cobble together specific intent as to a few individuals but, as shown herein, these attempts fail to prove specific intent to defraud and in most cases fail even to link the persons in question to the predicate acts charged in this case.

[5] Likewise, virtually all the other cases relied upon by the Government all applied the "collective knowledge" doctrine. None of them applied aggregation principles in determining corporate *intent*. *See Inland Freight Lines v. United States*, 191 F.2d 313, 315 (10th Cir. 1951) ("The *knowledge* of both agents or representatives was attributed to the company"); *CPC Intern, Inc. v. Aerojet-General Corp.*, 825 F. Supp. 795 (W.D. Mich. 1993) (aggregating information).

[Footnote continued on next page]

interpretation of *Bank of England*, squarely holding that while "collective knowledge" is a viable doctrine, "collective intent" is not. *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 670 n.6 (D.C. Cir. 1996). The Court of Appeals recognized that *Bank of New England* affirms this general legal principle, noting that although ". . . corporate *knowledge* of certain facts was accumulated from the knowledge of various individuals," "*the proscribed intent (willfulness) depended on the wrongful intent of specific employees*." *Id.* (emphasis added) (also noting jury instructions that "[t]he bank is deemed to have acted willfully if *one of its employees* in the scope of his employment acted willfully.").[6] Likewise, the Government acknowledges that *United States v. Sun-Diamond Growers*, 964 F. Supp. 486 (D.D.C. 1997) simply imputed knowledge from a *single* employee to the corporation and did not deal with "aggregated" knowledge or intent at all. Gov. Br. at 102.

In short, the courts do not recognize a collective "intent" doctrine analogous to the collective knowledge doctrine. *See, e.g., United States v. L.B.S. Bank-New York, Inc.*, 757 F. Supp. 496, 501 n.7 (E.D. Pa. 1990) ("although knowledge possessed by employees is aggregated so that a corporate defendant is considered to have acquired the collective knowledge of its employees, specific intent cannot be aggregated similarly") (citations omitted); *First Equity*

[Footnote continued from previous page]

The Government also cites language in *In re Worldcom, Inc. Securities Litig*., 352 F. Supp. 2d 472, 497 (S.D.N.Y. 2005) concerning aggregate corporate intent. But that decision is inconsistent with the vast weight of authority and was recently criticized in *Higginbotham v. Baxter, Int'l*, No. 04 C 7096, 2005 WL 1272271 (N.D. Ill. May 25, 2005) as being against the weight of authority and being limited to its specific facts.

[6] The same is true for the bulk of the other cases cited by the Government. In *United States v. T.I.M.E.-DC, Inc.*, 381 F. Supp. 730, 738-39 (W.D. Va. 1974), the court applied the "collective knowledge" doctrine but expressly noted that it did not apply to corporate intent. Similarly, the specific intent of a particular employee who was responsible for the fraudulent tax return was necessary in *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448 (9th Cir. 1986).

Corp., 690 F. Supp. at 260 (contrasting the permissibility of aggregation for purposes of determining "knowledge" with its impermissibility for purposes of determining intent).

3. Materiality

The concept of "fraud" under the mail and wire fraud statutes incorporates the common law requirement of "materiality." *Neder v. United States*, 527 U.S. 1, 25 (1999). In order to be material, a statement must "be of importance to a reasonable person in making a decision about a particular matter or transaction." *United States v. Winstead*, 74 F.3d 1313, 1320 (D.C. Cir. 1996). The "reasonable person" for these purposes is presumed to be a person of "ordinary comprehension." *Walters v. First Tennessee Bank*, 855 F.2d 267, 273 (6th Cir. 1988); *see also Corley v. Rosewood Care Center, Inc.*, 388 F.3d 990, 1009 (7th Cir. 2004) (to get materiality issue before jury, plaintiff "should have produced evidence that this statement influenced at least some of the prospective residents"; "the final nail in the RICO coffin for this claim is a lack of any proof that this promise would be material to a reasonable person."); *United States v. Hasson*, 333 F.3d 1264, 1270-71 (11th Cir. 2003) (to be material, fraudulent statement "must be one on which a person of ordinary prudence would rely"); *Associations in Adolescent Psychiatry v. Home Life Ins. Co.*, 941 F.2d 561, 570 (7th Cir. 1991) ("Fraud occurs only when a person of ordinary prudence and comprehension would rely on the misrepresentations."). Of course, the mere fact that a defendant made a statement is not evidence that the statement was material. *See, e.g.*, *Corley*, 388 F.3d at 1009 (describing such an argument as a "non-starter"). And the fact that accurate information is widely available from other sources demonstrates that an inaccurate statement is not one on which a person of ordinary prudence would rely. *Hasson*, 333 F.3d at 1271 ("nor would a person of ordinary prudence engaged in an arm's length purchase rely on the seller's representations regarding the market value of the property when the market value can be,

and should be, easily verified by consulting other sources"); *United States v. Brown*, 79 F.3d 1550, 1559 (11th Cir. 1996) (scheme to defraud not proved where "the representation is about something which the customers should, and could, easily confirm — if they wished to do so — from readily available external sources.").[7]

4. Intent to Deprive of Money or Property

The mail and wire fraud statutes do not encompass any and all frauds; they were designed only "to protect the people from schemes to deprive them of their money or property." *McNally v. United States*, 483 U.S. 350, 360 (1987). In *Cleveland*, for example, the Court made it clear that "frauds" directed — not at money or property — but at such things as the right to fair elections, a client's right to an attorney's loyalty, or the right to honest services by public officials, were not actionable under the mail or wire fraud statutes. *Cleveland v. United States*, 531 U.S. 12, 18-19 (2000). In this case, the only "money or property" that the Government contends was targeted by the alleged fraud was the money or property of consumers who purchased cigarettes. Any "fraud" that was designed to forestall public or private restrictions on smoking (or potential regulation or legislation) or to avoid legal liability is thus not cognizable under the mail or wire fraud statutes.

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[7] The Government argues (Gov. Br. at 91-92) that deceptive advertising is virtually always material and that materiality is presumed for matters involving health or safety. But none of the cases cited by the Government — which in any event are distinguishable because they arose under the FTC Act — addressed the situation where accurate information about the product in question was widely known to consumers. *See, e.g., FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965) (misrepresentation consisted of false claim that shaving cream could soften sandpaper). Nor is materiality irrebuttably presumed under the FTC Act.

In addition, there is significant evidence in the record that Defendants' statements regarding smoking and health were not material, indeed, were not believed at all. JDFOF Ch. 4, ¶¶ 185, 224-237; *id.*, Ch. 16, ¶ 52. Statements regarding marketing policies certainly are not material. 2/2/05 Tr. (a.m.) 11877:6-20, 11878:22-11879:1 (Eriksen).

Moreover, alleged misrepresentations which are merely collateral to a sales transaction and do not concern the quality or nature of the goods being sold do not go to the basis of the bargain and cannot be viewed as intended to deprive consumers of money or property. For example, in *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970), the Court held that alleged misstatements by salesmen that they had been referred by a friend of the customer or that they had a large inventory to be disposed of were only collateral, did not go to the nature or quality of the goods sold and thus could not constitute mail or wire fraud. Even if the deceptions had caused the customers to enter into purchase transactions, the customers received exactly what they had paid for and thus had not been deprived of "money or property." Similarly, to the extent that the Government's theories of fraud involve collateral matters that do not concern the quality or nature of the cigarettes purchased by consumers — *i.e.*, whether or not defendant engaged in youth marketing — they cannot support the Government's RICO claim.

5. Mailings or Wire Transmissions in Furtherance of the Fraud

A fraud that does not involve use of the mails or the wires does not violate the mail or wire fraud statutes. *Pereira v. United States*, 347 U.S. 1, 8 (1954). Thus, it is incumbent upon the Government to prove that Defendants caused a mailing or wire transmission with respect to each alleged predicate act. *United States v. Massey*, 827 F.2d 995, 999 (5th Cir. 1987) (the use of circumstantial evidence does not relieve the Government of its burden of establishing use of the mails "beyond a mere likelihood or probability").

Moreover, not every use of the mail or wires with some connection to a fraud amounts to mail or wire fraud. The statute penalizes only mailings caused "for the purpose of executing [the fraudulent] scheme or artifice." 18 U.S.C. § 1341. Thus, in order to violate the mail or wire fraud statutes, the use of the mail or wires must be "in furtherance of the [fraudulent] scheme."

United States v. Cacho-Bonilla, 404 F.3d 84, 90 (1st Cir. 2005). For example, a defendant who fraudulently used a credit card did not commit mail fraud simply because he knew that credit card slips would be mailed between businesses and the bank. *United States v. Maze*, 414 U.S. 395, 399 (1974). While the mailings were incidental to the fraudulent scheme, they were not "for the purpose of executing [the] scheme under the statute." *Id.*; *see also Schmuck v. United States*, 489 U.S. 705, 710-11 (1989) ("It is sufficient for the mailing to be incident to an essential part of the scheme, or a step in [the] plot."). Mere use of the mails "in the ordinary course of business" is insufficient to trigger the statute. *United States v. Bentz*, 21 F.3d 37, 40-41 (3d Cir. 1994). The mailings or wire transmissions must be "sufficiently closely related to the illegal scheme that it can be said that they further its accomplishment." *United States v. Koen*, 982 F.2d 1101, 1107 (7th Cir. 1992) (quoting *Maze*, 414 U.S. at 399); *see also United States v. Tencer*, 107 F.3d 1120, 1125 (5th Cir. 1997) ("completion of the alleged scheme must depend in some way on the information or documents that passed through the mail"); *United States v. Alston*, 609 F.2d 531, 539 (D.C. Cir. 1979) (mailing not a violation if it "neither furthered the objective of the scheme . . . nor served to conceal the fraudulent misrepresentation"); *United States v. Treadwell*, 566 F. Supp. 80, 83 (D.D.C. 1983) (mailing not in furtherance of fraud if it "neither furthered the objective of the scheme . . . nor served to conceal the fraudulent misrepresentation"). The mailing itself need not necessarily contain the false representation, but it must be in furtherance of the fraudulent scheme.

C. The Government's Burden of Proof

The Government concedes that it bears the burden of satisfying each of the elements of its claim by a preponderance of the evidence. Gov. Br. at 129. Defendants note that this

includes, not only all of the elements of an historical violation of RICO and the mail and wire fraud statutes but also of the likelihood of future RICO violations.

In addition, as Defendants have described fully in the past,[8] a heightened "clear and convincing" standard of proof is constitutionally required insofar as the Government alleges as fraudulent the Defendants' publicly expressed opinions in the context of a robust policy debate. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1984); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 502 (1984); *see also Groigan v. Gurner*, 498 U.S. 279, 286 (1991) (noting that elevated standard of proof applies when "particularly important individual interests or rights are at stake"); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983) (endorsing "clear and convincing" standard when important constitutional rights are at stake). As the Supreme Court recognized in *Illinois ex rel Madigan v. Telemarketing Assoc., Inc.*, 538 U.S. 600, 620 (2003), such "exacting proof requirements" serve the purpose of "provid[ing] sufficient breathing room for protected speech."[9]

III. JUDGMENT SHOULD BE GRANTED FOR DEFENDANTS BECAUSE THE GOVERNMENT HAS FAILED TO PROVE THE EXISTENCE OF AN ONGOING ENTERPRISE — OR AN ENTERPRISE AT ANY TIME

The existence of an "enterprise" is an essential prerequisite for a RICO claim, and its "central role . . . cannot be overstated." *United States v. Defries*, 129 F.3d 1293, 1310 (D.C. Cir.

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[8] *See* Joint Defendants' Opposition Memorandum of Points and Authorities to United States' Motion to Strike or, Alternatively, to Amend One Conclusion of Law in the Memorandum Opinion Accompanying Order #588.

[9] The Government (Gov. Br. at 131) cites *Whelan v. Abell*, 46 F.3d 1247 (D.C. Cir. 1995) – a non-RICO case – but that opinion offers no suggestion that it ever raised or considered the issue of the heightened standard of "clear and convincing" evidence or considered the special issues surrounding publicly expressed opinions in the context of a robust policy debate.

1997). Indeed, the entire purpose of the statute is to prohibit defendants who are associated with an "enterprise" from conducting the affairs of such an enterprise through a pattern of racketeering activity. The term "enterprise" is defined in 18 U.S.C. § 1961(4), and the case law has established that any "enterprise" must satisfy three basic requirements: (1) there must be an ongoing structure or organization; (2) the members of the "enterprise" must function as a continuing unit; and (3) the enterprise must be separate from the pattern of racketeering activity in which it engages. *United States v. Turkette*, 452 U.S. 576 (1981). The Government contends that the Defendants formed an "association-in-fact enterprise" in 1953 to achieve their "central shared objectives" of "maximizing their profits by acting in concert to enhance the market for cigarettes through an over-arching scheme to defraud." Gov. Br. at 7.

As shown below, (1) there is no evidence of any ongoing structure or organization that could possibly constitute an ongoing enterprise today; (2) the Government's theory that Defendants formed a criminal enterprise in 1953 was flatly disproven at trial; and (3) the Government has failed to otherwise satisfy the element of proof of an enterprise.

A. The Government Has Failed To Prove The Existence Of An Ongoing Enterprise

The central element of an enterprise is the existence of organization or structure. *United States v. Neopolitan*, 791 F.2d 489, 500 (7th Cir. 1986); *United States v. Perholtz*, 842 F.2d 343, 362 (D.C. Cir. 1988) (noting that structure or organization "is the most difficult [element of enterprise] to show").

But, as the Government concedes and this Court has recognized, both CTR and TI, the vehicles through which the Government says that the Defendants once organized and conducted the affairs of their enterprise, have been dissolved. JDFOF Ch. 11, ¶¶ 11, 18-21; GFOF, § 1,

¶¶ 525-534; Order #549, Memo. CTR cannot be reconstituted in any form by Defendants, and no entity similar to TI has been, or is likely to be, formed. JDFOF Ch. 3, ¶ 473, Ch. 11, ¶ 27.

Like TI and CTR, almost all of the other organizations cited by the Government during the trial as potential structural or organizational vehicles for the "enterprise" no longer exist. The Center for Indoor Air Research ("CIAR") was dissolved in 1999 pursuant to the MSA. The Committee of Counsel — which previously was a formal TI committee — did not continue its operations following TI's dissolution. Neither ICOSI nor its successor INFOTAB currently exists. Nor does the International ETS Management Committee. *See* JDFOF Ch. 11, ¶ 36.[10] The Government also referenced a number of organizations concerned with ETS but in each instance Defendants showed at trial that the organizations in question either no longer exist or that the Defendants no longer have any relationship to those organizations. *See* JDFOF Ch. 11, ¶ 40 (discussing the TI-ETS Advisory Group/ETS Advisory Group; CTR Special Projects; the Center for Environmental Health and Human Toxicology ("CEHHT"); the European, Asian, and Latin American Consultants Programs; the Tobacco Documentation Centre ("TDC"); ACVA Atlantic/Healthy Buildings International, Inc. ("HBI"); the Indoor Air International (IAI)/International Society for the Build Environment ("ISBE"); and Associates for Research in Indoor Air ("ARIA")).

[10] Although the Tobacco Documentation Centre, Shook Hardy & Bacon, and Covington & Burling were mentioned by the Government in its closing argument, the Government failed to provide any evidence that any of these organizations have ever served as a decision-making body, or that they are ever likely to do so. *See* JDFOF Ch. 11, ¶ 37. Similarly, the Government failed to establish that CORESTA, an association founded in France in the 1950s, whose membership comprises just under 200 member companies (most of which are headquartered in Europe), plays a role in any enterprise. *See* JDFOF Ch. 11, ¶ 38. The Government failed to explain how a French organization as varied as CORESTA could either reasonably or plausibly serve as the organizational infrastructure for the RICO enterprise alleged by the Government. *See id*. ¶ 39.

All of the Government's contentions concerning the requisite organization for the enterprise concern *past* events; none of them occurred after 1998. Gov. Br. at 9-11. Even when discussing "continuity" the Government relies only on conduct that existed between 1954 and 2000 and it speaks of continuity only in the *past* tense. Gov. Br. at 11.

The dissolution of these organizations (or Defendants' disassociation with them) leaves the Government with no viable theory of organization or structure with respect to any "future" RICO violation. Any attacks by the Government on current conduct are on the *individual* business practices of Defendants and not on any joint enterprise activity.

B. The Government Did Not Prove the Existence of a 1953 Enterprise

The alleged 1953 conspiracy and enterprise formation was the core of the Government's RICO claims. The Government contends that it was at the December 1953 Plaza Hotel meeting that Defendants agreed to a "central shared objective[]" of "maximiz[ing] their profits by acting in concert to preserve and enhance the market for cigarettes through an overarching scheme to defraud." Gov. Br. at 7. As the Government recognizes, this "central shared objective" or "common purpose" is an essential ingredient in the enterprise requirement — including an association-in-fact enterprise. *See id.* at 6. But the Government has failed to prove the establishment of its alleged common purpose to maximize profits through fraudulent conduct. *See generally* JDFOF Ch. 2. In particular, the evidence (including admissions from the Government's key expert on this subject, Dr. Brandt) indisputably shows the absence of an intent to use CTR or any other "association" to defraud. JDFOF Ch. 4, ¶¶ 91-93; *id.* Ch. 2, ¶¶ 72-80. The evidence shows that in forming the CTR, Defendants agreed — not to some nefarious or secret plot to defraud or to lie about the effects of smoking — but to fund high quality science by independent scientists. *See also infra* § V(B)(1).

The purported establishment of a conspiracy and enterprise in 1953 constituted the linch pin of the Government's RICO theory. The Government's utter failure of proof on this subject leaves it with nothing but disparate claims, none of which independently satisfies the prerequisites for mail and wire fraud in RICO liability.

C. The Government Did Not Prove the Existence of an Enterprise at Any Time

Even apart from the failure to prove the 1953 enterprise alleged, the Government has not proven the existence of *any* criminal enterprise at any time. Any enterprise must combine elements of (a) common purpose; (b) organization; and (c) continuity. *See Philip Morris, Inc.*, 116 F. Supp. 2d at 152 (citing *United States v. Perholtz*, 842 F.2d 343, 362 (D.C. Cir. 1988)).

As to *purpose*, the Government purports to sweep seven, disparate "pillars" or "subschemes" into one "enterprise" that purportedly began in 1953 meetings at which many of the supposed "pillars" — *e.g.*, denying marketing to underage persons, and statements related to addiction, nicotine manipulation, and ETS — not only were not discussed, but are not even alleged to have been conceived of. Nor does the Government point to specific meetings at any subsequent time to form an "enterprise" devoted to perpetrating a fraud on these issues. Instead, the Government's vehicle to join these temporally and substantively disparate activities into one "enterprise" is that all sought to "maximize profits." That supposed unifying purpose cannot withstand analysis for at least two reasons. First, absent common ownership (that did not exist here), profits are earned individually, not jointly, and one company's profits come at the expense of and do not inure to the benefit of its competitors. Accordingly, maximizing individual profits is antithetical to a "common" goal of competitors, as witnessed here by, among other things, the decline, marginalization and eventual acquisition of the 1953 market leader, The American Tobacco Company; the precipitous decline in Liggett's market share since the 1950s; and the

succession first of Reynolds and then Philip Morris USA to dominant market share positions. Second, the Government's theory simply proves too much. Every American corporation engages in conduct that fairly can be characterized as "profit maximization" and, if that suffices to establish a common "purpose" under RICO, the "purpose" requirement would be stripped of all meaning and effect. Moreover, to establish what the Supreme Court has called a "racketeering enterprise," the Government must prove the existence of "an association-in-fact that engages in a pattern of racketeering activity," not simply legal profit maximization. *National Org. for Women v. Scheidler*, 510 U.S. 249, 252 (1994).

As to *organization* (or structure), mere membership in various (now defunct) trade groups obviously does not suffice to prove membership in a criminal enterprise. Yet, evidence of legitimate participation in such trade groups forms the crux of the Government's enterprise allegations. Gov. Br. at 10-11. To infer association with a criminal enterprise merely from Defendants' past participation in a trade association would violate their association and First Amendment rights.[11] And, as noted, the trade associations in question dissolved nearly a decade ago in any event. Lacking any true organizing or structural mechanism for the enterprise, the Government proceeds to impermissibly conflate the supposed "pattern of racketeering activity" with the existence of an enterprise — another fundamental flaw. *See, e.g., United States v. Turkette*, 452 U.S. 576, 583 (1981) (enterprise must be "an entity separate and apart from the

[11] The Government also weakly attempts to prove an "informal" organization by reference to the unwritten, so-called "Gentleman's Agreement." Gov. Br. at 11. But, even if such an agreement existed long ago — and the evidence shows that no such agreement existed or was ever enforced, *see* §§ III.B. *supra* and V.B.5.b. *infra* — a mere agreement does not amount to an enterprise. *See, e.g.*, *Philip Morris, Inc.*, 116 F. Supp. 2d 131, 152 (D.D.C. 2000) (enterprise requires "some structure to distinguish [it] from a mere conspiracy."). In any event, the Government has never claimed that the scope of that alleged agreement is coextensive with the overarching scheme alleged now.

racketeering activity in which it engages"); *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir. 1982).

Finally, as to *continuity*, this element requires a certain core of constant personnel. *United States v. Perlholtz*, 842 F.2d 343, 355 (D.C. Cir. 1988); *United States v. DeFries*, 129 F.3d 1293, 1312 n.12 (D.C. Cir. 1997); *United States v. Cooper*, 91 F. Supp. 2d 60, 71 (D.D.C. 2000). But the Government nowhere explains how its imagined far-flung enterprise extending over 50 years could possibly satisfy this standard. The fact is that the Government has not even attempted, in its proposed findings or trial brief, to establish continuity over the multiple generations of employees at issue in this phantom 50-year enterprise. Indeed, the Government has not only failed to prove the "who," "what," "when," and "where" of any enterprise devoted to fraudulent conduct, but also compounds this basic failure of proof by simply abandoning any attempt to identify the actions of specific employees who formed the "continuing core" of the enterprise. *Perlholz*, 842 F.2d at 354-55; *United States v. Viola*, 35 F.3d 37, 43 (2d Cir. 1994) (must identify the "circle of people" who operated and managed the enterprise's affairs). The whole point of *Reves* is that plaintiff's proof must identify specific individuals, and the actions they took, to determine whether they "operated or managed" the enterprise. Nor does the Government provide more than scant innuendo to attempt to bootstrap the good faith performance of jobs by employees into racketeering acts in furtherance of a criminal enterprise. In fact, the Government has failed to identify ***any*** specific individuals who were members of the enterprise, an independent defect in its proof of enterprise which also requires dismissal.[12]

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[12] Defendants have already explained in detail how the plain language of 18 U.S.C. § 1961 (4) requires that an enterprise include two or more "individuals." Joint Defendants' Preliminary Proposed Rebuttal Findings of Fact and Conclusions of Law; Vol. III, ¶¶ 205-221. Before trial, the Government promised that it would prove up the identity of individuals who were members

[Footnote continued on next page]

IV. JUDGMENT SHOULD BE GRANTED FOR DEFENDANTS BECAUSE THE GOVERNMENT HAS FAILED TO PROVE THAT DEFENDANTS ARE CURRENTLY ENGAGED IN RICO VIOLATIONS AND/OR ARE LIKELY TO VIOLATE RICO IN THE FUTURE

A. Overview

The plain terms of 18 U.S.C. § 1964(a) expressly limit any grant of relief to those situations where such relief is necessary to "prevent and restrain violations of section 1962 . . ." 18 U.S.C. § 1964(a). As the D.C. Circuit recently noted, "[t]his language indicates that the jurisdiction is limited to forward-looking remedies that are aimed at future violations." *United States v. Philip Morris USA Inc.*, 396 F.3d 1190, 1198 (D.C. Cir. 2005); *see also United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995). Thus, this Court has previously recognized that the Government must prove that there is a reasonable likelihood of future violations before it can obtain any relief. *United States v. Philip Morris USA Inc.*, 116 F. Supp. 2d 131 (D.D.C. 2000). There "must be 'some cognizable danger of recurrent violation, something more than the mere possibility which keeps the case alive.'" *SEC v. Steadman*, 967 F.2d 636 (D.C. Cir. 1992) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

[Footnote continued from previous page]
of the enterprise. United States' Mot. for Partial Summary Judgment that each Defendant is Distinct from the RICO Enterprise, That a Defendant's Liability for RICO Conspiracy Does Not Require that Defendant to Participate in the Operation or Management of the Enterprise, and That RICO Liability Extends to Aiders and Abettors at 5 n.4. But it has no proposed finding on this issue, stating only generically that the enterprise included "individuals" without identifying them. GFOF, § 81, ¶ 2. In its opinion denying Defendants' motion to dismiss, this Court cited the Court of Appeals decision in *United States v. Perlholtz*, 842 F.2d 343 (D.C. Cir. 1988) for the proposition that an enterprise may consist of a "group of *individual[s]*, partnerships, *and* corporations associated in fact." 116 F. Supp. 2d at 152 (emphasis added). Nothing in that opinion — or in *Perlholtz*, which the Government acknowledges involved seven individual defendants (Gov. Br. at 18) — holds that an "association-in-fact" enterprise need not contain any individuals at all. Indeed, *Perlholtz* opined that "[t]his relationship of *individuals and corporations* is precisely what Section 1962(c) was designed to attack." 842 F.2d at 354 (emphasis added).

Here, there is no reasonable likelihood of future RICO violations by the Defendants. At the threshold, as described above, there is no organization or joint activity currently existing among Defendants that could possibly be described as an "enterprise": CTR, TI and CIAR — the organizations that allegedly provided the structure for the enterprise in the past — have not operated for years. But the existence of an "enterprise" is the *sine qua non* of a RICO violation. Defendants are aware of no reported RICO decision which has ever awarded relief under 18 U.S.C. § 1964(a) when there is no ongoing enterprise. Certainly the Government has cited no such decision and it offers no argument as to how relief can possibly be appropriate if no enterprise exists. Moreover — even apart from the absence of an "enterprise" — the environment in which Defendants conduct their businesses has changed radically in recent years. In particular, since 1998, the Defendants have been subject to the detailed restrictions of the MSA and related state settlements. The MSA prohibits virtually all of the conduct about which the Government complains, and thereby minimizes any possibility that the Defendants might, in the future, violate RICO in the ways the Government contends they have violated it in the past. Likewise, the Defendants now make public statements and take other actions that are flatly at odds with the allegedly fraudulent activity of the past, on issues extending from causation, to ETS, to low tar cigarettes, and beyond. The seven pillars of fraud alleged by the Government are inconsistent both with the Defendants' current conduct and the strictures of the MSA. Simply put, there is no indication whatsoever that Defendants are likely to violate RICO in the future.

Faced with these indisputable facts, the Government resorts to strained arguments in an attempt to keep this suit alive. The Government's principal legal position is that this Court should blindfold itself to the actual record evidence about whether the Defendants are likely to commit future RICO violations. Instead, the Government asks the Court to indulge a conclusive

presumption that the Defendants are likely to violate RICO in the future simply because, in its view, they have done so in the past. Gov. Br. at 151-156.

The Government's position is based upon a misinterpretation of the D.C. Circuit's opinion in *SEC v. First City Fin. Corp.*, 890 F.2d 1215 (D.C. Cir. 1989), and must be rejected. Indeed, the Government itself ultimately acknowledges that the Court must "consider[ ] *the totality of the evidence* of the underlying case" in determining whether future violations are likely. Gov. Br. at 153 (emphasis added). *See also First City*, 890 F.2d at 1228 ("the district court should determine the propensity for future violations based on the totality of the circumstances."). It would be a grave error to exclude the effects of the MSA and other aspects of Defendants' changed conduct from the "totality of the circumstances."

Apart from its flawed request for an irrebuttable presumption of recidivism, the Government's attempts to show that Defendants are currently engaged in RICO violations are nothing but a tribute to the Government's creativity. Virtually all of the specific acts that it points to as suggestive of future fraud amount to complaints that some Defendants in this action have been sanctioned by this Court for not abiding by certain court orders that have nothing to do with ongoing or future RICO violations. Beyond this, the Government attacks standard business practices that cannot possibly be labeled as fraudulent or as RICO violations — price promotions, use of direct-mail, motor sports sponsorships — to name a few. Finally, it urges that the Defendants are not sufficiently contrite with respect to their past behavior — a factor that was expressly *repudiated* in *First City*, 890 F.2d at 1229. The Government misses the point. The issue is not whether Defendants are doing everything that the Government wants them to do. The issue is whether they are, in the future, likely to violate RICO, *i.e.*, to conduct the affairs of an "enterprise" through a "pattern of racketeering activity." The evidence says no.

B. The "Totality of the Circumstances" Here Does Not Support a Finding of Ongoing or Likely Future Violations

Under *First City*, 890 F.2d at 1228, "the district court should determine the propensity for future violations based on the totality of the circumstances." Here, the totality of the circumstances makes future RICO violations unlikely. These circumstances must be viewed in combination, *i.e.*, as a "totality," in order to assess the likelihood of future violations and should not be viewed seriatim in isolation from each other.

1. There Is No Ongoing Enterprise (and Thus There Can Be No RICO Violation)

The existence of an "enterprise" is at the heart of any RICO violation. *See, e.g., United States v. Turkette*, 452 U.S. 576, 583 (1981) ("The existence of an enterprise at all times remains a separate element which must be proved by the Government."). As the Supreme Court has stated, "Congress did not intend RICO to extend beyond acquisition or operation of an enterprise." *Reves v. Ernst & Young*, 507 U.S. 170, 182 (1993). Therefore, it inescapably follows that the lack of any current RICO "enterprise" means that there is no reasonable likelihood of future violations. Yet the Government has wholly failed to prove the existence of a presently existing enterprise among the Defendants. As noted above, *supra* § III, all the organizations that form the heart of the Government's enterprise allegations — CTR, TI, and CIAR, among others — were dissolved nearly a decade ago. *See* JDFOF Ch. 12, ¶ 21-23. Moreover, the evidence establishes that a similar "enterprise" could not be created in the future because the MSA prevents the manufacturers subject to the MSA from establishing new industry research organizations like CTR. *See* MSA ¶ III(p) (JD-045158(@)).

The Government's failure to offer any meaningful evidence of an ongoing enterprise is particularly startling given that this subject was highlighted in closing arguments. JDFOF

Ch. 11, ¶ 5. The Government's persistent position is that it simply *does not need to bother* to establish an ongoing enterprise. Gov. Br. at 152-53. But the Government fails to cite a *single* case where any court has ever granted relief under 18 U.S.C. § 1964(a) in the face of a finding that no current enterprise existed.[13] Nor does the Government even attempt to explain how granting relief in the absence of an ongoing enterprise can possibly be consistent with the Court of Appeals' admonition — in this very case — that any remedies under section 1964(a) must be devoted to "separating the criminal from the RICO enterprise to prevent future violations." *United States v. Philip Morris*, 396 F.3d 1190, 1200 (D.C. Cir. 2005). Of course, no conceivable remedy can possibly be dedicated to separating Defendants from the "enterprise" if the enterprise does not even exist.

The Government's failure to prove an ongoing enterprise is dispositive but gains even greater force when viewed in the context of the "totality of the circumstances" as further discussed below.

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[13] Without exception, the cases cited by the Government involved judicial findings of a reasonable likelihood of future RICO violations. *See e.g., United States v. Local 560*, 974 F.2d 315, 333 (3d Cir. 1992) (union likely to fall back into control of organized crime unless particular Union official was enjoined from position of influence); *United States v. Local 30*, 871 F.2d 401, 408 (3d Cir. 1989) (noting that continuing policies "would not easily be eliminated merely by the removal of . . . 13 individuals."); *United States v. Local 295*, 784 F. Supp. 15, 18 (E.D.N.Y. 1992) (holding that "vestiges of [union's] old regime are not gone.").

The authority that does exist tends to confirm the common sense notion that there is no reasonable likelihood of a future RICO violation — or no continuing RICO violation — if the "enterprise" at the center of any such violation does not even exist. *E.g., Special Purpose Accounts Receivable Co-Op. Corp. v. Prime One Capital Co.*, 202 F. Supp. 2d 1339, 1347-48 (S.D. Fla. 2002) (noting that enterprise terminated when one defendant withdrew from the enterprise); *Kaplan v. Reed*, 28 F. Supp. 2d 1991, 1210 n.7 (D. Colo. 1998) (noting that enterprise had ceased to exist when one member — a law firm — had been dissolved and the bank account in question was closed).

2. The Alleged "Frauds" of Which The Government Complains Ended Long Ago and Defendants' Present Actions and the Provisions of the MSA Make Future Fraudulent Activity Unlikely

As noted, the principal "frauds" of which the Government complains allegedly stem from meetings that took place in the Plaza Hotel in New York City over 50 years ago. Wholly apart from the fact — detailed elsewhere in this brief and in Defendants' proposed findings — that these meetings did *not* lead to any fraudulent activity, the fact is that what took place in 1953 is of little or no relevance to what the Defendants are likely to do in 2005. More importantly, any conceivable allegations of misconduct regarding the principal matter alleged — *i.e.*, the causal link between smoking and disease — are now artifacts of distant history. Cigarettes have borne warning(s) determined by Congress to adequately inform consumers of the health risks of smoking for nearly four decades. 15 U.S.C. § 1331 *et seq.* Moreover, all of the Defendants now admit — albeit each in slightly different words — the causal link between smoking and disease. *See, e.g.,* 10/14/04 Tr. (p.m.) (Harris) at 2513:3-10 (by 1999, Defendants had made "direct and explicit admission[s] that cigarette[ ] smoking caused disease."). Wholly apart from whether such conduct was fraudulent decades ago when it occurred (*see infra*, § IV.C), the Defendants no longer publicly urge a distinction between scientific causation (focused on proof of the mechanism of disease) and statistical or epidemiologic causation. For example, PM USA's website expressly states that it "agrees with the overwhelming medical and scientific consensus that cigarette smoking causes lung cancer, heart disease, emphysema and other serious diseases in smokers." JDFOF Ch. 12, ¶ 177. Lorillard states that the public should "rely on public health authorities for information on the dangers of smoking," and that "[a]ll cigarettes are dangerous

and smoking can cause serious diseases, including lung cancer." JDFOF Ch. 12, ¶ 370.[14] And Reynolds concedes that "smoking, in combination with other factors, causes diseases in some individuals." JDFOF Ch. 12, ¶ 277.[15] Moreover, the MSA already specifically prohibits any "material misrepresentation of fact regarding the health consequences of using any Tobacco Product." MSA § III(r) (JD-045158(@)); JDFOF Ch. 12, ¶¶ 36-40.

Defendants have similarly forever changed their stance on addiction. For example, PM USA's website states that it "agrees with the overwhelming medical and scientific consensus that cigarette smoking is addictive." JDFOF Ch. 12, ¶ 179; *see also* JDFOF Ch. 12, ¶ 279 ("As stated on the company's website, Reynolds' position is that cigarette smoking is addictive as that term is commonly used today."); *id.* ¶ 375 (citing Lorillard CEO statement concerning website that "[c]igarette smoking can also be addictive").[16] But this is not enough for the Government. It argues that these statements are insufficient to permit consumers to understand that cigarette

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[14] The Government contends that "Lorillard's CEO, Martin Orlowsky . . .. refused at trial to admit to the full extent of smoking's harm." Gov. Br. at 157-58. But the very same page of testimony cited by the Government shows that (1) Mr. Orlowsky agreed that Lorillard had publicly stated that smoking causes lung cancer, emphysema, COPD, and heart disease, and (2) further testified that Lorillard has "stated publicly that it accepts the Surgeon General's and other public health authorities' views, which includes any disease." 10/13/04 Tr. (a.m.) at 2303:1-6.

[15] The Government complains that, in addition to admitting that smoking causes disease, Reynolds also adds that most chronic diseases have multiple causes. Gov. Br. at 157. The Government does not — and cannot — suggest, however, that this statement is in any way untrue or fraudulent. Likewise, the Government's concern that Andrew Schindler, Reynolds' former CEO, testified that cigarettes have "significant and inherent health risks" and "may contribute to causing disease in some people" is unpersuasive in light of the fact that Reynolds' website then and now advised readers that they should rely on the conclusions of the Surgeon General, public health and medical officials, when making decisions regarding smoking and provides links directly to such sources.

[16] The Government complains about a press release issued by Ronald Milstein, Lorillard's General Counsel, but Defendants have shown that this press release was a legitimate response to the verdict in the *Scott* class action in Louisiana and was not fraudulent in any way. JDFOF Ch. 12, ¶¶ 361-64.

smoking is addictive unless Defendants also expressly admit that it is the nicotine in cigarettes that make them addictive. JDFOF Ch. 12, ¶ 112. The Government has offered no evidence that this quibble over the precise wording of the addictiveness of smoking somehow augurs future RICO violations or that the present statements that smoking is addictive are confusing or misleading to consumers in any way. Moreover, Defendants are already subject to a prohibition against misrepresenting the addictiveness of smoking; the MSA's ban on any misrepresentations concerning the "health consequences of using any tobacco product," MSA § III(r) (JD-045158(@)), plainly extends to addiction.

Likewise, the alleged scheme of maintaining the "myth of independent research" is a thing of the past. The crux of that scheme was the industry's joint activities through the now-defunct CTR. Gov. Br. at 42-45. Nor is there any evidence of a present, or likely future, agreement to suppress research, whether into additional health hazards or potentially safer products.[17] On the contrary, the record is replete with evidence that Defendants vigorously compete in their individual attempts to develop safer products. For example, PM USA has spent hundreds of millions of dollars to develop its electrically-heated cigarette (Accord), *see* JDFOF Ch. 12, ¶ 194, and also has devoted significant resources in the development of its ScoR program. *See* JDFOF 12, ¶ 194. Also, PM USA has urged public health agencies to define standards for assessing the relative risk of different cigarettes and supports legislation that would permit the FDA to regulate cigarettes. *See* JDFOF 12, ¶ 196. Reynolds also has worked to develop potentially less hazardous cigarettes, including Eclipse, and it has shared information

[17] As noted below, no such agreement would be a fraud cognizable under the mail and wire fraud statutes in any event. *See infra*. But for present purposes it is enough that there is no reasonable likelihood of such an agreement to suppress in the future.

regarding Eclipse with the Government, the Institute of Medicine, and the World Health Organization. *See* JDFOF 12, ¶ 296. Reynolds has two websites devoted to the Eclipse brand, one that provides information about Eclipse to consumers, and another that provides information to scientists. *See* JDFOF 12, ¶ 296. Likewise, Lorillard's Potentially Reduced Exposure Product ("PREP") project continues in full force. *See* JDFOF 12, ¶ 455. Through the PREP project, Lorillard is attempting to reduce or eliminate any smoke constituent that is potentially harmful and has measurable biological effects. *See* JDFOF 12, ¶ 457.

In addition, the MSA expressly prohibits any future suppression of research or development of new products:

> No Participating Manufacturer may enter into any contract, combination or conspiracy with any other Tobacco Product Manufacturer that has the purpose or effect of: (1) limiting competition in the production or distribution of information about health hazards or other consequences of the use of their products; (2) limiting or suppressing research into smoking and health; or (3) limiting or suppressing research into the marketing or development of new products . . . .

MSA § III(q) (JD-045158 (@)); *see also* JDFOF 12, ¶¶ 41-45.

Given the above facts, the Government focuses its allegations of potential future "frauds" on its remaining "pillars" of youth marketing, low tar cigarettes, and causation as it applies to ETS. Gov. Br. at 156.[18] But here again, there is no substantial danger of any future RICO violations.

[18] The Government's brief makes no contentions regarding the likelihood of future RICO violations with respect to the alleged "nicotine manipulation" scheme. Nor could it. The Government cannot show that the *design* of the cigarettes amounts to a fraud within the meaning of the mail or wire fraud statutes. *See* § V.B.4.a.i *infra*. And, in any event, the alleged fraud involving Defendants' mere *denials* that they manipulated nicotine levels in cigarettes revolved around specific events that took place more than ten years ago in the wake of David Kessler's unsuccessful attempts to secure FDA regulation over the tobacco industry. These events have not been — and are not likely to be — repeated. And, as described below, they were not fraudulent in any way.

As to youth marketing, the undeniable fact is that — even if Defendants did threaten to engage in this conduct — it would *not* be a RICO violation. In any event, there is no significant danger that the Defendants will engage in youth targeting in the future. Such targeting is, once again, expressly prohibited by the terms of the MSA. MSA ¶ III(a) (JD-045158 (@)) (prohibiting "any action, directly or indirectly, to target Youth . . . in the advertising, promotion or marketing of tobacco products, or take any action the primary purpose of which is to initiate, maintain, or increase the incidence of youth smoking"). And, as detailed in Joint Defendants' proposed post-trial findings, numerous other provisions of the MSA provide various additional, specific limitations upon even inadvertent spillover appeal or reach to youth. *See generally* JDFOF Ch. 12, § II.B.2.b.

Even apart from the strictures of the MSA, the Government has failed to identify any industry documents or other evidence demonstrating that any of the Defendants are engaged in youth (*i.e.*, under 18) targeting in their advertising and marketing. Instead it contends that general marketing activities directed to adults but with collateral effects in youth (*e.g.*, price promotions) amount to youth marketing. The Government's apparently boundless definition of youth marketing — essentially amounting to a proposed prohibition on any marketing activity that might potentially result in youth, as well as adult, smoking — simply illustrates how far this case has drifted from the issue of whether or not Defendants are likely to engage in future RICO violations. Does the Government genuinely believe that it somehow violates RICO for Defendants to engage in the vigorous price competition that is *required* by the antitrust laws simply because lower prices might increase the numbers of youth (as well as adults) who smoke? There is not one iota of evidence that Defendants have conspired with one another to lower cigarette prices — or that any defendant could possibly "conduct the affairs" of a joint

"enterprise" by engaging in vigorous public competition designed to increase its market share at the expense of that of rival manufacturers. In any event, far from increasing, youth smoking prevalence has declined approximately 40% since the MSA went into effect. JDFOF Ch. 12, ¶ 99.

On the subject of the alleged "low tar" fraud, any actual fraud or misrepresentation in this area is already foreclosed by the MSA's prohibition of any misrepresentations of fact regarding the health consequences of using any tobacco product. MSA § III(r) (JD-045158 (@)). Moreover, the Defendants' current statements on the subject of low tar cigarettes are not by any conceivable measure fraudulent. For example, PM USA's website expressly warns that "smokers should not assume that lower-yielding brands are safe or safer than full flavor brands" and alerts them to the phenomenon of "compensation." It adds that, "as of today, there is no cigarette on the market which the public health community endorses as offering 'reduced risk.'" JDFOF Ch. 12, ¶ 182. PM USA has also distributed onserts to consumers of light cigarettes on several occasions with this same information. Like PM USA, Reynolds expressly discusses compensation on its website and notes that many scientists have concluded that smokers who switch to cigarette brands with a lower tar and nicotine yield compensate for these reductions by smoking lower tar cigarettes differently, and that the more intensely a smoker smokes a cigarette, the more tar and nicotine he or she will receive from that cigarette. JDFOF Ch. 12, ¶ 285. In addition, Reynolds advises the public that there is no safe cigarette, explains numerous issues related to lower yield cigarettes and its use of brand descriptors. *Id*. ¶¶ 281-284. Lorillard states on its website that all cigarettes are dangerous and urges consumers to rely upon public health authorities for information about smoking and health. Lorillard's website provides links to public health authority websites, including NCI's website. *Id*. ¶ 370. Thus, even apart from the

lack of any evidence of joint activity among the Defendants with respect to low tar cigarettes, there is no proven danger of future fraud with respect to such products.

Finally, as to ETS, PM USA's current website recites the conclusions of public health officials that "secondhand smoke from cigarettes causes disease, including lung cancer and heart disease, in non-smoking adults," and states that the "public should be guided by the conclusions of public health officials regarding the health effects of secondhand smoke. . . ." It adds that adults should avoid smoking around children. JDFOF Ch. 12, ¶ 180. Similarly, Reynolds' website states that it believes that "[p]ublic health authorities have concluded that ETS exposure can cause a number of diseases in both children and adult nonsmokers," and that "both smokers and nonsmokers should be guided by and rely upon information provided by public health officials regarding the reported risks of ETS." *Id*. ¶ 287. Likewise, Lorillard's website indicates that "public health authorities have concluded that ETS exposure can cause lung cancer and heart disease in non-smoking adults, and asthma, respiratory infections and symptoms, and other serious conditions in children," and that "smokers and non-smokers should be guided by and rely upon that information." *Id*. ¶ 359. In sum, notwithstanding that many company (and other) scientists remain unconvinced that ETS causes disease in adult non-smokers (JDFOF Ch. 5, ¶¶ 108-117), Defendants direct consumers to statements by the public health community on this issue. The Government nowhere explains how this position can possibly be described as fraudulent or somehow amounts to a RICO violation.

3. The Fact That The MSA Already Prohibits the Core Fraudulent Activity Alleged By The Government Is Unquestionably Relevant To Whether Defendants Are Likely To Engage In Future RICO Violations

As reflected in the above discussion, the MSA already "prevents and restrains" Defendants from pursuing the core alleged fraudulent activity that the Government claims took place in the past. The Government belittles the MSA, suggesting that the Court should simply ignore the substantial restrictions and oversight it places on Defendants' activities. This position is unsupported by both logic and law.

The existence of the restraints imposed by the MSA — which is enforceable in state courts in every state in the nation — obviously limits the Defendants' ability to engage in future fraudulent conduct. And as a matter of law, it is a well-established principle that additional equitable relief is unnecessary and inappropriate where Defendants are already judicially barred from engaging in the misconduct in question. The reasoning of the cases on this point is simple: given the existing injunction, there is no "cognizable danger that, unless enjoined, [defendant] would revert to the peccadilloes involved in the [alleged unlawful conduct]." *SEC v. American Bd. of Trade, Inc.*, 751 F.2d 529, 538 (2d Cir. 1984) (Friendly, J.). For instance, in *Nat'l Farmers' Org., Inc. v. Associated Milk Producers, Inc.*, the Eighth Circuit affirmed a trial court's rejection of injunctive relief where the conduct at issue had already been enjoined through prior consent decrees: "there is nothing to be gained by entering an injunction that substantially duplicates the relief already available." *See* 850 F.2d at 1309; *see also Hawaii v. Standard Oil Co. of Calif.*, 405 U.S. 251, 261 (1972) ("the fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one."); *United States v. Jones*, 136 F.3d 342, 348 (4th Cir. 1998) (injunction could not issue where consent decree already barred defendant from returning to the unlawful policy); *Comfort Lake Ass'n v. Dresel*

Contracting, Inc., 138 F.3d 351, 354-55 (8th Cir. 1998) (dismissing claim for injunctive relief where existing settlement agreement eliminated likelihood of recurrence); *Harthman v. Witty*, 480 F.2d 337, 340 (3d Cir. 1973) (reversing grant of second injunction as unnecessary because another injunction already prohibited further polluting activity).

More recently, the Sixth Circuit held that a trial court had "committed reversible error in concluding that a risk of continuing irreparable harm had been shown" when Defendants were already subject to a consent decree. *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 476 (6th Cir. 2004). Particularly where there was "no evidence that the EPA failed to enforce the decrees," *id*., there was no basis for additional relief. Of course, the requirement of "continuing irreparable harm" is analogous to the requirement of a "continuing violation"; indeed, the case for judicial restraint is even more powerful in this case because the requirement of a likely future violation is based on the actual language of the RICO statute.[19]

4. The Government Has Not Shown That the MSA Is Ineffective

At the outset of the case, Defendants moved to dismiss on the "likelihood of future violations" issue. This Court denied the motion on the ground that it would have required the Court to make "two assumptions" that it was not prepared to make on the pleadings: (1) that Defendants have complied with and will continue to comply with the terms of the MSA; and (2) that the MSA has adequate enforcement mechanisms in the event of non-compliance. *United*

[19] In the past, the Government has cited *United States v. Borden*, 347 U.S. 514, 519 (1954), for the proposition that the general rule against duplicative injunctions does not apply when the Government is seeking injunctive relief. But, even apart from the fact that the first injunction in *Borden* (unlike the MSA) was entered on behalf of purely private parties, *Borden* ***rejected*** the Government's position that "the existence of the private decree warrants no consideration by the chancellor in assessing the likelihood of recurring activity." *Id*. at 520 (emphasis supplied). In other words, *Borden* supports Defendants' argument that the MSA should be considered as part of the "totality of the circumstances."

States v. Philip Morris, 116 F. Supp. 2d at 149. Again, when Defendants requested summary judgment on this issue, the Court stated that it was not prepared to accept those assumptions at the summary judgment stage. *United States v. Philip Morris*, 316 F. Supp. 2d 6, 11 (D.D.C. 2004).

Now, however, a trial has been completed. The Government cannot seek refuge in mere allegations or in a "genuine issue of material fact." Fed. R. Civ. P. 56. The question now is whether the weight of the evidence demonstrates that (1) Defendants have not substantially complied with the MSA; and (2) that the enforcement mechanisms of the MSA are inadequate. Defendants submit that the evidence overwhelmingly supports their position on both of these issues.

a. Defendants Have Complied With the MSA

As set forth in Defendants' proposed findings, *see generally* JDFOF Ch. 12, § II, the MSA is being fully enforced and is having its desired effect. Defendants have complied with the provisions of the MSA since its adoption in 1998. Defendants have substantially altered their marketing practices as required by the agreement and have repeatedly modified their conduct in ways suggested by the Attorneys General.

The Government makes much of a handful of alleged violations of the MSA by the Defendants. Yet the record is undisputed that the few instances in which there was a finding of noncompliance resulted from legitimate disagreements about particular provisions' precise meaning and scope. Notably, the Government does not claim that it has identified any asserted violation of the MSA not pursued by the Attorneys General. Failing there, the Government's brief recites some actions that it mistakenly claims violate the "spirit," but evidently not the letter, of the MSA. Thus, it complains that after the MSA prohibited outdoor and billboard ads,

Defendants increased their levels of price promotions. But such price promotions are competitive activities; they are not prohibited by (and do not violate) either the MSA or RICO. The Government also complains that Lorillard did not change its "Pleasure" campaign, without indicating why that campaign violated either the MSA or RICO.[20] And they complain that PM USA did not treat its parent, Altria, which does not manufacture or sell cigarettes as a party to the MSA, although it is undisputed that Altria is not a party to that agreement. Gov. Br. at 167. In any event, none of these matters are claimed RICO violations.

b. The MSA Has Effective Enforcement Mechanisms

As shown above, the Defendants have made significant efforts to implement the MSA and to cooperate in effecting its goals. Equally important however is the fact that the MSA has real teeth — *i.e.*, effective enforcement mechanisms in the event of asserted noncompliance. Effective enforcement ensures that there is no cause to duplicate the relief already afforded by the MSA. The evidence adduced at trial demonstrates that the MSA *does* have extensive enforcement provisions. JDFOF 12, § 56-60, 62. Under these provisions, courts in every state and the District of Columbia retain jurisdiction over enforcement actions brought by state Attorneys General to remedy violations of the Consent Decrees entered by those courts. *See* MSA § VII(a); *see also* Consent Decrees, § XIII.[21]

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[20] In its proposed findings (but not its brief) the Government suggests that the "Pleasure" campaign circumvented (without violating) the provisions in the Cigarette Advertising Code, although it does not mention the MSA. GFOF ¶ 4085. But the testimony cited in support of this proposition provides no support whatsoever for the Government's statement. It appears that the Government simply copied this proposed finding verbatim from its earlier proposed findings (¶ 3473) — for which it had cited Professor Krugman's report, and then simply claimed that this matter had been covered in Krugman's actual trial testimony when in fact it was not.

[21] The Government argues that the MSA is ineffective because the seven-year time-period permitting open review of the Defendants' internal books will soon begin to expire in various states. Gov. Br. at 241. However, the expiration of the period for open reviewing of Defendants' books does nothing to change the existence of two fundamental facts: (1) the MSA

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The MSA also provides for the NAAG to coordinate and facilitate the MSA's implementation and enforcement by the states. MSA § VIII. Implementation of the MSA and related consent decrees by the state Attorneys General and NAAG, including investigation and litigation, are funded by the signatory Defendant cigarette manufacturers themselves, who agreed to pay $50,000,000 into an escrow fund for such purposes. MSA § VIII(b-c) and Exhibit J. JDFOF Ch. 12, ¶ 59.

Pursuant to the foregoing provisions, NAAG and the various state Attorneys General actively monitor the signatory Defendant cigarette manufacturers' compliance with the MSA. This takes the form of periodic meetings specifically required by the MSA, as well as numerous informal contacts between NAAG and state Attorneys General offices, on the one hand, and the signatory Defendant cigarette manufacturers, on the other. JDFOF Ch. 12, ¶ 59. The uncontradicted evidence shows numerous inquiries by NAAG and the state Attorneys General offices concerning, among other things, third-party billboards, alternative advertising, sponsorship advertising, race track signage, sampling coupons, youth targeting issues, website document posting and access, product placement, and magazine advertisement placement issues. JDFOF Ch. 12, ¶¶ 66-68. Normally, concerns are resolved on an informal basis under this process.[22] Moreover, on the few occasions where NAAG and/or the states have concluded that

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prohibits most of the conduct at issue in this litigation and (2) the MSA grants each state (and the NAAG) extensive powers to remediate violations of the MSA. Indeed, if the states believe a violation has taken place, or is ongoing, it is doubtful that a court would deny the state a subpoena for any relevant documents — especially since each state court specifically retained jurisdiction pursuant to the consent decrees entered in each state. In addition, as the Defendants have proven, they have *willingly* provided assistance to the state Attorneys General well beyond anything required by the MSA. And they have an incentive to be forthcoming with the state Attorneys General in order to avoid unwanted enforcement actions.

[22] Obviously, the mere fact that the MSA wisely calls for "mandatory discussion and consultation" (Gov. Br. at 164-65) does not render it ineffective. On the contrary, these

[Footnote continued on next page]

the MSA is being violated and where informal attempts at resolution have failed, they have pursued formal enforcement action. *Id*. ¶ 69.

It is not necessary, of course, that the MSA and its enforcement mechanisms make it absolutely *impossible* for Defendants to violate RICO in the future. Rather, the issue is whether, as part of the "totality of the circumstances," the MSA conjoins with other factors to lead to the conclusion that the Government has not satisfied its burden that it is *reasonably likely* that Defendants will violate RICO in the future.

Finally, the Government argues that the MSA is inadequate because it does not afford all the relief that the Government seeks in this action, or all the relief that would have been provided by the 1997 McCain bill. Gov. Br. at 166-67. These complaints are beside the point. The only relevant issue is whether the MSA, along with other facts making up the "totality of the circumstances," make it unlikely that Defendants will engage in future RICO violations. That the provisions of the MSA do not precisely dovetail with the Government's preconceived wish list of remedies is entirely irrelevant to this issue.

5. The Defendants Have Instituted Significant Changes in Management Culture and Policy that Make Future RICO Violations Less Likely

In addition to the above, the Defendants have made substantial changes in their corporate cultures, in their advertising and marketing practices and in other key respects that make any future RICO violations less likely. For example, PM USA no longer advertises any of its brands in any magazines whatsoever (JDFOF Ch. 9; Ch. 12, ¶ 206), it has supported FDA regulation of cigarettes (JDFOF Ch. 12, ¶¶ 196, 235-238), it funds an extensive youth smoking prevention

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requirements have time and time again led to negotiated resolutions without the need for extensive enforcement proceedings. JDFOF Ch. 12, ¶ 58.

program (*id*. ¶ 150-174), and its Chairman has introduced a compliance program (*id*. ¶¶ 146-149) and a new Mission Statement and Core Values designed to "enhance our ability to act in a way that is consistent with society's expectations of a responsible company." *Id*. ¶ 137.[23] Reynolds has likewise adopted principles under which it "(i) fully recognizes that it produces a product that has significant and inherent health risks; (ii) believes that people should — and do — know about those risks and is committed to trying to develop products that might present less risk; (iii) does not want children to smoke; and (iv) does not encourage nonsmokers to start smoking." *Id*. ¶ 257. Likewise, Lorillard has instituted policies against youth marketing and has circulated them broadly to employees as part of its Corporate Principles, *id*. ¶¶ 399-407, and has implemented an extensive youth smoking prevention program. *Id*. ¶¶ 439-450.

Although the Government attempts to belittle these extensive corporate policies and changes, it has not produced any evidence that the changes and policies are in any way insincere or merely transitory.

C. The Government Is Not Entitled, As It Suggests, to a Presumption that Defendants Will Engage in Future RICO Violations Simply Because they May Be Found to Have Engaged in RICO Violations in the Past

Seeking to avoid the extensive record evidence that Defendants are unlikely to violate RICO in the future, the Government requests that this Court hold that Defendants' past conduct alone compels a finding that Defendants are likely to violate RICO in the future. Gov. Br. at 155. In other words, the Government asks the Court to don blinders and not even consider the restrictions of the MSA, the non-existence of any "enterprise," or any of the other factors

[23] Executive compensation is tied to achieving the goals of the Mission Statement. JDFOF Ch. 12, ¶ 141. And all but one of PM USA's "senior team" have been appointed since the Mission and Values were implemented. JDFOF Ch. 12, ¶ 143.

relevant to the "totality of the circumstances" that currently affect Defendants' conduct. This request cannot be squared with either the factual record in this case or the governing case law.

The Government relies chiefly upon the decision in *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1228 (D.C. Cir. 1989). But, as this Court has noted, that decision makes clear that no single factor is determinative and that "the district court should determine the propensity for future violations based on the totality of circumstances." *United States v. Philip Morris USA Inc.*, 116 F. Supp. 2d 131, 148 (D.D.C. 2000); *First City*, 890 F.2d at 1228. Nothing in this Court's prior statement that a "reasonable likelihood of violations" might possibly be established by inferences drawn from past conduct[24] suggested that this Court would (or could) ignore the extensive evidence that relates directly to Defendants' ability and propensity to engage in future RICO violations.

The Government's argument is based on a skewed interpretation of three factors discussed in *First City* — (1) whether a Defendant's violation was isolated or part of a pattern; (2) whether it was flagrant and deliberate; and (3) whether a Defendant's business will present opportunities to violate the law in the future. Gov. Br. at 152-56. Nothing in *First City*, however, suggests that these factors are exclusive. To the contrary, the decision in *First City* stressed that the true test is the "totality of circumstances." 890 F.2d at 1228; *see also United States v. Philip Morris USA Inc.*, 316 F. Supp. 2d at 11 ("the Court must look at the whole factual picture"). Certainly nothing in *First City* either requires or justifies ignoring facts such as the length of time that has elapsed since the alleged violations, Defendants' changed conduct, the

[24] On the contrary, at summary judgment the Court held that resolution of whether Defendants were reasonably likely to engage in future RICO violations was a matter of factual dispute for trial. 316 F. Supp. 2d at 12.

dissolution of the organizations through which the "enterprise" allegedly operated, or the existence of consent decrees and attorney general oversight that place severe limitations on Defendants' future conduct. *First City* did not involve a situation — as here — where a defendant was already specifically enjoined from engaging in the alleged wrongful conduct of the past, and thus says nothing about that issue.[25] Indeed, the authorities discussed above, *see supra* § IV.C., establish that it is inappropriate to presume future violations from mere past conduct when an effective injunction already prohibits future repetitions of the past wrongdoing.

D. The Government's Additional Arguments That Defendants Are Likely to Engage In Future Violations Are Unconvincing

Many of the Government's contentions regarding the likelihood of future violations have been addressed above. In addition, the Government also recites actions by the Defendants during the pendency of this lawsuit that it contends evidence a likelihood of future violations. Most of the conduct identified in the Government's brief is conduct specific to Defendants' defense of this litigation and does not even begin to suggest that Defendants are likely to violate RICO in their marketing and sale of cigarettes. Thus, the Government complains that Liggett produced privilege logs with "misleading descriptions"; that PM USA was sanctioned because certain employees inadvertently deleted e-mail messages that should have been preserved under the

[25] Further, *First City* was a case involving securities fraud — not a RICO – case. Thus, the decision was not subject to and did not analyze the "prevent and restrain" limitation of 18 U.S.C. § 1964(a) and there is considerable doubt that the three factors outlined in *First City* for securities cases carry equal force in RICO cases. To focus on just the three non-exclusive factors expressly listed in *First City* would largely render the "prevent and restrain" clause a nullity. The first two factors — pattern and intentional conduct — would, of course, be satisfied in *any* RICO case, since these are elements of the offense. As interpreted by the Government, the third factor — whether the Defendants' business will present opportunities to violate the law in the future — would apply to any person still alive or any corporation still in business. Defendants contend that this factor also should take account of changes in the business environment, like the MSA, and the lack of any "enterprise."

Court's preservation order; and that BATCo was sanctioned for disobeying court orders. Gov. Br. at 159-60. None of these matters — all of which have already been dealt with in the context of this litigation — has anything to do with possible future violations of the mail or wire fraud statutes or RICO. Moreover, the Court has already sanctioned the Defendants for any improprieties. The Government's request that the Court draw an inference of a propensity to commit future RICO violations from those events is not only illogical but also a thinly disguised request for an additional, onerous, and unjustified sanction.

Finally, the Government's suggestion that Defendants are likely to engage in future violations because they are insufficiently contrite over their past conduct (Gov. Br. at 159 n.117) is foreclosed by the D.C. Circuit decision in *First City*:

> The district court misconstrued our precedents in suggesting that another basis for justifying the injunction was appellants' 'lack of remorse' . . . . The securities laws do not require Defendants to behave like Uriah Heep in order to avoid injunctions. They are not to be punished because they vigorously contest the Government's allegations.

First City, 890 F.2d at 1229.

In sum, the clear weight of the evidence demonstrates that Defendants face a radically changed set of circumstances and that they are unlikely to commit future RICO violations. Accordingly, no relief can be awarded on the Government's claims.

V. THE GOVERNMENT HAS NOT PROVED THE EXISTENCE OF THE ALLEGED FRAUDULENT SCHEMES UNDERLYING ITS PREDICATE ACT ALLEGATIONS AND HAS NOT PROVED ANY ACT OF MAIL OR WIRE FRAUD

A. Overview: Each Alleged Scheme to Defraud Must Be Viewed on Its Own Terms

A basic element of any mail or wire fraud is the existence of a scheme to defraud. 18 U.S.C. §§ 1341, 1343. If there was no scheme to defraud consumers of money or property, then there are no predicate acts, no "pattern of racketeering activity," and thus no RICO violations.

The Government alleges seven schemes (or "pillars") of fraud in this case:

1. The "Frank Statement" or "Myth of Independent Research" scheme, which the Government claims was hatched at the 1953 Plaza Hotel meeting;

2. The "adverse health effects" or "causation" scheme, whereby the Government contends that the Defendants falsely denied that it had been proven that cigarette smoking caused disease, claiming instead that there was a legitimate "controversy" or "open question" on this issue. The Government also contends that more recently they fraudulently denied that it had been proven that environmental tobacco smoke (ETS) causes disease.

3. The "addiction denial" scheme, whereby Defendants denied that cigarette smoking was "addictive" as that term had been used for years in the scientific community.

4. The "nicotine manipulation" scheme, whereby Defendants denied that they manipulated nicotine deliveries in cigarettes in an effort to create or sustain addiction.

5. The "suppression" scheme, whereby the Government contends that the Defendants (1) suppressed the development of safer cigarettes; (2) suppressed research; and (3) failed to disclose (or destroyed) relevant documents.

6. The "youth marketing" scheme. The Government concedes that marketing cigarettes to youth is not a mail or wire fraud, but contends that the Defendants violated these statutes by allegedly falsely denying allegations of youth marketing when they were accused of engaging in that practice.

7. The "low tar" scheme, whereby the Government contends that Defendants falsely represented that "low tar" cigarettes were less harmful to smokers' health than conventional cigarettes.

As noted below, each of these schemes (or pillars) has basic defects that fail to satisfy the requirements of the mail and wire fraud statutes and RICO. The Government has consistently contended that it does not matter that the seven alleged schemes (or pillars) individually fail to satisfy the requirements of the mail and wire fraud statutes and RICO. The Government has claimed that, regardless of the inadequacy of the alleged individual schemes, they all served a *broader* scheme to defraud, which does satisfy RICO. However, the Government has failed to identify this nebulous broader scheme to defraud. Plainly it is not the alleged conspiracy emanating from the 1953-54 Plaza Hotel meeting, a theory that was dead on arrival after the admissions by Dr. Brandt at the beginning of plaintiff's case. *See supra* § III.B. Nor can it be the alleged "common purpose" of maximizing profits, since the mere maximization of profits does not amount to fraud.[26] The fact of the matter is that there *is* no "overarching" fraud, and each of the supposed "pillars" must be viewed on its own merits. Indeed, some of the alleged frauds are *contradictory — i.e.*, the alleged causation fraud (by which Defendants allegedly

[26] Any contention that the mere common goal of "profit maximization" cures the defects in the Government's individual schemes leads to the untenable (and absurd) conclusion that *any* legitimate mailing designed to increase profits amounts to a mail or wire fraud.

denied that cigarettes were dangerous to health) and the alleged low tar fraud (by which they allegedly falsely claimed that some were safer than others). The only "organizing principle[s]," *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 238 (1989), for the Government's case are the seven discrete "pillars" of fraud that were the Government's focus throughout the trial.

B. Each of the Alleged "Pillars" of Fraud Crumbles Under Scrutiny

1. The Government Has Failed to Prove the "Myth of Independent Research" Subscheme

The Government's so-called "Myth of Independent Research" subscheme unraveled during the cross-examination of Dr. Brandt and was laid to rest by the unchallenged testimony about CTR by Dr. McAllister. The Government has failed to prove that Defendants' pledges in the Frank Statement to fund independent research were false, were made with an intent to defraud, or were material to consumers' decisions to purchase cigarettes. The evidence at trial showed unequivocally that Defendants kept these pledges. The "Myth of Independent Research" is itself a myth that the Government referred to over and over but failed to support with any meaningful evidence at trial.

a. Defendants' Pledges in the Frank Statement Were Not False When Made

In the 1954 Frank Statement, Defendants pledged (1) to fund research into all phases of tobacco use and health by, among other things, creating CTR; (2) to create an Advisory Board of distinguished scientists, disinterested in the tobacco industry, to advise CTR on its research program; and (3) to put a scientist of unimpeachable integrity and national repute in charge of CTR's research program. All these things were put in place by Defendants in 1954, and they

remained in place for 45 years. The Government has failed to prove that these pledges were false in 1954, or at any time in the decades that followed.

On cross-examination, Dr. Brandt acknowledged that the key agreement among the tobacco companies in December 1953 was "to do good science, independent science." 9/27/04 Tr. (p.m.) at 740:15-17, 753:13-18; JDFOF Ch. 2, ¶ 72. The Government was unable to produce at trial any evidence of an intent to deceive on the part of the tobacco companies during the meetings leading up to the publication of the Frank Statement. JDFOF Ch. 2, ¶¶ 20-22, 74-75. Dr. McAllister testified to the same effect. 3/21/05 Tr. (a.m.) at 16212:6-11, 16212:18-21, 16213:16-16214:5, 16209:23-16210:6.

b. Defendants' Pledges Were Fulfilled Over the Decades of CTR's Existence

Over the 45 years of CTR's existence, the pledges by Defendants about what CTR would do were fulfilled. A Scientific Advisory Board of distinguished scientists, unaffiliated with the tobacco industry, determined the scientific direction of the CTR grant-in-aid program. JDFOF Ch. 3, ¶¶ 10-21, 48-82. CTR's Scientific Directors — Dr. Clarence Cook Little and his successors — were highly-respected scientists of unimpeachable integrity and national repute. JDFOF Ch. 3, ¶¶ 22-47.

Defendants also fulfilled their pledge to fund high-quality, independent scientific research relevant to all phases of tobacco use and health. JDFOF Ch. 3, ¶¶ 83-246. From 1954 to 1999, CTR provided over $300 million to fund 1,335 grants-in-aid to nearly 1,200 scientists affiliated with 300 of the most significant research organizations, universities, and medical centers in the United States and abroad, resulting in at least 6,400 scientific publications, mostly in peer-reviewed scientific journals. Over the course of nearly half a century, these CTR-funded

scientists carried on their research and reported their findings with complete scientific freedom. McAllister WD at 35:24-36:17, 52:7-56:2, 195:4-203:10.

(i) Defendants Funded Independent Research into the "Central Question" of the Connection Between Smoking and Disease

At trial, the Government's vague charge that Defendants "failed to fund independent research dedicated to the central question of the connection between cigarette smoking and disease" (Gov. Br. at 43) melted away in the face of overwhelming evidence. The Government presented no scientists who had assessed the research that had been funded by CTR. The Government's "scientific historian," Dr. Brandt, acknowledged that "the work of CTR ultimately evolved . . . such that between CTR, both its grant program and its contract program, and the companies in their work on product design, that ***all areas of research regarding the relationship of smoking and disease were being covered***" with "different emphases." 9/28/04 Tr. (a.m.) at 817:19-25 (emphasis added); *see also id.* at 784:14-17 (lung cancer); JDFOF Ch. 3, ¶¶ 141-48 (same); *id.* ¶¶ 149-70, 293-340 (McAllister: bioassay research, animal skin painting and smoke inhalation); *see also id.* ¶¶ 171-89.[27]

The Government did not challenge Dr. McAllister's testimony (1) about the numerous published scientific articles in which CTR-funded researchers reported findings that showed a link between smoking and diseases or the pharmacological effects of nicotine, McAllister WD at 210:21-214:10; JDFOF Ch. 3, ¶¶ 195-98, or (2) showing that the U.S. Surgeon General's Reports

[27] The Government relies on criticisms of CTR-funded research by executives and lawyers for the tobacco companies as evidence that CTR-funded research was not relevant to the "central question" of the connection between smoking and disease. But these industry criticisms neither negate the relevance of CTR-funded research nor challenge the independence of the SAB in determining the direction of the CTR grant-in-aid program. JDFOF Ch. 3, ¶¶ 341-75.

and the FDA 1996 Jurisdictional Statement cited CTR-funded research hundreds of times. McAllister WD at 151:19-153:10; JD-090124 (@); JD-093619 (@); JDFOF Ch. 3, ¶¶ 190-94.

Any criticism of the direction of CTR-funded research, in any event, is a criticism of the collective scientific judgment of the SAB — not the tobacco companies. JDFOF Ch. 3, ¶¶ 136-37. It was the SAB, composed of distinguished and independent scientists, "that always made the judgment about what to fund and what not to fund." 9/28/04 Tr. (a.m.) at 817:8-10 (Brandt); McAllister WD at 112:9-15. The Government presented no credible evidence that Defendants usurped the SAB's scientific judgment. JDFOF Ch. 3, ¶¶ 48-82, 371-75.

(ii) Defendants Did Not Terminate Funding or Alter The Results of This Independent Research

The Government does not dispute that the 1,200 researchers who received CTR grants were independent not only in that they were not tobacco industry employees, but also in that they were guaranteed complete scientific freedom to conduct their research and report their findings in the scientific literature. JDFOF Ch. 3, ¶¶ 83-126, 302-40. Dr. McAllister's testimony that no CTR grantee ever complained about an infringement of his or her scientific freedom was unrebutted. McAllister WD at 195:4-203:10. Even the two isolated examples of alleged "terminated funding" invoked by the Government (Gov. Br. at 43), cannot withstand scrutiny.

First, the Government claims that Defendants discontinued their funding of promising inhalation research conducted by Microbiological Associates, Inc. and manipulated the report from the scientists involved. Gov. Br. at 43. In fact, Defendants did not "terminate" MAI's research contracts after MAI "made progress" toward an animal inhalation model for lung cancer. JDFOF Ch. 3, ¶¶ 312-27. Dr. Carol Henry, MAI's project director for the inhalation research, acknowledged that CTR fully funded to completion the contract inhalation studies

conducted by MAI, including two long-term, large-scale studies. *See* Henry, *Florida* Dep., 7/31/97, at 144:3-10, 187:7-188:9, 224:17-225:3 (agreeing that "CTR didn't in fact terminate [the] study" but "allowed the study to run full course").[28] The SAB decided in 1980 not to approve MAI's proposal for a third long-term study because MAI's first long-term study had failed to provide an animal model, and the ongoing second study did not seem likely to do so. JDFOF Ch. 3, ¶¶ 313-17. Dr. Henry agreed that it was not unreasonable for the SAB to conclude that the results of a third study would also be negative. *See* Henry, *Florida* Dep., 7/31/97, at 223:13-22, 240:18-241:5, 260:14-261:5.

Nor did Defendants "manipulate" MAI's Final Report on its inhalation research. JDFOF Ch. 3, ¶¶ 328-35. Dr. Henry acknowledged that the MAI scientists accurately and truthfully documented the results of their experiments in the MAI Final Report and did not falsify any data. *See* Henry, *Florida* Dep., 7/31/97, at 82:12-18, 83:5-8, 85:11-21, 264:2-16, 300:1-302:11. In 1984, CTR published MAI's Final Report verbatim, with a brief foreword by Dr. Sommers summarizing its principal findings. *See* JD-090217 (@); JD-094474 (@); JDFOF Ch. 3, ¶ 334.[29]

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[28] The Government suggests that "Defendants discontinued their funding" of MAI due to a memorandum in which Dr. Thomas Osdene, a PM USA scientist, expressed his "opinion that the [MAI] program seems to be misdirected since its main mission seems to be to prove that smoking causes cancer." Gov. Br. at 43 (quoting US 24708). The Government has offered no evidence that the SAB ever received this memorandum, let alone was influenced by Dr. Osdene's concerns. In fact, the SAB decided not to fund a third MAI inhalation study in mid-1980 — almost 18 months after Dr. Osdene's January 8, 1979, memorandum. And the MAI inhalation experiments continued for more than two years after the SAB's decision until 1982. Henry, *Florida* Dep., 7/31/97, at 266:5-266:10; JDFOF Ch. 3, ¶¶ 313-14.

[29] The Government's assertion that Dr. Sommers' foreword "omitted the scientists' conclusions that there was carcinogenic response in animals after exposure to cigarette smoke" (Gov. Br. at 43) is wholly unsupported by the record. The first MAI study failed to induce any type of lung cancer in the experimental animals. JDFOF Ch. 3, ¶ 316. The second MAI study failed to produce any squamous cell carcinomas (the type of lung cancer then associated with smoking in humans) or a statistically significant increased incidence of adenocarcinomas (not generally thought to be associated with human smoking at the time). JDFOF Ch. 3, ¶¶ 320-24. Dr. Henry admitted that the published report disclosed the critical findings and data and that

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Two years later, the MAI scientists published an article in the *Journal of the National Cancer Institute* where they reported for the first time their belief that cigarette smoke was weakly carcinogenic in mouse lungs. This finding was based on a significance level less rigorous than the generally-accepted .05 used by MAI in designing the studies. JDFOF Ch. 3, ¶¶ 323, 335 & n.15. Nonetheless, these CTR-funded scientists were free to reach this conclusion and to report it; CTR "paid for [Dr. Henry's] time and Dr. Kouri's to [prepare and] publish that article," which was among at least 88 scientific publications by MAI scientists reporting the findings of their CTR-funded research. Henry, *Florida* Dep., 7/31/97, at 150:2-22, 301:16-24; JD-091196(@); JDFOF Ch. 3, ¶ 331.

Second, the Government's assertion that Defendants "cut off" funding to Dr. Huber and the Harvard Smoking and Health Research program because the tobacco companies were concerned that Dr. Huber was "getting too close to some things" (Gov. Br. at 43) was completely refuted at trial. JDFOF Ch. 3, ¶¶ 508-37. Arthur Stevens directly refuted Dr. Huber's claims of a meeting in which Dr. Huber was told his funding was being terminated because he was getting "too close to some things." 9/30/04 Tr. (a.m.) at 1305:25-1306:8 (Stevens). Moreover, the evidence showed that Dr. Huber had complete freedom to (and did) conduct his research and publish the results of his research. After eight years of funding, the tobacco company sponsors

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Dr. Sommers' foreword contained no false statements. Henry, *Florida* Dep., 7/31/97, at 275:8-19, 284:3-8, 276:1-277:2.

The Government points to a 1997 affidavit by another MAI scientist, Dr. Richard Kouri, that asserts that Dr. Sommers' foreword was "seriously misleading because of the conclusions that are drawn and the failure to include the context in which the research was carried out." Gov. Br. at 119 (citing US 31076). Dr. Kouri's affidavit is inadmissible: it is naked hearsay, offered for the truth of the matter asserted. Moreover, the affidavit concedes that Dr. Sommers' foreword was "technically true" and fails to specify how the two-paragraph foreword was "seriously misleading." US 31076(^).

decided not to further extend the contract with Harvard because of continued problems with the facilities that Harvard provided to conduct the research, not out of any concern that Dr. Huber's research was unfavorable to the tobacco companies. JDFOF Ch. 3, ¶¶ 508-37.[30]

(iii) The Existence of CTR Special Projects Does Not Prove a "Myth of Independent Research"

The fact that CTR administered from 1966 until 1990 a smaller, separate program of research projects, called CTR Special Projects, does not make any of Defendants' statements about funding independent research fraudulent. CTR Special Projects were legitimate, high-quality research projects, conducted by independent scientists, and funded by the tobacco companies for litigation and regulatory purposes. JDFOF Ch. 3, ¶¶ 403-66. Special Projects were kept separate and distinct from the SAB grant-in-aid program and had no impact on it: the two programs had separate and independent budgets, the SAB had no role in approving CTR Special Projects, and Defendants asked and recommended that CTR Special Projects recipients include the wording "Special Project" when they acknowledged CTR funding, in order to avoid confusion with the SAB grant-in-aid program. JDFOF Ch. 3, ¶¶ 414-26. Accordingly,

[30] As to the Government's claims that, during the 1990s, tobacco company lawyers acted improperly in their interactions with Dr. Huber, the record establishes that: (1) Dr. Huber did have litigation consultancy agreements with two of the law firms representing the tobacco companies; (2) when the tobacco company lawyers learned that Plaintiffs' lawyers had what the tobacco company lawyers viewed as improper *ex parte* contacts with Dr. Huber, the tobacco company lawyers advised Dr. Huber that they considered him a confidential litigation consultant and recommended that he hire a lawyer to advise him as to his rights and obligations regarding the consultancy; and (3) despite innuendo elicited by Plaintiffs' lawyers at various points in the deposition, Dr. Huber testified unequivocally at the end of the deposition that no tobacco company lawyer ever threatened him. JDFOF Ch. 3, ¶¶ 538-47; Huber, *Texas* Dep., 9/20/97 at 118:11-19, 118:24-119:2, 144:11-19, 180:20-25.

Defendants in no way compromised their pledge to fund independent research by also funding separate and distinct directed research for litigation/regulatory purposes.[31]

c. The Government Failed to Prove that Defendants Designed the Pledges in the Frank Statement With the Specific Intent to Defraud Consumers of Money or Property

The Government failed to prove that any agent of a Defendant harbored the requisite specific intent to defraud consumers of money or property through the "Myth of Independent Research" subscheme. Nor did it show that Defendants' statements were anything but good faith expressions of their opinion and/or intentions. In its post-trial brief, the Government contends that, years after the Frank Statement was made, Dr. Sheldon Sommers, CTR's Scientific Director from 1981 to 1987, and Dr. Alexander Spears, a Lorillard scientist, possessed the requisite specific intent. These attempts are irrelevant because they do not address the intent of a responsible agent of Defendants as of the time of the Frank Statement. In any event, both attempts fail.

As to Dr. Sommers, the Government cites only two items that arguably go to his state of mind. First, Dr. Sommers' 1986 testimony that "a CTR grant application's relevance to cigarette smoking and health was not the primary factor used in rating grant applications, but that scientific merit [was of] equal or greater importance" (Gov. Br. at 20) does nothing to prove fraudulent intent. There is nothing remotely fraudulent in ensuring that scientific projects have "scientific merit." Second, far from evincing a specific intent to defraud, Dr. Sommers' 1978 letter (Gov. Br. at 120) forcefully confirms his integrity and commitment to the SAB's

[31] Nor is there any evidence that CTR Special Projects were "biased" (Gov. Br at 3), even though such proof could not seem to support a fraud claim in any event. JDFOF Ch. 3, ¶¶ 436-62.

independence. In that letter, Dr. Sommers protested the advice of CTR's legal counsel against funding a research proposal on the effect of nicotine on the central nervous system. JDFOF Ch. 3, ¶¶ 224-28. He urged that CTR ignore this legal advice and fund the grant application, and even noted that he was considering leaving the SAB because of his concern that the SAB's independence would be compromised. US 20281 (@). In doing so, he sarcastically noted that, unless the advice were rejected, "CTR should be renamed Council for Legally Permitted Tobacco Research, CLIPT for short." Two months later, the application was funded. Dr. Sommers remained on the SAB — later testifying that he would not have remained if lawyers generally were involved in CTR's funding decisions. Sommers, *Arch* Dep., 7/14/97, at 104:4-22, 105:2-25; JDFOF Ch. 3, ¶¶ 227-28. [32]

As to Dr. Spears, his 1974 memorandum does not prove that he believed that CTR's research program was "not to examine smoking effects on health." Gov. Br. at 115. To the contrary, the Government's own expert, Dr. Brandt, agreed that Dr. Spears' memorandum said one of the purposes of CTR was "to define the effects of cigarette smoke on the human system." 9/28/04 (a.m.) at 800:21-802:11. Likewise, the memorandum did not suggest that CTR's grant program was not doing what was pledged in the Frank Statement and did not say or imply that

[32] The Government's other allegations concerning Dr. Sommers have no discernible relation to his intent. The mere fact that he criticized Dr. Auerbach's "smoking beagles" experiments in a 1970 press conference (Gov. Br. at 119) says nothing about what he actually believed about those studies. The fact that the Government believes that his foreword to the 1984 MAI report was "seriously misleading" (Gov. Br. at 119) does not mean that Dr. Sommers believed it to be false; indeed, the only evidence on the point is to the contrary. Sommers, *Small* Dep., 10/8/97, at 251:15-253:4. In any event, as explained above, his foreword contained no false statements. The mere fact that Dr. Sommers reviewed and approved CTR Special Projects while he also participated in the SAB's program does not evince a fraudulent intent, particularly in the absence of evidence that he ever compromised the integrity or independence of the SAB program. And his valid receipt of approximately $1,000 from Special Account #4 says nothing about specific intent either. JDFOF Ch. 3, ¶¶ 407-70; Sommers, *Cipollone* Dep., 4/18/88, at 8604; JD 081146.

CTR intended to avoid funding relevant research into questions of smoking and health. *Id*. at 808:5-12.[33]

d. The Government Cannot Transform Tort Claims Into Mail/Wire Fraud

Because the Government cannot prove that the pledges in the Frank Statement were false or fraudulent, the Government argues that the Frank Statement gave rise to a fiduciary relationship between Defendants and the public, and that Defendants committed fraud by somehow breaching their fiduciary duties. But this is a RICO case based on mail and wire fraud. The Government must prove fraud — a breach of assumed duties under state tort law will not suffice. *See, e.g., Reynolds v. E. Dyer Dev. Co.*, 882 F.2d 1249, 1253 (7th Cir. 1989) (rejecting attempt in RICO case "to make it a federal crime to breach a state-law warranty of habitability"); *In re All Terrain Vehicle Litig.*, 771 F. Supp. 1057, 1061 (C.D. Cal. 1991) (rejecting attempt to transform breach of the UCC implied warranty of merchantability into mail/wire fraud); *Smith v. Grundy County Nat'l Bank*, 635 F. Supp. 1071, 1076 n.8 (N.D. Ill. 1986) (rejecting attempt "to use pleading 'hocus-pocus' to turn a state law breach of contract and fiduciary duty case into a federal mail fraud and hence RICO case").

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[33] The sole basis for the Government's contention that Dr. Spears intentionally sought to prevent CTR from funding research that might confirm smoking as a cause of disease is a 1978 memorandum *sent to Dr. Spears* from outside the company, in which the author proposed a list of "Subjects to Be Avoided" by CTR. Gov. Br. at 115-16. The Government asserts that Defendants' failure to introduce evidence that Dr. Spears specifically "disavowed or disagreed" with this outside proposal somehow transforms the memorandum into proof of Dr. Spears' specific intent to defraud. *Id.* It does not. First, the evidence shows that the proposal was not implemented. JDFOF Ch. 3, ¶¶ 231-39; McAllister WD 147:1-150:10. Second, even if true, a failure to respond is ambiguous, as it could be explained by any number of reasons; it would be a Kafka-esque world if all of us were charged with agreeing with any e-mail or memo, or other communication to which we did not expressly object. Third, Dr. Spears is deceased and his prior testimony on the subject, though offered by Defendants (JD's 5/24/04 Designations of Prior Testimony-Fact Witnesses) was excluded by the Court (Order # 630).

Moreover, this Court has held that the Frank Statement imposed no special duties upon the cigarette manufacturers because "a special duty cannot be created by corporate advertisements to the general public." *Service Employees Int'l Union Health & Welfare Plan v. Philip Morris, Inc.*, 83 F. Supp. 2d 70, 93 (D.D.C. 1999), *rev'd in part on other grounds*, 249 F.3d 1068 (D.C. Cir. 2001). This Court explained:

> Plaintiffs point to the "Frank Statement," where Defendants acknowledged and accepted their responsibility to safeguard the public health. For a special duty to exist, the acknowledgement of that duty must have been made directly to the beneficiary, not to the general public through advertisements. "Converting a company's marketing into a special undertaking to inform the public about the known risks of its products would subject every manufacturer that advertises its products to liability for a 'special duty' created by such marketing, and that duty would be violated by every material omission in such advertising."

Id. at 93 (quoting *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris Inc.*, 171 F.3d 912, 936 (3d Cir. 1999)).

e. The Government Failed to Prove that Defendants' Statements Were Material to Consumers' Decisions Whether to Purchase Cigarettes

The Government failed to offer any evidence proving that any promises in the Frank Statement were material to consumers' decisions whether to purchase cigarettes. The Government has simply not explained how a promise in 1954 to fund research concerning smoking and health, repeated on infrequent occasions thereafter, could be designed to cause consumers to continue to purchase cigarettes. No witness testified that such a promise would be material to such consumer decisions. Defendants' statements about their intention to fund independent research were no more than "collateral to the sale" of cigarettes and "did not concern the quality or nature of the goods being sold." *U.S. v. Starr*, 816 F.2d 94, 98 (2d Cir.

1987). *See also U.S. v. Regent Office Supply Co.*, 421 F.2d 1174, 1179 (2d Cir. 1970) ("[S]olicitation of a purchase by means of false representations not directed to the quality, adequacy or price of goods to be sold, or otherwise to the nature of the bargain [does not] constitute a 'scheme to defraud' or 'obtaining money by false pretenses.'").

f. The Predicate Acts Associated With This Scheme Were Not "In Furtherance of" the Fraud

The Government identifies 46 predicate acts as associated with this scheme but none of them can legitimately be viewed as "in furtherance of" the fraud. JDFOF Ch. 16, ¶¶ 35-242. For example, the Government contends that a request for CTR Special Projects funding from a Professor of the Yale School of Medicine is a predicate act under this scheme. But the request is unrelated to any alleged misrepresentation and was authored by a researcher who subsequently published his research results. *Id.* at ¶¶ 133-147. It seems that the Government believes that any mailing related in any way to CTR's activities amounted to mail fraud.

2. The "Open Question" or "Causation" Scheme

a. Plaintiff Failed to Prove Any Underlying Scheme to Defraud or Any Intent to Defraud

The Government argues that Defendants' statements debating whether causation had been scientifically proven were fraudulent because they were at odds with the consensus of the scientific community. Gov. Br. at 32. The Government's allegations are best viewed with respect to three time periods — pre-1964, 1964-1984, and 1985 to the present.

(i) Pre-1964

Although the Government persists in its claim that there was pre-1964 scientific "consensus" that smoking caused lung cancer, that persistence is at best half-hearted. Gov. Br. at

32-33 (concedes that pre-1964 statements "may not have been literally false"). Dr. Brandt admitted:

- The "consensus judgment" reached by the Study Group in 1957 was rejected by scientists at NCI. JDFOF Ch. 4, ¶ 44.
- The Public Health Service labeled the conclusion in Dr. Burney's 1959 JAMA article "weasel words" JDFOF Ch. 4, ¶ 45.
- The WHO statement of 1960 equivocated on its causal conclusion, using the "most reasonable interpretation" formulation in assessing the evidence. JDFOF Ch. 4, ¶ 46.
- It would be reasonable to say that no consensus on causation emerged until the 1964 Surgeon General's Report was published, that "[o]f course there was a controversy" over causation, and that a scientific controversy existed among scientists with no ties to the tobacco industry up until publication of the 1964 SGR. JDFOF Ch. 4, ¶ 49.

The Government's claim that pre-1964 objections were raised only by "a few isolated skeptics" (Gov. Br. at 32) fares no better. One such skeptic was Dr. Lewis Robbins — Chief of Cancer Control at the Public Health Service and its "point person" on this specific issue. *See* JDFOF Ch. 4, ¶¶ 61-62. He concluded in 1961 that there was "no proof" of the causal relationship and that because the traditional scientific viewpoint looked to experimental evidence to decide the issue, he did not expect the issue to be settled in his lifetime. *Id*. ¶¶ 70, 81-82. He was joined by NCI's Section Chiefs of epidemiology, pathology, environmental cancer, and carcinogenesis, each of whom believed that experimental evidence was necessary to decide causation. *Id*. ¶¶ 58-60. In short, the Government simply ignores the clear and unequivocal evidence of a legitimate scientific debate prior to 1964. That debate centered on whether experimental proof was required to confirm a causal relationship. *See* JDFOF Ch. 4, ¶¶ 58-87. It was this issue that led to the appointment of the Surgeon General's Advisory Committee and the effort to provide a public health "judgment" on the question of causation. *See* JDFOF Ch. 4, ¶¶ 80-87, 127-40.

(ii) 1964-1984

After the publication of the landmark 1964 Surgeon General's report, the conclusions of that report regarding causation became the scientific consensus. JDFOF Ch. 4, ¶ 141. Nevertheless, independent scientists, as well as defendants, continued to be of the view that causation had not been proven. *Id.* ¶¶ 144-146. This was because the 1964 Report embraced a new view of epidemiologically-based causation, rather than the traditional requirement of proof of a mechanism between smoking and disease. Mere disagreement with an emerging scientific consensus is not fraud, and the Government has not proved that agents of the Defendants did not actually believe what they said about causation effects in 1964. JDFOF Ch. 4, ¶¶ 197-219.

(iii) Post-1984

The Government has not identified any statements by the Defendants after 1984 where they on their own took their views on causation to the public. JDFOF Ch. 4, ¶ 222. TI determined in 1984 that its previously articulated position lacked credibility with the public and sought to minimize any statements on the issue. *Id.* ¶¶ 223-65. At a minimum, that statements made during this period were made responsively suggests that there was no specific intent to deprive smokers of money or property. After 1984, Defendants began to admit that smoking was a "risk factor" for disease. *Id.* ¶¶ 266-68. And by 1997, Defendants decided to simply defer to the Surgeon General's conclusions on causation. JDFOF Ch. 4, ¶ 289-78. As noted above, all Defendants now concede causation.

b. The Government Failed to Prove a Specific Intent to Defraud

The Government never introduced evidence that anyone associated with Defendants who expressed an opinion on causation did not actually hold that opinion. JDFOF Ch. 4, ¶¶ 317-31. Nor does mere disagreement with a scientific "consensus" — even if one had existed — amount

to a fraud. And the fact that some employees (who are not alleged to have been responsible for "not proven" statements) did not share the "not proven" viewpoint, is irrelevant to the issue of specific intent in the absence of proof that those responsible for expressing "not proven" viewpoints did not believe the statements. *See* JDFOF Ch. 4, ¶¶ 197-219; § II.B.2, *supra*.

The Government relies on a series of memos from late 1982 and early 1983 to argue that Messrs. Witt, Horrigan and Juchatz of Reynolds possessed specific intent to defraud because they undertook a "'re-education campaign'" after Reynolds' vice president of research and development, Dr. G. Robert DiMarco, allegedly indicated his acceptance of the scientific evidence that smoking causes disease. Gov. Br. at 111 (discussing US 23009 (@), US 20746 (@), US 20747 (@), US 20748 (@)). But at trial Mr. Juchatz explained his legitimate concerns over substantiating advertising claims that one cigarette was "safer" and characterized the suggestion that Dr. DiMarco was "flipped" as "nonsense." 11/18/04 Tr. (p.m.) at 6592:4-12; 6618:5-6. This testimony is confirmed by: (a) Mr. Juchatz's contemporaneous written account of what Dr. DiMarco said (*see* US 20746 at 50574 1141 (@)); (b) the fact that Dr. DiMarco ultimately "got all the programs he ever asked for," 11/18/04 Tr. (p.m.) at 6624:19 - 6625:2; and (c) Dr. DiMarco's testimony that "there ain't no way that the legal department had something to do with running my department . . . . I had that understanding before I joined the company or I wouldn't have joined. And the company had never let me down." DiMarco, *Falise* Dep., 10/27/99, at 57:25-58:22.[34]

[34] Likewise, none of the three documents cited with respect to former Reynolds CEO William Hobbs have anything at all to do with specific intent to defraud. The Government also cites a 1971 interview in which former PM CEO Joseph Cullman stated that "we do not believe that cigarettes are hazardous" (Gov. Br. at 107) but this does not prove that Mr. Cullman believed the contrary. Nor does the Government point to any testimony in this case relevant to Mr. Cullman's intent. The Government also states that executive Hugh Cullman received a memorandum

[Footnote continued on next page]

Likewise, the Government relies on a B&W document containing the phrase "doubt is our product" (Gov. Br. at 35), but the Government fails to point out that far from evidencing an intent to defraud, the document deals with the "opportunity to put across the real facts about smoking and health." *Smoking and Health Proposal*, US 21040(@) at 3-5 (@).

> "Truth is our message because of its power to withstand a conflict and sustain a controversy. If in our pro-cigarette efforts we stick to well documented facts, we can dominate a controversy and operate with the confidence of justifiable self-interest."

Id.

In short, there is no proof of specific intent to defraud.

c. The Government Has Not Proven that Defendants' Statements Were Material

Having submitted no evidence on the issue, the Government now requests a ruling that Defendants' statements about the relationship between smoking and disease were "material as a matter of law." Gov. Br. at 36. Materiality requires that the particular statement was of that type that reasonable consumers would take into account in purchasing cigarettes. *See supra*. Though

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[Footnote continued from previous page]
regarding alleged non-competition agreements within the industry (Gov. Br. at 110-11) but again fail to demonstrate how his receipt of a memorandum can demonstrate his specific intent to defraud or that his receipt of a memorandum is connected with any of the predicate acts. The fact that Ross Millhiser, another PM executive, received a copy of a 1977 communication regarding a potential meeting "to develop a defensive smoking and health strategy for major market" (Gov. Br. at 111) says nothing about Mr. Millhiser's specific intent. Nor does his alleged conversation with Dr. DeNoble reflecting skepticism about his experiments. And, again, the Government identifies no testimony relevant to Mr. Millhiser's intent. The mere fact if true that it was "generally accepted that smoking causes disease" at certain meetings attended by Thomas Osdene of PM USA (Gov. Br. at 108, 109 n.65) does not mean that Osdene agreed with that sentiment; indeed, the testimony cited by the Government (Gov. Br. at 109 n. 65) suggests the opposite. Likewise, the Government cites no evidence that William Kloepfer or Brennan Dawson did not believe the statements they made while employed by TI. On the contrary, even the document relied upon by the Government confirms that Mr. Kloepfer thought of the causation issue "as a controversy" and "[a] subject far from decided." Gov. Br. at 121.

the Government alludes to the testimony of Drs. Weinstein and Slovic, Gov. Br. at 37-38, that testimony is of no help in redeeming the Government's failure of proof. Dr. Weinstein acknowledged he was not an expert in either the information environment concerning smoking or decision theory, JDFOF Ch. 4, ¶¶ 174-75, 194. He made no attempt to determine what information people saw, heard, read, or understood about the risks of smoking, *id.* ¶ 192, and had no knowledge and made no study of any of the statements charged as racketeering in this case. *Id*. ¶¶ 191-92. Moreover, Dr. Weinstein could not even confirm that the additional information he believed smokers ought to have under his "ideal knowledge" standard would be material to smokers' decisions. *Id*. ¶¶ 194-96. Similarly, Dr. Slovic acknowledged he was not offering testimony about even a single statement Defendants are alleged to have made. *Id*. ¶¶ 187-88. Indeed Dr. Slovic's central thesis was that risk information was *not* important to smokers' decisions about smoking but that such decisions were made by emotions or "affect." *Id*. ¶¶ 173, 188-89.

Thus — apart from *ad hominem* attacks on his fees — Dr. Viscusi's testimony is unrebutted that smokers have long since reached "saturation" levels of awareness of the hazards of smoking, and that the public universally disbelieved the opinions Defendants expressed about causation, which is corroborated by contemporaneous historical records. *See* JDFOF Ch. 4, ¶¶ 153-67, 179-83, 185. Having no evidence of materiality — or even any recent arguably false statement by Defendants on the subject of smoking and health — the Government simply changes arguments, to address a matter that is not even alleged in the complaint: the disease risks of ETS.

d. The Government Has Not Proven ETS-related RICO Violations

After years of discovery, the production of tens of millions of pages from Defendants' files, and thousands of pages of testimony from dozens of witnesses, including many disaffected former employees, the Government still has no credible evidence that Defendants did not believe what they said about ETS and disease causation. Given the substantial evidence that Defendants' employees believed what Defendants were saying about ETS, *see* JDFOF Ch. 5, § II.A.3, the Government failed to establish specific intent. Furthermore, the Government did not establish that a single third-party scientist who spoke or wrote publicly on Defendants' behalf or at Defendants' request, said or wrote something he or she did not genuinely believe. Defendants presented evidence regarding hundreds of industry-funded or industry-conducted ETS-related research projects that resulted in numerous important scientific advances and hundreds of publications published in peer-reviewed journals. *See* JDFOF Ch. 5, § III.B.2. Further, the Government built much of its case around supposed inadequacy of funding acknowledgments in these articles and letters published in scientific journals and in regulatory submissions, yet failed to show that consumers read those acknowledgments or that their purported inadequacies were intended to be material to obtaining money or property from smokers. Finally, the Government failed to establish that Defendants' public statements regarding ETS and disease causation were intended to affect smokers' decisions to purchase cigarettes, as opposed to legislative and regulatory efforts to restrict smoking.

The Government's ETS case ultimately rests on the premise that it need not show specific intent at all because it was fraud *per se* to question the Surgeon General's conclusion in 1986 that causation had been established. Gov. Br. at 40. And while the Government would make this a credibility contest between, on the one hand, Drs. Samet and Burns and, on the other hand,

Dr. Bradley, it is not. The issue before the Court is not whether ETS has been shown to cause disease in nonsmokers; instead, it is whether Defendants' statements of belief that ETS had not been shown to cause disease in nonsmokers are fraudulent – whether their opinions were not held in good faith. And, with respect to that issue, the Government never explains:

- How it could be a fraud to disagree with the Surgeon General's conclusion in 1986 when, according to the Government's own expert (Dr. Samet) there was a "paucity of data" on the ETS issue in 1984. Nor is there evidence of any substantial incremental data between 1984 and 1986. JDFOF Ch. 5, ¶¶ 36.

- Why Defendants were not allowed to question the causal connection when the epidemiological studies relied on proxies for exposure and generally reported only insignificant relative risks that were only slightly over (and sometimes under) 1.0. *See* JDFOF Ch. 5, ¶¶ 63-67.

- Why, in 1986 — the same year it supposedly became fraud *per se* to question whether ETS causes disease in nonsmokers:

    - Two of three "consensus" reports — the 1986 NRC Report and the 1986 IARC Report — examined the relationship between ETS and disease in nonsmokers and reached conclusions that were not stated in terms of "cause" JDFOF Ch. 5, ¶ 47.

    - The Surgeon General wrote privately that the "statement that the 'currently available data do not support a conclusion that exposure to environmental tobacco smoke represents a health hazard' *is supportable,* given the existing evidence." JDFOF Ch. 5,¶ 37.

    - Drs. William Blot and Joseph Fraumeni — respectively, the Chief of NCI's Biostatistics Branch and the NCI's Associate Director for Epidemiology and Biostatistics and both of whom were reviewers of the 1986 SGR — published an editorial in a peer-reviewed scientific journal stating that "*[t]here is uncertainty* . . . about the causal nature of the association" between ETS and lung cancer in nonsmokers. JDFOF Ch. 5, ¶ 38.

- Why, long after 1986 and even very recently, prominent scientists – including Drs. Ernst Wynder and Dietrich Hoffman (1994), Dr. John Bailar, III of the University of Chicago (1999), Dr. Elizabeth Whelan of the American Council on Science and Health (2000), and Dr. Richard Smith, the editor of the *British Medical Journal* (2003) – continue to hold and express the judgment that ETS had not been shown to cause lung cancer, heart disease, and other chronic conditions in non-smokers. JDFOF Ch. 5, ¶¶ 87, 90, 92, 93, 99, 102, 114, 412.

Implicitly acknowledging its failure of proof, the Government argues that, even "assuming *arguendo*" that Defendants' statements concerning the state of science regarding ETS and disease causation were true, the Court nonetheless may find the required specific intent under a reckless indifference standard because Defendants spoke "to improve their profits, without regard to the truth of their assertions." Gov. Br. at 41. But the mere fact that the speaker has a profit motive does not convert a truthful statement expressing the judgment that "there [are] legitimate scientific questions about whether exposure to secondhand smoke cause[s] disease" into a mail or wire fraud violation.[35] Indeed, the Government's argument reduces to the circular absurdity that truthful statements can be the basis for criminal fraud charges when made by someone with a profit motive "without regard to their truth" and, if adopted, would criminalize virtually any statement made by employees of profit-seeking entities.[36]

Moreover, the Government has failed to prove how Defendants' statements about ETS are *material* to the purchasing decisions of smokers — as opposed to decisions about the manner and place where they will smoke. Nor has the Government explained how such statements were designed to defraud consumers of money or property, as opposed to forestalling private Government restrictions against public smoking. JDFOF Ch. 5, § II.C; ¶¶ 141-61, 234-235.

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[35] The authorities the Government cites on page 41 and in footnotes 20 and 21 are inapposite because they involved *false statements* where, despite the speakers' claimed ignorance of their statements' falsity, fact finders were permitted to find specific intent because the speakers acted with reckless indifference or willful blindness to the truth of their *false statements*. *E.g.*, *United States v. Munoz*, 233 F.3d 1117, 1135-36 (9th Cir. 2000) (false representations relating to Ponzi scheme); *S.E.C. v. Infinity Group Co.*, 212 F.3d 180, 193 (3d Cir. 2000), *cert. denied*, 532 U.S. 905 (2001) (false statements about past/future investment returns); *United States v. Cassiere*, 4 F.3d 1006, 1023-24 (1st Cir. 1993) (false land valuations).

[36] In short, there is no evidence that any employee or agent responsible for Defendants' statements about ETS had a specific intent to defraud or believed that those statements were untrue when made. The Government's claim that Defendants' current statements concerning ETS are somehow fraudulent has been addressed above.

Accordingly, even if Defendants' statements had been deliberately untrue — which they were not — they could not possibly support claims of mail or wire fraud.

e. The Predicate Acts Associated with the Causation Scheme Were Not "In Furtherance Of" a Fraud

Analysis of the 40 specific predicate acts associated with this scheme demonstrates that they were not "in furtherance" of any fraud. JDFOF Ch. 16, ¶¶ 243-465. For example, several predicate acts merely concern correspondence about funding independent scientific research. *Id*. ¶¶ 368-78. Plainly funding legitimate research does not amount to furthering a fraud.

3. The "Addiction Denial" Scheme

The Government charges that "since 1982 Defendants have intentionally made and continue to make material[,] false and otherwise fraudulent statements about the addictiveness of smoking." Gov. Br. at 46. But as Joint Defendants demonstrated in their proposed findings, the evidence is to the contrary.

a. The Evidence Does Not Support The Government's Allegations That The Defendants Engaged In a Scheme to Defraud the American Public About the Addictiveness of Smoking

(i) The Label Applied to Cigarette Smoking Has Changed Over Time

Prior to 1964, there was no agreement among scientists regarding the label that should be applied to smoking. JDFOF Ch. 6, ¶¶ 5-40. In 1964, the Surgeon General, applying accepted scientific definitions, determined that smoking was a habit, rather than an addiction. *See id.* ¶¶ 41-52. The Surgeon General concluded that, unlike alcohol and hard drugs, smoking does not result in intoxication or other psychotoxic effects, results in psychological but not in physical dependence, and does not lead to antisocial behavior. *See id.* ¶¶ 49-52.

Between 1964 and 1988, no consensus existed — either within the Defendant companies or in the scientific community generally — as to what label to apply to the act of cigarette smoking. Scientists used three terms: addiction, habit, and dependence. *See id.* ¶¶ 53-67. In 1988, however, the Surgeon General changed the criteria necessary to satisfy the definition of "addiction" and thereby labeled cigarette smoking as "addictive." *See id.* ¶¶ 68-99. In particular, the Surgeon General abandoned the requirements of intoxication, tolerance, severe withdrawal symptoms, and antisocial behavior — the requirements which, under the Surgeon General's 1964 definition, distinguished smoking from hard drugs. *See id.* ¶ 70. In their place, the Surgeon General substituted a definition of "addiction" that required only: (1) compulsive use, (2) psychoactive effects, and (3) drug-reinforced behavior. *See id.* This change in definition was the only basis for the Surgeon General's reclassification of smoking from a "habit" to an "addiction." *See id.* ¶¶ 72-79.

The evidence is clear that the Surgeon General's decision to reclassify smoking as addictive was done for policy, not scientific, reasons. *See id.* ¶¶ 88-99. As one of the Government's experts who was involved in drafting the 1988 Surgeon General's Report, Dr. Jack Henningfield, wrote at the time:

> The question, then, raised by many reviewers was how to communicate the information to the Public and how to thereby maximize public health benefit. Highly technical terms do not always serve well in this regard. . . . [T]he interpretation of the U.S. public (including health professionals) is that dependence is a lesser form of addiction (that was not the intent of the WHO). We made a similar mistake when cocaine was once labeled "habituating" and a generation was raised to believe that cocaine was not a drug to take seriously. That mistake should not be made again.

JD-004593 (@). Dr. Henningfield continued: "As a researcher, I will use the term 'dependence' in scientific meetings, to communicate to the public, however, I am persuaded by our reviewers that the term 'addiction' can serve quite usefully in accurately disseminating information on a more general level." *Id.* Dr, Henningfield still uses the term "dependency" in his scientific publications today. *See* 11/23/04 Tr. (a.m.) at 6960:4-6961:8 (Henningfield); JD-004596 (@); JD-004597 (@).

Even after the Surgeon General's 1988 pronouncement classifying smoking as an addiction, not all scientists have accepted this conclusion. *See* JDFOF Ch. 6, ¶¶ 100-18. Another one of the Government's experts, Dr. Neal Benowitz, admitted that there is no evidence, even today, that smoking is "addictive" under the classical scientific definition of that term. *See* 11/02/04 Tr. (a.m.) at 4545:16-21 (Benowitz). Scientific debate over the term most appropriately applied to describe cigarette smoking continues today. *See* JDFOF Ch. 6, ¶¶ 129-30.

(ii) There Is No Evidence That The Defendants Fraudulently Denied That Smoking Is Addictive

Of critical importance here, the evidence does not support the Government's contention that "Defendants have intentionally made and continue to make material[,] false and otherwise fraudulent statements about the addictiveness of smoking." Gov. Br. at 46. Dr. Benowitz testified that the Defendants have never denied that smoking is difficult to quit, the fact that Dr. Benowitz described as the "key concept" of "addiction." Benowitz WD at 26:3-6; 11/02/04 Tr. (a.m.) at 4505:6-4506:1, 4672:25-4673:4 (Benowitz). Likewise, Dr. Henningfield admitted that there is no evidence that Defendants believed that smoking was "addictive" under the classic scientific definition. *See* 11/23/04 Tr. (a.m.) at 6869:12-6871:19 (Henningfield). And, indeed,

the Defendants' internal documents reflect their belief during the period contemporaneous with their alleged false statements that they did not believe that smoking is "addictive" under the proper definition of that term. *See* JDFOF Ch. 6, ¶¶ 147-48.

Nevertheless, the Government claims that certain references in Defendants' internal documents to smoking as "addictive" establishes Defendants' fraudulent intent in denying publicly that smoking was addictive. Gov. Br. at 54. But the evidence does not support this contention. Just as the Government itself and public health authorities have used the terms "habit," "addiction," and "dependence" loosely and interchangeably over the years, so, too, have various employees of certain Defendants. The use of such labels is not evidence of fraud, but simply of semantic imprecision. *See* JDFOF Ch. 6, ¶¶ 161-82.

(iii) The Defendants Did Not Conceal Any Material Information About the Properties and Effects of Nicotine

The Government also charges that the Defendants concealed information about the addictive properties and effects of nicotine. Gov. Br. at 53. But there is no credible evidence to support any claim by the Government that Defendants concealed any information not known to the Government and public health community or material to the smoking public. It has long been known that nicotine has pharmacological effects in humans. *See* JDFOF Ch. 6, ¶¶ 183-90. Indeed, the Supreme Court has found that, when Congress enacted the Federal Cigarette Labeling and Advertising Act in 1965, "the adverse health consequences of tobacco were well known, as were nicotine's pharmacological effects." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 138 (2000). The evidence simply does not support any claim that the Defendants had or concealed any information about nicotine that was not known to others. *See* JDFOF Ch. 6, ¶¶ 191-234.

b. The Government's "Addiction Denial" Claim Has Numerous Legal Defects

The Government's "addiction denial" claim suffers from numerous legal defects:

- First, the Government cannot establish that various statements made by the Defendants denying the addictiveness of smoking were even false, much less made with the specific intent to defraud required to impose RICO liability under the mail and wire fraud statutes. As set forth above, the term "addiction" lacks a precise and universally agreed-upon meaning. The Government cannot ask this Court to impose RICO liability by insisting that it ignore this lack of precision and universal agreement, and judge the truth or falsity of Defendants' statements using the Government's chosen definition of "addiction."

- Second, even assuming various statements of the Defendants could be adjudged "false" applying the Government's definition of "addiction," there is a lack of evidence to support a finding that the speaker lacked a genuine belief in the truth of his or her statement and possessed a specific intent to defraud the American public about the addictiveness of smoking. The various Defendants genuinely and in good faith disagreed with the Government's changed definition of "addiction," and exercised their right to express their contrary opinion.

- Third, the evidence fails to establish that any statements made by the Defendants (or information allegedly concealed by them) were material to the decisions of consumers to smoke. Materiality, of course, is an essential element of the Government's mail and wire fraud claims. *See Neder v. United States*, 527 U.S. 1, 25 (1999).

- Fourth, the predicate acts associated with this scheme were not "in furtherance of" a fraud. On the contrary, many of the Defendants' statements charged as racketeering acts by the Government were not only made in the context of a public debate over whether smoking should properly be characterized as "addictive," but specifically were directed toward influencing legislative decisionmakers and thus are constitutionally protected petitioning activities. *See, e.g., United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). This is manifestly true, for example, of the Defendants' 1994 statements to Congress. *See* JDFOF Ch. 6, ¶¶ 154-55. The Court cannot impose liability on Defendants based on such statements.

4. The "Nicotine Manipulation Denial" Scheme

Since the Government first headlined its case with the testimony of former FDA Commissioner Dr. David Kessler, its nicotine manipulation allegations have faltered under the scrutiny of cross-examination and the uncontroverted science. The Government's nicotine manipulation subscheme has shifted between two theories: (1) Defendants allegedly falsely

denied manipulating nicotine deliveries in an effort to create or sustain an addiction; or (2) Defendants' nicotine manipulation denials were false because they knew and/or took into account nicotine deliveries in designing or manufacturing their products. Neither theory provides a basis for RICO liability.

a. The Government Has Failed To Prove That Defendants' Nicotine Manipulation Denials Were Fraudulent

At the outset, allegations of nicotine manipulation alone cannot constitute a fraudulent scheme supporting RICO violations. Instead, the Government's nicotine manipulation allegations must be (and are) based on Defendants' alleged false statements denying that they engaged in such manipulation. However, the Government's nicotine manipulation claims cannot pass the most basic threshold requirement in any RICO case sounding in mail or wire fraud — namely a specific intent to defraud or deceive. In particular, the Government has not shown that any employee or agent of a defendant had the specific intent to defraud with respect to nicotine manipulation or that any person responsible for such statements believed them to be false. Nor could it, as the evidence shows that the Defendants' denials of nicotine manipulation were truthful.

(i) The Evidence Shows That Defendants Did Not Secretly Manipulate Nicotine In An Attempt To Create Or Sustain Addiction

Altered Tar-To-Nicotine Ratios: Neither the Government's proposed findings of fact nor its post-trial brief successfully rebut the overwhelming evidence showing that Defendants' attempts to alter tar-to-nicotine ratios through the addition of exogenous nicotine or the use of genetically modified "Y-1" tobacco (a) were not secret; (b) occurred in parallel with — and often at the behest of — the Government's efforts to develop less hazardous cigarettes; (c) were

rejected by consumers; and, consequently (d) were never incorporated in nationally commercialized products. *See* JDFOF Ch. 7, §§ III.B, III.C.

Indeed, the Government showcases an "admission" by PM USA's Dr. Whidby that its Merit Ultima brand uses a higher nicotine blend of tobacco to show that Defendants attempted to alter the tar-to-nicotine ratio. Gov. Br. at 57; *see also* GFOF ¶ 2654 (describing Dr. Farone's "unchallenged" testimony regarding Merit). However, the Government's own proposed findings confirm the non-secret nature of this practice. PM USA disclosed the use of this higher nicotine blend in the very 1994 Congressional Hearings in which it claims Defendants fraudulently denied manipulating nicotine. *See* GFOF ¶ 2478 (reciting PM USA's Campbell's 1994 acknowledgement before Congress that PM USA "manufactured its Merit Ultima low tar cigarette using, for 40% of the blend, a tobacco that had a nicotine content higher than that used for the manufacture of some of its other products").[37]

In the same manner, the Government has failed to show that Dr. Spears' (or others') statements regarding tar-to-nicotine ratios were made with a specific intent to deceive. In fact, the Government fails to prove that the testimony it cites on this point — Dr. Spears' congressional testimony that the correlation between FTC nicotine and tar yields is "essentially perfect" — was false, much less that it was intentionally false. That testimony concerned FTC tar and nicotine *yields* and, thus, is not contradicted by the statements cited by Plaintiff regarding the tar and nicotine *content* of the tobacco blend. Gov. Br. at 116 (citing US 86932 (#)[38] (a 1981 article by Dr. Spears) and US 34293 (@) (a 1971 memo sent to Dr. Spears)). According to the

[37] The fact that PM USA (having disclosed the practice) did not choose to characterize it in pejorative terms as "nicotine manipulation" cannot transform the disclosure into a fraud.

[38] Dr. Spears' 1981 article is also US 56269 (@) and cited as such in Defendants' Proposed Findings of Fact.

Government's own expert, Dr. Benowitz, tar and nicotine *content* is not positively correlated with tar and nicotine *yields*. *See* JDFOF Ch. 7, § III.C. Moreover, the record shows that Dr. Spears specifically disclosed, both in his 1981 article and in his congressional testimony, that tar and nicotine *content could* be controlled by blending. *See* US 21990(@) (at 80-81); US 86932 (#).

At the end of the day, the only "evidence" proffered to show that Defendants did alter tar-to-nicotine ratios consisted of Dr. Kessler's testimony regarding and presentation to the Court of a graph he originally presented to Congress in 1994 that purported to show a divergence between tar and nicotine levels. This graph (and Dr. Kessler's related testimony) was thoroughly discredited on cross examination and by the introduction of subsequent, unrebutted evidence showing that neither Dr. Kessler nor the FDA responded to the FTC's clear and repeated warnings regarding the misleading nature of this graph. *See* JDFOF Ch. 7, § III.C.3; *id.* at Ch. 14, ¶¶ 7-10.

Ammonia Technology: In the same manner, the Government's nicotine manipulation accusations built upon Defendants' use of ammonia technology cannot provide fodder for its RICO allegations. Again, the Government's post-trial submissions leave unscathed the record evidence showing that Defendants' use of ammonia technology (a) stemmed from Defendants' attempts to compete on the basis of taste or other sensory characteristics and (b) included investigations on the effects of pH in terms of "impact" or "satisfaction" — neither of which refers to nicotine absorption within the lung or other addictive properties. *See* JDFOF Ch. 7, §§ IV.A.1-IV.A.2.a. Nor can the Government refute the admissions of its own experts that (a) the use of ammonia did not affect pH levels, and (b) that any potential effects on absorption

of nicotine resulting from pH levels remains — at best — hypothetical results from an untested theory. *See id.* §§ IV.A.2.b, IV.A.3.

Finding no persuasive evidence that Defendants did, in fact, create or sustain addiction through nicotine manipulation, the Government is left only with accusations that Defendants attempted to do so, but were unsuccessful. Gov. Br. at 59 ("Defendants clearly intended their design features and additives such as ammonia to have the effect of delivering more nicotine than the levels measured by the FTC method . . ."). The only "evidence" on this point consists of the Government's unilateral interpretations of snippets of company documents or the testimony of former B&W researcher, Dr. Jeffrey Wigand. *See, e.g.*, GFOF ¶ 2903. However, as detailed in Joint Defendants' proposed findings, Dr. Wigand's testimony on this and other subjects is unreliable and entitled to no weight. *See* JDFOF Ch. 7, ¶¶ 12-14; *id.* at Ch. 14, ¶¶ 25-32.[39] In any event, even if Dr. Wigand were correct, *unsuccessful attempts* to manipulate nicotine would not render false Defendants' statements that they did not manipulate nicotine.

(ii) Defendants' Publicly Disclosed Considerations Of Nicotine Deliveries In Designing Or Modifying Their Products Do Not Render Their Nicotine Manipulation Denials False

The Government's nicotine manipulation theory has devolved into allegations regarding Defendants' knowledge of nicotine's properties and their considerations of those properties in designing their products. Gov. Br. at 57-58. In so doing, it appears to have collapsed the nicotine manipulation subscheme into the addiction subscheme. *See id.* at 56, n.32 ("denials of

[39] Indeed, Dr. Wigand's credibility has been so thoroughly and uncontrovertibly compromised, that the Government did not even attempt to salvage it in its post-trial brief.

manipulation are part of their more general denial of the addictiveness of nicotine."). In that event, there is no independent "manipulation" scheme at all.

In addition, the Government focuses on design features which took nicotine deliveries into account. However, the context for the nicotine manipulation denials upon which the Government focuses demonstrates that such denials did not (and were not intended to) encompass such design considerations — all of which were disclosed to the Government decades before the 1994 hearings. *See* JDFOF Ch. 7, § V.

b. First Amendment Protections Preclude The Imposition of Liability For Statements — Including the Alleged "Racketeering Acts" — Made In The Context Of Proposed Regulation Or Other Legislative Action

The Government also does not and cannot contest the evidence showing that Defendants' nicotine manipulation denials (including each and every one of its alleged racketeering acts relating to this subscheme) (*see* JDFOF Ch. 16, ¶ 14 514-67) arose in the context of proposed FDA regulation and in direct response to accusations levied by Congress members and others in a politically charged atmosphere. *See* JDFOF Ch. 7, § II. In this circumstance, the Government's nicotine manipulation subscheme fails for the additional reason that civil liability cannot be predicated on legitimate petitioning activities. The First Amendment "shields . . . a concerted effort to influence public officials regardless of [the petitioning parties'] intent or purpose." *See United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965).

c. The Government Has Provided No Evidence That Defendants' Nicotine Manipulation Denials Were Material To Consumers Or Intended To Deprive Consumers Of Money or Property

The Government's failure or inability to adduce any evidence showing that Defendants' nicotine manipulation denials were material to consumers or were issued with the intent to

deprive consumers of money or property provides further reasons to deny the Government's attempt to prove RICO violations through this subscheme. *See Neder*, 527 U.S. at 25; 18 U.S.C. §§ 1341 and 1343.

Although the Government offers a throw-away phrase that may be meant to imply materiality by claiming that Defendants' alleged intent to affect nicotine deliveries was a "salient fact to their consumers," (Gov. Br. at 59), the Government has provided no evidence whatsoever in support of this claim. To the contrary, it strains credulity to believe that an alleged ***intent*** to affect nicotine deliveries or systemic effects that was ultimately ***unsuccessful*** (as described above) would have any resonance or import to consumers in making purchasing decisions.

d. The Predicate Acts Associated with the Nicotine Manipulation Scheme Were Not "In Furtherance Of" Any Fraud

The 5 predicate acts identified as related to this scheme did not further a fraud. JDFOF Ch. 16, ¶¶ 514-67. They are all statements to Congress protected by the First Amendment, and were responses to Congressional inquiries, not part of an affirmative scheme to defraud.

5. The "Suppression" Scheme

Using the aegis of "suppression," at trial the Government drew together a plethora of allegations that it claimed involved efforts by the Defendants to prevent the American public from learning about the health risks of smoking. These included allegations that (1) the Defendants reached an agreement in 1953 not to compete on health claims, (2) the Defendants had a "Gentlemen's Agreement" not to conduct in-house biological research and to share any technological advances that could lead to a safer cigarette (thereby undermining the incentive to develop one), and (3) the Defendants engaged in a wide variety of acts intended to prevent the truth about smoking and disease from coming to light, including censoring research and

scientific statements, destroying documents, and asserting false privilege claims. As demonstrated below, not only are the factual allegations relating to each aspect of the Government's "suppression" claims false or badly overstated, but there are a host of legal defects as well.

a. The Alleged Agreement Not to Compete on Health Claims

(i) The Evidence Contradicts the Government's Claim That There Was An Agreement Not to Compete on Health Claims

In its brief, the Government persists in asserting that the Defendants "agreed not to compete through use of explicit health-related claims in the marketing of cigarettes at [the] Plaza Hotel Meetings in 1953." Gov. Br. at 26. As Joint Defendants demonstrated in their proposed findings, the evidence is to the contrary. *See* JDFOF Ch. 8, ¶¶ 10-51. First, the contemporaneous evidence surrounding the 1953 Plaza Hotel meetings contradicts the existence of any such agreement. *See id.* ¶¶ 14-23. Second, the evidence shows that to the extent cigarette companies dropped their "white coat" or "doctor" advertisements containing health claims during the 1950s, that was due to the FTC's actions and public criticism of the health claims made in such advertising. *See id.* ¶¶ 24-36. Indeed, in testimony directly contradicting the Government's claim, the Government's own expert, Dr. Jeffrey Harris, conceded that health-claim advertising continued *after* the alleged agreement was supposedly reached at the 1953 Plaza Hotel meetings. *See id.* ¶¶ 19, 37-39.

A fact fundamentally inconsistent with the Government's theory that there was an agreement by the Defendants not to compete on the basis of health is that when the Defendants were permitted to compete on the basis of lower tar in their cigarettes, they did so vigorously. *See id.* ¶¶ 40-51; *see also* JDFOF Ch. 10, ¶¶ 28-34, 49-81, 112-153. The 1950's "tar derby" and

the intense competition by the Defendants to develop lower-tar products after the FTC developed a standardized test method and first permitted, then later required, the Defendants to advertise the tar and nicotine yields of their cigarettes demonstrate the absence of any agreement by the Defendants not to compete.

Rather, the evidence shows that any lack of health claims in cigarette advertising was due to other factors, including the FTC's regulation requiring substantiation for such claims, the absence of any recognized standards to determine the scientific validity of such claims, and the lack of consumer acceptability for potentially less hazardous cigarette products. *See* JDFOF Ch. 8, ¶¶ 24-32, 52-182. What is undeniable — and wholly inexplicable if one were to accept the Government's claim that the Defendants had an agreement not to compete on the basis of health claims — are the enormous efforts and resources devoted by the Defendant cigarette manufacturers over the past several decades, and continuing today, to develop potentially less hazardous cigarette products acceptable to consumers. *See id.* ¶¶ 209-465. The Government's assertions that these efforts can be explained as some sort of "defensive" effort to be ready to enter the less hazardous cigarette market if the Defendants' agreement ever broke down, or that research and marketing of such potentially less hazardous cigarettes was suppressed, are contradicted by the undeniable facts. *See id.* ¶¶ 466-809.

The ultimate irony in the Government's allegation that the Defendants agreed to suppress the development of a less hazardous cigarette is found in the testimony of its own 30(b)(6) witness on less hazardous cigarette products, Dr. Michele Bloch, who testified:

- She is uncertain that a less hazardous cigarette exists. 6/20/02 Bloch *United States* Dep. at 134:1-6.
- She doesn't know if, despite the Government's allegations, it is even possible to develop a less hazardous cigarette. *Id.* at 134:8-19.

- She doesn't know if the Government even favors the development of a less hazardous cigarette. *Id.* at 140:16-141:10.

JDFOF Ch. 8, ¶ 7. So, basically, the Defendants stand accused by the Government of agreeing not to advertise and promote a product that the Government itself does not know exists, does not know can be developed, and may not want developed. No RICO claim can be founded on evidence such as this.

(ii) An Agreement Not to Compete on Health Claims Would Not Violate RICO

In an effort to adapt allegations underlying antitrust and product liability claims in other cases to this case, the Government has overlooked one critical and independently compelling issue: even if proved, the alleged agreement by the Defendants not to compete on health claims would not violate RICO. Specifically, the Government has failed to show that there were any false or fraudulent statements *connected to such an agreement* made for the purpose of obtaining money or property from consumers by false or fraudulent means or that such statements, even if made, would be material to consumers. The Government's RICO claims are predicated on alleged acts of mail and wire fraud, which necessarily require such proof. *See* 18 U.S.C. §§ 1341, 1343. While the Government cites various purported false statements in the section of its proposed findings dealing with the alleged agreement not to compete, none of these statements has anything to do with such an agreement. *See* GFOF ¶¶ 1196-1204. Rather, they all have to do with alleged denials of any connection between smoking and disease. *See id.* Such statements are simply not relevant to the Government's allegations regarding an alleged

agreement not to compete on health claims, which itself thus has no relevance to RICO claims predicated on alleged mail and wire fraud violations.[40]

b. The Alleged "Gentlemen's Agreement"

(i) The Evidence Fails to Support the Government's Claim That There Was a "Gentlemen's Agreement" Entered Into for Improper Purposes

The Government further claims that the Defendants' agreement not to compete on health claims included "a 'Gentlemen's Agreement' whereby they agreed that any tobacco company to discover an innovation that could lead to the manufacture of a less hazardous or 'safer' cigarette would share it with the others and that no domestic tobacco company would use intact animals for in-house biomedical research to test their commercial products." Gov. Br. at 26. The Government charges that "pursuant to these agreements, the Cigarette Company Defendants sought to avoid any actions that would contradict their fraudulent public relations position."

Again, the evidence fails to support the Government's claims. First, as to the allegation that the Defendants agreed to share innovations in less hazardous cigarette development, there is indeed some evidence to support this. But far from being undertaken to "avoid any actions to contradict their fraudulent public relations position," this was a commitment made by various cigarette manufacturers to HEW Secretary Wilbur Cohen in 1968. *See* JDFOF Ch. 8, ¶ 205. Specifically, the notes of a May 2, 1968 meeting show that executives of a number of major cigarette manufacturers told Secretary Cohen that they had "already discussed among themselves the matter of handling any method of making a safer cigarette" and that "they all had agreed

[40] In addition, the Government failed to prove any of the elements of mail and wire fraud with respect to these statements, including that they were material and made with specific intent to defraud.

informally to share such information with each other." JD-000364 at 9-10 (#). Just as importantly, shortly before this meeting with Secretary Cohen, the cigarette manufacturers had agreed to the *Government's* invitation to join the Tobacco Working Group, the joint government/industry effort to develop a less hazardous product where all parties shared information and ideas for safer products. *See* JDFOF Ch. 8, ¶¶ 207, 450-465. It is thus impossible for the Government to allege that there was any such agreement undertaken for "fraudulent" purposes when, since at least 1968, the Government was aware at its highest levels of the cigarette manufacturers' willingness to share information on a less hazardous cigarette.

Second, while various individuals within the industry at various times may have believed there was an agreement not to conduct in-house biological research, the Government has failed to carry its burden of establishing the actual existence of such an agreement. *See id.* ¶¶ 183-208. Indeed, the fact is that, whatever various individuals believed about the existence of such an agreement, *such biological research was performed*, both in-house and by contractors, domestically and overseas. *See id.* ¶¶ 702-789. Further, the Government's allegations regarding the suppression of research are simply mistaken. *See id.* ¶¶ 790-809. In short, the Government has failed to establish the existence of a "Gentlemen's Agreement" undertaken for fraudulent purposes.

(ii) The Alleged "Gentlemen's Agreement" Would Not Violate RICO

Again, as with the Government's allegations regarding an agreement not to compete on health claims, the alleged "Gentlemen's Agreement" also fails to provide support for the Government's claims because such an agreement would not violate RICO. The Government has not even alleged, must less proved, that there were any false or fraudulent statements connected

to such an agreement made for the purpose of obtaining money or property from consumers by false or fraudulent means, as required to establish the Government's RICO claims predicated on alleged acts of mail and wire fraud. *See* 18 U.S.C. §§ 1341, 1343. Moreover, as demonstrated above, the evidence shows that to the extent there was any agreement by any of the Defendant cigarette manufacturers to share innovations in less hazardous cigarette research, it was part of an understanding with the *Government itself*. This alone demonstrates that there was no fraudulent intent involved. The Government's RICO claims thus draw no sustenance from the alleged "Gentlemen's Agreement."

c. The Government's Allegations Concerning Censorship of Research and Scientific Statements and Nondisclosure and Destruction of Documents

(i) The Evidence Fails to Support the Government's Claim That Defendants Suppressed Research and Scientific Statements and Failed to Disclose or Destroyed Documents as Part of a Scheme to Defraud the American Public

The Government charges that "[t]hroughout the past fifty years, Defendants have engaged in parallel efforts to destroy and conceal documents and information in furtherance of the Enterprise's goals. . . ." Gov. Br. at 82. According to the Government, Defendants have sought to suppress research and scientific statements concerning smoking and disease "in direct furtherance of their scheme to defraud because disclosure of the information would have assisted the American public to understand the truth about the negative health consequences of smoking. . . ." In support of these allegations, the Government has raised a whole series of varied and disconnected acts allegedly committed by various Defendants that it somehow tries to weave together as a common scheme. Yet the Government did not prove an agreement between even two companies — much less the formation of an "enterprise" — to destroy documents or

censor research for any purpose. Moreover, the Government's allegations are false and/or badly overstated. *See* JDFOF Ch. 8, ¶¶ 810-1063.

As the Government acknowledges, it relies heavily on the testimony of fired industry scientists such as Drs. Jeffrey Wigand, Victor DeNoble, and William Farone for its evidence relating to the alleged suppression of research and scientific information. It asserts: "Defendants fail to articulate why respected scientists like Drs. Farone, DeNoble and Wigand would lie." Gov. Br. at 88. This ignores one of the most obvious reasons in the world why these individuals, each of whom was fired by one of the Defendants, would lie: revenge. But regardless of their motives, the fact is, as Joint Defendants demonstrated in their proposed findings, the testimony of each of these individuals is not only biased, but it is contradicted by a series of undeniable facts. *See* JDFOF Ch. 14, ¶¶ 25-32 (Dr. Wigand), ¶¶ 83-99 (Dr. DeNoble), ¶¶ 100-111 (Dr. Farone). It should not be credited by this Court.

Further, a good deal of the evidence relating to the alleged nondisclosure or destruction of documents introduced by the Government at trial, and relied upon in its brief, relates to Australian entities and litigation. Gov. Br. at 88-91. As discussed further below, the Government has failed to establish that such events had direct or substantial effects in the United States, thus rendering them irrelevant to the Government's RICO claims. Regardless, much of the Government's evidence on Australian matters comes from a former in-house attorney for an Australian tobacco company, Fred Gulson, and a former head of the Tobacco Institute of Australia ("TIA"), John Welch. The Government's attempts to bolster the very dubious credibility of these two witnesses (Gov. Br. at 88-89) are belied not only by their obvious bias, but by the undeniable facts contradicting their testimony. As Joint Defendants showed in their proposed findings of fact, Mr. Gulson's testimony was wholly unreliable. *See* JDFOF Ch. 8, ¶¶

997-1009. Likewise, Mr. Welch's testimony was contradicted by documents that he created during his brief period of employment with the TIA in 1991-92. *See id.* at ¶¶ 1010-1022. There is nothing in their testimony on which this Court can rely.

Indeed, the Court must proceed cautiously in placing any reliance whatsoever on the Government's proposed findings relating to its suppression claims, which are rife with overstatement and error. For example, the Government asserts that "[i]n applying the TIA Document Retention Policy, Welch testified that the primary factor in determining whether a document should be destroyed was '[w]hether the document would be damaging in litigation positions, legislative positions, or public affairs positions.'" GFOF ¶ 5102. What the Government fails even to mention, much less explain, is that it was indisputably established from the documentary evidence introduced during Mr. Welch's cross-examination, including his own writings, that *there was no document retention policy in effect at the TIA during his tenure there.* *See* JDFOF ¶¶ 1014-1020.

In sum, the evidence fails to support the Government's allegations that the Defendants have fraudulently engaged in efforts to censor research and scientific information or fraudulently failed to disclose and destroyed documents.

(ii) The Alleged Acts of Censorship of Research and Scientific Statements Would Not Violate RICO

In addition to the absence of proof on this issue, there are at least six other fundamental reasons why the Government's allegations concerning alleged acts of suppression of research and scientific statements and nondisclosure or destruction of documents, would not support its RICO claims:

- First, again, the Government has not even alleged, must less proved, that there were any false or fraudulent statements connected to these acts of suppression made for the

purpose of obtaining money or property from consumers by false or fraudulent means, as required to establish the Government's RICO claims predicated on alleged acts of mail and wire fraud. *See* 18 U.S.C. §§ 1341, 1343.

- Second, the Government has failed to establish that any of the information allegedly suppressed by the Defendants, much less all of it, would have been material to the alleged victims of Defendants' fraud, the American public. Materiality, of course, is an essential element of mail and wire fraud. *See, e.g., Neder v. United States*, 527 U.S. 1, 25 (1999).

- Third, the Government has failed to show how these diverse and sundry acts of alleged misconduct were part of a common scheme to defraud. All that the Government has purported to show are disconnected and unrelated individual company acts. There is no evidence these actions were undertaken pursuant to or are in any way related to a RICO enterprise and conspiracy. *See United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 131, 152 (D.D.C. 2000) (noting common purpose as one of the elements for an association-in-fact enterprise).

- Fourth, to the extent any alleged racketeering acts are involved, the Government has failed to establish the continuity plus relationship between the acts required to establish a pattern of racketeering activity. *See, e.g., Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985). "It is not the number of predicates, but the relationship that they bear to each other or to some external organizing principle that renders them 'ordered' or 'arranged,'" and, thus, a pattern. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 238 (1989). Again, all that the Government has purported to show are disconnected and unrelated individual company acts, which simply do not bear the requisite relationship to one another to form a pattern of racketeering activity.

- Fifth, a good deal of the evidence relied upon by the Government for its "suppression" theory concerns conduct occurring outside the United States, particularly Australia. *See, e.g.*, GFOF ¶¶ 5051-5111. It is well-established that RICO does not apply to conduct occurring outside the United States that does not have direct and substantial effects in this country. *See North South Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1052 (2d Cir. 1996); *Butte Mining PLC v. Smith*, 76 F.3d 287, 291 (9th Cir. 1996); *see also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (Sherman Act reaches extraterritorial conduct only if it "was meant to and did in fact produce some substantial effect in the United States."). This rule derives from both the "presumption against extraterritoriality" of federal statutes, *see EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (Title VII of Civil Rights Act), and the courts' concern "to preserve American judicial resources for the adjudication of domestic disputes and the enforcement of domestic law," *see Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987) (Securities Exchange Act). Because extraterritorial conduct not having direct and substantial effects in the United States cannot constitute a RICO violation, the Court does not have the power to prohibit or otherwise remedy it. *See, e.g., United States v. Philip Morris USA Inc.*,

396 F.3d 1190, 1198 (D.C. Cir. 2005) ("Section 1964(a) provides jurisdiction to issue a variety of orders 'to prevent and restrain' RICO violations."). Here, the Government has failed to offer sufficient evidence to show that the foreign conduct of which it complains had direct or substantial effects in this country, thus rendering it irrelevant to its RICO claims.

- Sixth, the alleged predicate acts associated with the so-called "suppression" scheme were not "in furtherance of" the alleged fraud. *See, e.g.*, JDFOF, Ch. 16, ¶¶ 568-628.[41]

6. The "Youth Marketing" Scheme

The Government contends that the Defendants have engaged in a longstanding campaign to advertise and promote cigarettes to the youth (under 18) population while falsely denying it.[42] For the most part, the Government contends that the Defendants' marketing may appeal to youth

[41] Throughout its trial brief, the Government focuses, on numerous occasions, on incidents described as the editing of the "Vancouver minutes" and the so-called "mental copy." *See, e.g.*, Gov. Br. at 85-87. It argues that these incidents demonstrate Brown & Williamson's and BATCo's fraudulent efforts to suppress less hazardous research and are material examples of fraudulent conduct. Even setting aside the factual disputes surrounding both issues, what is clear, as discussed in Joint Defendants Findings, from both the Government's witnesses, defense witnesses and the documentary evidence, is neither incident related to the editing or censorship of actual less hazardous cigarette research. It is uncontroverted that "Vancouver minutes" were (1) neither research nor a report on the findings of research, and that safer cigarette research continued after the Vancouver meeting without regard to any alleged editing of the minutes; and (2) the original meeting minutes were maintained – unedited – in the files of BATCo and Brown & Williamson, and produced in litigation. *See* JDFOF Ch. 8, § III.B.3. With respect to the "mental copy rule," there is no evidence that it related to any actual research or data. It only related to the care scientists were to show in their description of research. Indeed, regardless of any scientific description of the data, the data itself is available for other scientists to review, analyze and ascribe meaning. *See generally* JDFOF Ch. 8, § III.B. Moreover, this "mental copy rule" for certain internal reports is consistent with the recommendations from publications by the American Law Institute and the American Bar Association. Thus, neither of these incidents upon which the Government places such great emphasis can support any claim of fraud or the suppression of critical research.

[42] The Government also continues to include in its allegations of youth marketing claims that Defendants marketed to persons under 21 (Gov. Br. at 74), even though it is legal to sell cigarettes to persons 18-21 years old in virtually every state. JDFOF Ch. 9, ¶¶ 417-22. Moreover, Defendants have demonstrated their efforts to minimize marketing spillover from legal smokers over the age of 18 to younger persons. *Id.*, ¶¶ 508-684. Most important, the Government's claim that Defendants had promised not to market cigarettes to legal-age 18-21 year olds fell apart during the testimony of Professor Dolan. JDFOF Ch. 9, ¶¶ 423-448; 12/02/04 Tr. (a.m.) (Dolan) 7768:23-7769:14; 7770:3-7771:20.

(albeit that it was developed exclusively through interaction with *adult* smokers and designed to appeal to *adult* smokers). The Government also complains that the cigarette manufacturers utilized marketing that was accessible to youth (albeit again, was directed to adults, such as by advertising in magazines overwhelmingly read by adults).

a. Youth Marketing is Not a RICO Violation

It is undisputed that youth marketing itself — even if it involves the mails or wires — does not constitute mail or wire fraud or a RICO violation. And the Government cannot transform a practice it does not like into a RICO violation merely by asserting that, when confronted with allegations that they engaged in the practice, Defendants denied them. The Government repeatedly fails to distinguish between the act of youth marketing itself and Defendants' alleged denials of youth marketing, which muddies its entire argument. *See, e.g.*, Gov. Br. at 78 (contending that youth marketing itself, not denials of youth marketing, comprises the scheme to defraud and that youth were the target of the fraud). Indeed, many of the "youth marketing" predicate acts consist, not of denials of youth marketing, but of advertisements that allegedly appealed to youth. *See, e.g.*, Alleged Racketeering Acts Nos. 76, 83, 84, 97, 102,135-42, 147, and 148. But these advertisements did nothing to further the fraud alleged — *i.e.*, the *denial* of youth targeting.

b. Defendants Did Not Engage in Youth Marketing

Defendants did not in fact, as the Government contends, target persons under the age for smoking cigarettes. JDFOF Ch. 9, ¶¶ 32-54, 272-416. The mere fact that advertising themes or campaigns designed to be attractive to young adults generally might also be attractive to some underage smokers, Gov. Br. at 77, does not amount to youth targeting. *Id.* ¶¶ 195-203.

As even the Government's experts admitted, Defendants' market planning documents are critical in evaluating their marketing practices and those documents refer exclusively to target ages that were over the legal age of smokers. JDFOF Ch. 9, ¶¶ 24-38. The Government argues further that Defendants' internal documents demonstrate that they marketed to youth, Gov. Br. at 72 n.36, but the Government's experts completely undermined this claim. Dr. Dolan testified that the "target customer is at the center" of all marketing activities. Dolan WD at 31:12-13. He explained that "one of the most important places to look for targeting is in the actual marketing plans." Tr. 12/2/04 (p.m.) at 7809:13-17. Dr. Dolan confirmed that the "target" of Defendants' marketing plans was always at least 18. Tr. 12/2/04 (p.m.) at 7842:15-22, 7844:2-8; *see also* Tr. 1/10/05 (p.m.) at 9587:18-23 (Biglan; same); Tr. 12/14/04 (p.m.) at 8540:22 – 8541:4 (Krugman; same re media plans). And there is no evidence that Defendants conducted marketing research or product taste tests with anyone under age 18. Tr. 12/2/04 (p.m.) at 7843:12 - 7844:1 (Dolan). In the face of these key admissions to the Government's youth targeting allegations, the Government is left with citing to various old documents completely untethered to the legal issues in this case. These remaining documents are decades old and represent a tiny number of outliers often taken out of context and/or written by third party marketing companies, in the course of "brainstorming" sessions, or for purposes other than marketing.[43] These documents cannot support claims that Defendants intended to target youth. For example, the Government refers to a 1981 report of the Philip Morris Research Center entitled "Young Smokers Prevalence, Trends,

[43] For example, the Government relies on a document generated by a creative director for Robert Brian Associates (an outside consultant to Lorillard) showing a design for "Lorillard's Kicks cigarettes brand." GFOF ¶ 4305. What the Government fails to disclose is that (a) the "Kicks" brand never existed; (b) it was the idea of an outside consultant and rejected by Lorillard; and (c) Lorillard was not even aware of the creative director's actions until they were reported months later in *Consumer Reports*. JDFOF Ch. 9, ¶ 89 n.8.

Implications and Related Demographic Trends," Gov. Br. at 72 n.36, but fails to disclose that this particular report was authored by a Myron Johnston, a low-level researcher in PM USA's Research and Development Department who had no connection with PM USA's marketing department; moreover, the document contains no marketing recommendations and in fact was used for the purpose of forecasting future trends in the adult smoker market. JDFOF Ch. 9, ¶ 175. All the documents presented by the Government as exemplars of "internal evidence" purporting to prove that Defendants marketed their products to youth actually prove nothing of the sort.[44]

The Government's argument that the MSA has not changed Defendants' marketing practices as they pertain to youth (Gov. Br. at 81-82) is plainly wrong and is refuted above. *See supra*. It attacks the continued (limited) use of Marlboro brand imagery (Gov. Br. at 81) but does not counter the evidence that Marlboro's business and marketing plans are aimed — not at

[44] For example, the Government cites U.S. 30792(@) for the proposition that Defendants considered "starters" to include minors. GFOF § 3, ¶ 4411. But that document specifically defines "starters" as "M/F, 21+ years of age." Similarly, the Government cites "Philip Morris memorandum" for the proposition that the purpose of the Advertising Code was simply to avoid restrictive advertising regulation, which would affect the "bottom line." GFOF § 3, ¶ 4099. Even if true, of course, a purpose to avoid regulation is not a RICO violation. But the actual document is from Philip Morris Asia and has nothing to do with the Advertising Code at issue in this case. And the "bottom line" quotation is stripped from yet *another* memorandum which makes no mention of the Advertising Code or youth. US 37924(@), at 3752. As another example of misstating evidence, the Government continues to claim that Newport is currently one of the three most heavily advertised brands (GFOF ¶ 3931) even though Dr. Eriksen could not support the claim for any year since 1993 and the evidence shows that the contention has been untrue for more than ten years. JDFOF Ch. 9, ¶ 205. The Government also refers to a 1990 memorandum by a Reynolds sales employee (GFOF § III, ¶ 4604-05) but fails to disclose that the employee was *reprimanded* by Reynolds and that the event caused Reynolds's sales director to send out a memo to all sales representatives to confirm its policy against youth marketing. 12/16/04 Tr. (a.m.) at 8808:24-88818:1 (Krugman). In a number of instances the Government copied paragraphs from its proposed pretrial findings verbatim, even though it never introduced the cited evidence, and simply attached citations to unrelated evidence. *Compare* USPFOF ¶ 3473 *with* GFOF ¶ 4085 and USPFOF ¶ 4294 *with* ¶ 4820.

youth — but at maximizing market share and brand loyalty of adult smokers. JDFOF Ch. 9, ¶¶ 467-76. Although the Government attacks Lorillard's Newport campaign, it simply ignores the evidence that Newport's youth popularity is not linked to its advertising share of voice, its ads are placed exclusively in magazines on the adult side of the dividing line set by Dr. Krugman, and that a static 30-year campaign is the opposite of what appeals to youth. JDFOF Ch. 9, ¶¶ 286-333. Likewise, the Government's reference to ads in *Rolling Stone* magazine (or to flavored cigarette brands) cannot substitute for evidence that these advertisements or products were aimed at youth. JDFOF Ch. 9, ¶¶ 334-356;[45] Ch. 14, ¶ 146.

Finally, the Government again fails to even address the fact that cigarette marketing and advertising are under FTC jurisdiction and that the FTC has never determined Defendants' advertising to be illegal as youth-targeted, despite several investigations dedicated to that very subject. JDFOF Ch. 9, ¶ 345.

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[45] The Government further makes the irrelevant contention that it is untrue that Defendants employ marketing in order to encourage brand switching and maintain product loyalty. Gov. Br. at 82. This argument is predicated on a complete misunderstanding of the evidence and ignores the extensive evidence presented by Defendants that this is the legitimate and economically sound aim of Defendants' marketing practices. *See* JDFOF Ch. 9, ¶ 501. Various Government agencies, including the Office of the Surgeon General, the FTC, the Council of Economic Advisers to the President, and the Department of Justice itself, as well as Government expert Jonathan Gruber while at the Department of Treasury, have concluded repeatedly that cigarette marketing impacts brand switching, not recruiting "new" smokers. JDFOF Ch. 9, ¶ 246. This has been confirmed in numerous other studies concluding that cigarette advertising is used for competitive purposes, not for market expansion purposes. *Id*. ¶ 247. Moreover, the contention that Defendants' marketing must therefore be aimed at youth does not logically follow from the Government's claims, especially given the fact that only 2% of cigarettes are consumed by youths and the weight of authority shows that smoking initiation is primarily determined by peer and family influence, not advertising. *See*, *e.g.*, 12/9/04 Tr. at 8238; 16-8239:2 (Chaloupka) (98% of all cigarettes sold are purchased by legal age smokers); JDFOF Ch. 9, ¶¶ 790-92. Thus, the repeated suggestion by the Government that Defendants must target youth to "replace" smokers who quit is utterly fallacious.

c. The Challenged "Denials" of Youth Marketing Are Largely Legitimate Attempts to Discourage Youth Smoking

The Government has produced no evidence that any person responsible for Defendants' denials of youth marketing had a specific intent to defraud consumers. Indeed, many of these denials were in fact part of Defendants' legitimate efforts to discourage youth smoking. One example is the 1964 Cigarette Advertising Code. The Government claims that this was merely an attempt to avoid the threat of FTC oversight. Gov. Br. at 73. But the Government fails to prove that the purpose of the Code was fraudulent. The Government has admitted that the press release announcing the Code "on its face . . . [it] does not misrepresent or conceal any fact." Pl.'s Second Supplemental Resp. to Joint Defs.' First Set of Continuing Interrog. No. 118. Similarly, the Government introduced a more recent statement by Lorillard's CEO Alexander Spears that: "[w]e are committed to reducing underage access and consumption of cigarettes. . . ." US 25830 (#) (at 7301). Dr. Spears made that 1999 speech, not to the public, but to the Tobacco Merchants Association. If Dr. Spears was not sincere, it is difficult to understand why he would have chosen tobacco merchants to hear the message that Lorillard wanted to reduce youth access and consumption. JDFOF Ch. 12, ¶ 428. The Government offers no proof to contradict the sincerity of these and other public statements announcing efforts to prevent youth marketing. JDFOF Ch. 9, ¶¶ 466-93.

d. Defendants' Statements Concerning Youth Marketing Were Neither Material To Smokers' Decisions To Purchase Cigarettes Nor Calculated To Deprive Consumers Of Money Or Property

There was not one shred of evidence introduced at trial that Defendants' statements that they did not market cigarettes to youth would have caused a person of "ordinary prudence and comprehension" to purchase cigarettes. Statements about Defendants' marketing practices are

not statements about the quality of the products. Certainly, denials that Defendants engaged in youth marketing — as contrasted to youth marketing itself (which is not a RICO violation) — could not be calculated to cause youth to smoke. *See* 5/16/05 Tr. (a.m.) at 21128:12-23 (Eriksen; could not identify scientific evidence demonstrating any effect).

For the same reasons, such denials — most of which were made to influence government officials (*e.g.*, GFOF ¶¶ 3951, 3953, 3955, 4007, 4009, 4023) — were not calculated to deprive consumers of money or property. The controversy over whether Defendants' market to youth has to do with potential *regulatory* actions. For example, the industry promulgated the Cigarette Advertising Code in the face of public criticism and proposed FTC regulation. 12/15/04 (a.m.) at 8608:12-8611:16 (Krugman). Thus, in addition to not being directed to business or property, they are protected by the First Amendment as well.

e. The Predicate Acts Associated with the Alleged Youth Marketing Were Not "In Furtherance Of" Any Fraud

The 44 predicate acts associated with this scheme do not satisfy the "in furtherance of" requirement. JDFOF Ch. 16, ¶¶ 629-900. The essence of the alleged fraud is the *denial* of youth marketing, not youth marketing itself. But most of the predicate acts have nothing to do with the *denial* of youth marketing and instead constitute acts which the Government contends were "in furtherance of" *youth* marketing. *E.g.*, JDFOF ¶¶ 631, 727-900. If the Government's allegations are true — and they are not — far from being *denials* of youth marketing, these documents would amount to virtual *admissions* of such marketing and thus could not possibly be in furtherance of the fraud.

7. Low-Tar Cigarettes

a. No Enterprise or Joint Activity Existed With Respect To The Development And Marketing Of Reduced-Yield Cigarettes

Far from showing any joint activity or "enterprise" conduct with respect to reduced-yield cigarettes, the evidence establishes that the Defendants engaged in fierce competition regarding these products. Even the contemporaneous notes of the meeting at the Plaza Hotel on December 14, 1953 indicate that the executives agreed that each company must individually decide its own advertising policy. *See* JDFOF Ch. 10, § III.D. Until the FTC stepped in to halt certain comparative filtration and tar-reduction advertising in late 1954, the Defendants competed vigorously against each other in this area. *See* JDFOF Ch. 10, § III.E. Even after the adoption of the FTC's Cigarette Advertising Guidelines in 1955, the Defendants continued vigorous competition in what became known as the "Tar Derby," JDFOF Ch. 10, § IV, until the FTC brought the Tar Derby to a halt in 1960. JDFOF Ch. 10, § V.A, C. A change in FTC policy, brought about by encouragement by the public health community, led to yet another surge in competition in this area in and after 1966. JDFOF Ch. 10, § VI.A., C.[46]

In the *Barclay* litigation, R.J. Reynolds and PM USA complained to the FTC about claims being made by Brown & Williamson for its Barclay cigarette. *Id.* They raised the very issues that the Government now wrongly claims they have suppressed — ventilation, compensation and the inaccuracy of the FTC method. JDFOF Ch. 10, § XI.A.1. Finally, the diverse nature of Defendants' recent actions regarding low-tar cigarettes speaks to a lack of

[46] The documentary evidence cited by the Government in this area consists entirely of individual company documents. Gov. Br. at 59-71. The documents discuss company-specific advertising or product development issues, and there is no mention of or suggestion that those strategies were motivated by collusion rather than competition.

uniformity of action and evidences the individual nature of the Defendants' conduct. *See* JDFOF Ch. 10, § VIII.

b. The Defendant Cigarette Manufacturers' Statements About Low-Tar Cigarettes Were Not Fraudulent

The Government has also failed to prove that the statements (express or implied) that the individual Defendants made concerning reduced-yield cigarettes were false when made. The overwhelming evidence at trial was that the development and marketing of reduced-yield cigarettes was supported by the state-of-the-art, contemporaneous science, as reflected in the peer-reviewed literature and the pronouncements of various public health authorities, including the American Cancer Society and Reports of the Surgeons General. JDFOF Ch. 10, §§ VI, VII, VIII, and IX. The Government asserts that the Defendants uniquely possessed scientific evidence establishing that their reduced-yield cigarettes posed no lesser risk of lung cancer, focusing on the extent of "compensation," Ames test results (mutagenicity) on an equal weight of tar basis, and the so-called "elastic" yield of reduced-yield cigarettes designed by the Defendants. Gov. Br. at 65-66. That attempt is unavailing for at least three reasons.

First, even after the release of the internal documents from the files of the Defendant cigarette manufacturers and more recent scientific developments, the science today still does not establish that reduced-yield cigarettes fail to reduce lung cancer risk. To the contrary, the weight of the scientific evidence presented at trial suggests that they do. *See* JDFOF Ch. 10, § XII. Indeed, the administrative agency entrusted with responsibility for developing policy in this area, the Federal Trade Commission ("FTC"), with the requested assistance of the Department of Health and Human Services, has been grappling with this complex issue for years but, like its counterparts elsewhere in the world, continues to encourage competition on the basis of reduced-

FTC yields. JDFOF Ch. 10, §§ XI.C.2, especially ¶¶ 334-337, and § X.B.[47] Although, the Government asserts that "the scientific consensus is that low tar cigarettes are not better for smokers' health" (Gov. Br. at 68) this assertion ignores (1) the actual text of the recent Government-sponsored reports on which the Government relies (JDFOF Ch. 10, § XII.A)(2) the testimony of the Government's own experts that certain reduced-yield cigarettes reduce or probably reduce lung cancer risks (JDFOF Ch. 10, § XII.A) and (3) the admission of Dr. Burns — one of the scientific editors of NCI Monograph 13 and a contributor to the 2004 Surgeon General's Report — that his opinion that there had been no meaningful reduction in risk due to reduced-yield cigarettes was his own personal belief and *not* scientific consensus. 2/15/05 Tr. (p.m.) at 13392:13-13393:12 (Burns). *See also* 2/16/05 Tr. (a.m.) at 13484:3-12 (Burns) (testifying that Monograph 13 did *not* reach the conclusion that "20 1990s cigarettes a day are at least as bad as 20 1950s cigarettes a day, in terms of lung cancer risks . . ."). Finally, it ignores the uncertainty in the underlying science today (JDFOF Ch. 10 § XII), especially the consistent results of epidemiologic studies showing reduced lung cancer risk among smokers of reduced-yield cigarettes that the Government attempts to explain away with mere hypotheses masquerading as scientific facts. *Compare* GFOF § III.D.4.a *with* JDFOF Ch. 10, § XII.D.2.d.

Second, "*only* epidemiologic studies can provide information on modification of the risks of smoking as the cigarette has evolved." 9/29/04 Tr. (p.m.) at 1161:16-22 (Samet) (emphasis added). *See also* JDFOF Ch. 10, § XII.A.2.d.(1). But it is undisputed that dozens of epidemiologic studies comparing lung cancer risks among smokers of higher and lower yield

[47] The principal obstacle to the FTC's action has been the significant delay by the Department of Health and Human Services in responding to the FTC's request for guidance and assistance. JDFOF Ch. 10, § XI.C.2, especially ¶¶ 334-337.

cigarettes, taken as a whole, give the "clear impression" that "there is a lower risk of lung cancer among populations of smokers who use lower yield products. This relationship is evident in the case-control [retrospective] studies as well as in prospective mortality studies . . . ." Monograph 13, US 58700 (at 81) (@); *see also id.* at 96 and 108; 2/16/05 Tr. (a.m.) at 13477:1-10 (Burns); 9/29/04 Tr. (p.m.) at 1162:4-10, 1165:2-21 (Samet); JDFOF Ch. 10, § XII.D.2.d.(1).[48] Nor does the Government allege that the Defendant cigarette manufacturers uniquely possessed secret epidemiologic data that contradicted the publicly available studies. The epidemiologic studies directly assess the disease risks of cigarettes as designed and as used by smokers in their natural environment. JDFOF Ch. 10, § XII.A.2.d.(1). Thus, epidemiology inherently accounts for any tendency of smokers to "compensate" by smoking individual reduced-yield cigarettes more intensively, or by taking advantage of design features that purportedly give cigarettes "elastic" yields. 9/29/04 Tr. (p.m.) at 1161:23-1162:3; 1176:9-23; 1178:10-14 (Samet). *See also* JDFOF Ch. 10, § XII.A.2.d.(1). Epidemiology would also inherently account for any mutagenicity in low tar cigarettes that translated into increased lung cancer risk. JDFOF Ch. 10, § XI.E.2.c.

Third, the Defendant cigarette manufacturers did not uniquely possess important scientific data concerning compensation, the purported "elasticity" of cigarette design, or Ames test results.

[48] It is true that epidemiologic studies that control for cigarettes per day could theoretically be biased to the extent that smokers who switch to reduced-yield cigarettes compensate by smoking more cigarettes each day. This hypothesis was addressed in NCI Monograph 13, which concluded that the hypothesis was unproven. US 58700 (@) at 96. Moreover, the evidence presented at trial was that smokers who switch to lower tar cigarettes do not, on average, increase the number of cigarettes they smoke each day. JDFOF Ch. 10 § XII.D.2.d.(3).

Compensation was reported in the literature — including a discussion of compensation being driven by a need for nicotine — as early as 1945. J.K. Finnegan, P.S. Larson, and H.B. Haag, "The Role of Nicotine in the Cigarette Habit," *Science*, 102:94-96 (1945), JD-000499 (@) (discussed with Dr. Benowitz, 11/104 Tr. (p.m.) at 4528:16-24). While compensation was a "common concern" in the early 1960s, the literature began systematically reporting studies that assessed quantitatively the degree of compensation in the late 1960s and early 1970s. JDFOF Ch. 10, §§ V.B. and V.B. Defendants contributed importantly to the publicly-available information. The early literature on nicotine and compensation was summarized in a book published in 1961 and funded by the tobacco industry through the Tobacco Industry Research Committee. JDFOF Ch. 10, § V.B. The Defendant cigarette manufacturers likewise contributed to later peer-reviewed studies that assessed quantitatively the degree to which compensation was complete. JDFOF Ch. 10, § VII.B. And, in the early 1980s, as a direct result of complaints lodged by certain Defendants concerning the Barclay cigarette, the validity of the FTC's standardized method for measuring tar and nicotine was challenged by Defendant Brown & Williamson Corp. on the basis of compensation. The issue was fully litigated before the FTC and in the courts. Ultimately, based on a presentation of state-of-the-art evidence concerning compensation, including biologic marker studies, the FTC prevailed and the standardized test remained in place. *See* JDFOF Ch. 10, § XI.A.1.

As to "*elasticity*" of design, it is undisputed that no tobacco-burning cigarette design exists that would prevent a smoker from taking more puffs, deeper puffs or longer puffs. *See* JDFOF Ch. 10, § XI.A.[49] Nor were the design features incorporated in the Defendant cigarette

[49] No Government witness testified about the effect of the alleged elasticity purportedly designed into reduced-yield cigarettes. The record is devoid of any evidence that this alleged

[Footnote continued on next page]

manufacturers' reduced-yield cigarettes secret. US 58700 (@) at 15, Table 2-2 ("The design features listed in Table 2-2 should not be considered 'secrets' of cigarette manufacture."); JDFOF Ch. 10, § XI.A. And finally, the Defendant cigarette manufacturers specifically advised the FTC in the mid-1960s, when the FTC was considering implementing the FTC method, that the same cigarette would generate different yields of tar and nicotine depending upon how was it smoked. JDFOF Ch. 10, § VI.B.1[50]

As to *mutagenicity*, apart from being trumped by the epidemiologic data, the Ames test is but one of several short-term biologic assays to assess the potential health risks of reduced-yield cigarettes. JDFOF Ch. 10, § XI.E.2.b. In most of those assays, including tumorigenicity and cytotoxicity studies, reduced-yield cigarettes compare favorably or are equivalent to higher-yield cigarettes *on an equal weight of tar basis*. JDFOF Ch. 10, § XI.E.2.a. Moreover, whether reduced-yield cigarettes have higher Ames test results *on an equal weight of tar basis* than higher-yield cigarettes varies from cigarette-to-cigarette, and Defendants' internal documents reflect data showing that reduced-yield cigarettes generally produce lower Ames test results *on a per cigarette basis* than their higher tar counterparts. JDFOF Ch. 10, § XI.E.2.a.[51]

[Footnote continued from previous page]
elasticity had any meaningful effect on either the extent of compensation with reduced-yield cigarettes or the health risks presented by those products. On this record, the Court would be forced to speculate as to whether this alleged unique knowledge had any effect.

[50] To be sure, the *ability* of smokers to change their puffing patterns to offset reductions in machine-measured yields — *i.e.*, "elasticity" — is not the same thing as the extent to which they do completely offset reductions in FTC-yields by changing the way they smoke individual cigarettes — *i.e.*, engage in "puff" or "within" cigarette compensation. JDFOF Ch. 10, § VI.B. But that does not make Defendants' disclosures to the FTC irrelevant as the Government claims. Gov. Br. at 67.

[51] For these same reasons expressed above, none of the predicate acts associated with the low-tar scheme was made "in furtherance of" a fraudulent scheme, as required by RICO.

c. There Was No Evidence That Any Employee Of The Defendant Cigarette Manufacturers Specifically Intended To Defraud Consumers with Respect to Low Tar Cigarettes.

Defendants' current and former employees, including Dr. Farone, one of the Government's experts, unequivocally testified that Defendants' goal in reducing FTC tar and nicotine yields was to produce less hazardous cigarettes. *See* JDFOF Ch. 10, § X.B.1. No current or former employee testified that, at any time during their employment and prior to the publication of NCI Monograph 13 in 2001, they knew or believed that the lower-FTC yield cigarettes marketed by their employer offered no reduction in health risk.[52]

That direct testimony was confirmed by substantial corroborating evidence that Defendants' employees lacked a specific intent to defraud. First, the fact that the Defendant cigarette manufacturers' development and marketing of reduced yield cigarettes was a response to the changing regulatory environment in which they were forced to compete is powerful evidence they had no specific intent to defraud. For example:

- When the FTC permitted competition on the basis of tar and nicotine yields in the mid-1950s, the Defendant cigarette manufacturers competed in what became known as the "tar derby." JDFOF Ch. 10, § IV.

- When the FTC barred competition on the basis of tar and nicotine yields in the early 1960s, the Defendant cigarette manufacturers stopped competing on that basis and the decline in the sales weighted average tar and nicotine yields of cigarettes sold in this country stalled. JDFOF Ch. 10, § V.

[52] The Government seizes upon a lone 1966 document by PM USA's Myron Johnston, an economist, who asserted that "[t]he illusion of filtration is as important as the fact of filtration." Gov. Br. at 62. But, there is no evidence that this document describes the approach to filtration actually taken by PM USA, much less other Defendants. The PM USA witnesses personally involved in designing filtered cigarettes testified that that was not the company's approach. JDFOF Ch. 10, § X.B.2.g, especially ¶¶ 222-227. Moreover, Drs. Samet and Farone agreed that Defendants' filtered cigarettes were safer than unfiltered cigarettes and even Dr. Burns conceded that he was not saying that 20 filtered cigarettes were as hazardous as 20 unfiltered cigarettes. JDFOF Ch. 10 § XII.C; 2/16/05 Tr. (a.m.) at 13484:3-12 (Burns).

- Starting in the mid 1960s, when the FTC actively encouraged and approved competition on the basis of the FTC's standardized testing method, including the use of descriptors such as "light" to describe cigarettes with FTC yields in a particular range, the Defendant cigarette manufacturers again vigorously competed and the sales weighted average tar and nicotine yields resumed their decline. JDFOF Ch.10, § VI.

Indeed, after reviewing the FTC's "comprehensive, detailed regulation" of competition on the basis of FTC yields, the Eighth Circuit very recently and unanimously held that the "manufacture, distribution, promotion, marketing, and sale of . . . Light [cigarettes]" were "actions taken under the direction of a federal officer," specifically the FTC. *Watson et al. v. Philip Morris,* No. 04-1225, 2005 WL 2036292 at *1 and *4-5 (8th Cir.) (August 25, 2005).

Second, the FTC, acting at the urging of the scientific and public health communities, encouraged competition on the basis of FTC-yields because it perceived those cigarettes as less harmful. JDFOF Ch. 10, § VI.A. As discussed earlier, based on the underlying scientific data, particularly epidemiologic studies, the prevailing opinion of the scientific and public health communities from the mid-1960s through the filing of this lawsuit was that reduced-yield cigarettes posed reduced lung cancer risks. JDFOF Ch. 10, § VII. Thus, the underlying contemporaneous science is also powerful evidence that Defendants lacked a specific intent to defraud.[53]

[53] Additionally, while the Court has rejected summary judgment based on exclusive FTC jurisdiction, *U.S. v. Philip Morris*, 263 F.Supp. 2d 72 (D.D.C 2003) (Order #356), courts in a variety of different contexts are reluctant to substitute their judgment for that of the administrative agency acting within its statutory purview, including review under the Administrative Procedure Act as well as under the judicial doctrine of primary jurisdiction where courts defer taking action on issues then pending before appropriate administrative agencies. 5 U.S.C.A. § 706(2)(A) (establishing standard of review of "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *Far East Conference v. United States,* 342 U.S. 570, 574-75 (1952); *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956); *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 310 (1963); *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 305-06 (1973); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973); *Danielsen v. Burnside-Ott Aviation Training Ctr.*, Inc., 941 F.2d 1220 (D.C. Cir.

[Footnote continued on next page]

These factors — the regulatory environment in which they were forced to compete and the underlying science — fully explain the Defendants' development and marketing of potentially less hazardous cigarettes. By contrast, the RICO conspiracy conjured up by the Government posits irrational behavior by Defendants — *i.e.*, that they falsely marketed as *safer* products that they knew not to be safer while at the same time *not marketing* as *safer* products that *were* actually safer in order to "preserve" their causation position.

Moreover, the evidence marshaled by the Government in its attempt to prove specific intent is largely irrelevant and devoid of context. For example:

- The Government contends that about half of all smokers of low tar cigarettes believe that low tar cigarettes present reduced health risk. Gov. Br. at 63. It never explains how this bears on whether the Defendant cigarette manufacturers specifically intended to market reduced-yield cigarettes that offered no lung cancer risk reduction. And, one would never know from reading the Government's brief that the Government itself and the public health authorities expressly told the public that reduced-yield cigarettes reduced health risks and wanted the public to believe it. JDFOF Ch. 10, § VIII.

- The Government contends that some smokers view switching to reduced yield cigarettes as an alternative to quitting. Gov. Br. at 63. Apart from having no apparent relationship to the Defendant cigarette manufacturers' alleged specific intent to market reduced-yield cigarettes that they knew were, in fact, no safer, nowhere does the Government acknowledge that that was precisely the message the Government and public health authorities conveyed to smokers for decades: Quit, but if you will not, switch. JDFOF Ch. 10, § VIII. Nor would one know from reading the Government's brief that there is no evidence establishing that smokers, in fact, switch instead of quitting. JDFOF Ch. 10, § XIV.B.

[Footnote continued from previous page]
1991); *Covad Commu'ns Co. v. Bell Atlantic Corp.*, 201 F. Supp. 2d 123 (D.D.C. 2002), *aff'd in part, rev'd in part,* 398 F.3d 666 (D.C. Cir. 2005). The Court ought to be particularly reluctant to do so here where the FTC's assessment was consonant with the contemporaneous prevailing opinion of the scientific and public health communities.

- The Government observes that an internal document refers to reduced-yield cigarettes as "health reassurance" cigarettes. Gov. Br. at 59. But, nowhere does the document indicate that "health reassurance" cigarettes were not reduced-risk cigarettes. And, the evidence is to the contrary: BATCo viewed "health assurance" cigarettes as well as so-called "health-oriented" cigarettes, as "health products." JDFOF Ch. 10, ¶¶ 228-231.

VI. ANALYSIS OF THE ACTUAL PREDICATE ACTS ALLEGED BY THE GOVERNMENT REQUIRES JUDGMENT FOR DEFENDANTS AND DEMONSTRATES THAT THE RICO REQUIREMENTS HAVE NOT BEEN SATISFIED

A. The Government Failed To Connect The Alleged Predicate Acts With The "Continuity and Relationship" Necessary To Form a Pattern

In addition to proving at least two racketeering acts for each Defendant, the Government must prove that these acts constituted a "pattern." The acts must bear a sufficient relationship to each other or to "some external organizing principle." *H.J., Inc. v. Northwestern Bell Tel.*, 492 U.S. 229, 238 (1989). In other words, a pattern requires "continuity and relationship." *See supra* § II.A.5. Here the only conceivable "external organizing structures" are the seven schemes to defraud alleged by the Government. It follows that no Defendant can be liable unless it committed at least two predicate acts associated with a particular scheme.[54] In any event, the Government has not sufficiently linked its alleged predicate acts — which range from press releases to advertisements to letters to Congress and compelled testimony — to form a pattern.

The Government contends that the "continuity" element can be determined by reference to *all* of the predicate acts alleged against *all* defendants, rather than on a defendant-specific basis with respect to any predicate acts committed by that particular defendant. Gov. Br. at 142-43. This is incorrect. All of the examples cited by the Court in *H.J., Inc. v. Northwestern*

[54] It bears noting that, as to many of the schemes, the Government has not even *alleged* that a number of the Defendants committed two predicate acts.

Bell Telephone Co., 492 U.S. 229, 242-43 (1989) involved single defendants. In fact, numerous courts have held that — consistent with the language of 18 U.S.C. § 1962(c) — "the requirements of section 1962(c) must be established as to each defendant." *DeFalco v. Bernos*, 244 F.3d 286, 322 n.22 (2d Cir. 2001) (adopting defendant-specific analysis); *see also First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 181 (2d Cir. 2004) (must evaluate RICO allegations "with respect to each defendant individually" to determine continuity); *Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 45 (1st Cir. 1991) (same); *Banks v. Wolk*, 918 F.2d 418, 422 (3d Cir. 1990) (same).[55]

B. The Government Has Failed to Prove That Defendants Conducted the Affairs of an Enterprise Through a Pattern of Racketeering Activity

To prove liability as to any particular defendant, the Government must prove that the defendant "conduct[ed] or participat[ed] . . . in the conduct of" the alleged enterprise's affairs through a pattern of racketeering activity. 18 U.S.C. § 1962(c).

1. Defendants Did Not Conduct the Affairs of an Enterprise

In *Reves v. Ernst & Young*, 507 U.S. 170 (1993), the Supreme Court held that a defendant does not "conduct" or "participate in the conduct" of the affairs of the enterprise by mere involvement in, or assistance to, an illegal enterprise. *See id*. at 177-79.[56] Rather, each defendant must take part in "directing th[e] enterprise's affairs," *id.* at 179, *i.e.*, "participate in the operation or management of the enterprise itself." *Id*. at 185. This "is a very difficult test to satisfy." *Amsterdam Tobacco Inc. v. Philip Morris, Inc*., 107 F. Supp. 2d 210, 216 (S.D.N.Y.

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[55] The Government's reliance upon *United States v. Richardson*, 167 F.3d 621, 626 (D.C. Cir. 1999) is misplaced because that case involved the conspiracy provisions of 18 U.S.C. § 1962(d).

[56] The Government's contention that *Reves* does not apply to an "insider" (or member of the enterprise) has been addressed *supra* at § II.A.4.

2000) (quoting *LaSalle Nat'l Bank v. Duff & Phelps Credit Rating Co.*, 951 F. Supp. 1071, 1090 (S.D.N.Y. 1996)).

The Government has failed to satisfy this rigorous standard. First, as corporations, the Defendants can "conduct" the affairs of an enterprise only through the actions of individual employees. S*ee Goldfine v. Sichenzia*, 118 F. Supp. 2d 392, 403 ("The business entities named by the Plaintiffs in their § 1962(c) claim, as opposed to the individual defendants, cannot possibly 'lead, run, manage, or direct' the affairs of the alleged enterprise, or, for that matter, act 'intentionally' at all, since corporations can act only through their individual officers, directors, or agents (who are not explicitly identified)"). Accordingly, it is necessary to identify the "circle of people who operated or managed the enterprise's affairs." *United States v. Viola*, 35 F.3d 37, 43 (2d Cir. 1994). But the Government has failed to identify the particular individuals employed by each defendant who supposedly "conducted" the affairs of the alleged association-in-fact enterprise.

The Government is plainly wrong in contending that mere participation in the enterprise satisfies *Reves.* Gov. Br. at 22-27. Not everyone who is a member of an enterprise necessarily participates in "leading, running, managing, or directing" the enterprise's affairs. *See Schmidt v. Fleet Bank*, 16 F. Supp. 2d 340, 346 (S.D.N.Y. 1998) ("There is a substantial difference between actual control over an enterprise and association with an enterprise in ways that do not involve control; only the former is sufficient under *Reves* because the test is not involvement but control") (citations and quotations omitted). Nor is it sufficient that a defendant operated or managed one of the members of the enterprise, or implemented the decisions of other members of the enterprise.

The Government also attempts to satisfy *Reves* by alleging participation in the schemes to defraud. Gov. Brief at 23. Even if these allegations were true — and they are not — mere participation in a scheme to defraud does not satisfy — and indeed, is irrelevant to — *Reves*' "operation and management" test. *See, e.g., Chisolm v. Charlie Falk Auto Wholesalers, Inc*., 851 F. Supp. 739, 763 (E.D. Va. 1994) (finding defendant to be "more appropriately characterized as a partner in this scheme, participating in the operation and management of the *scheme*, rather than in the affairs of [the enterprise]," and that as a result, plaintiffs failed to show that the defendant "participated in the conduct of [the enterprise's] affairs, not just its own affairs"), *vacated on other grounds*, 95 F.3d 331 (4th Cir. 1996); *Stone v. Kirk*, 8 F.3d 1079, 1092 (6th Cir. 1993) (that defendant may have "engaged in a pattern of racketeering activity when he repeatedly violated the anti-fraud provisions of the [federal] securities laws," does not suggest that he "direct[ed]" the enterprise's affairs); *Goldfine*, 118 F. Supp. 2d at 404 (that defendant may have "intentionally assisted in the purported scheme [is] . . . insufficient as a matter of law to" satisfy *Reves*' "operation" or "management" test).

Thus, the Government's allegations are entirely insufficient to meet the *Reves* standard. For example, the Government alleges that each Defendant "participated in the conduct" of the enterprise through making and implementing decisions through TIRC/CTR, the Tobacco Institute, and other joint committees and organizations. Gov. Br. at 22-23. However, while the Government points to these entities in identifying the purported "enterprise," the Government has failed to show the identity of the individuals who formed the structure and provided the continuity of personnel of the alleged "enterprise." JDFOF Ch. 13, ¶ 24.

2. Defendants Have Not Conducted the Affairs of the Enterprise Through the Alleged Pattern of Racketeering Activity

Furthermore, to establish a Section 1962(c) violation, it is not enough to prove that each defendant participated in the "operation or management" of the "enterprise's affairs." Rather, the Government must show that such "operation or management" was accomplished "through a pattern of racketeering activity." 18 U.S.C. § 1962(c).

As the D.C. Circuit has held, "Congress in enacting the RICO statute did not purport to outlaw the commission of the predicate acts. It sought rather to outlaw the commission of the predicate acts only when those acts were the vehicle through which a defendant 'conduct[ed] or participat[ed] . . . in the conduct of [the] enterprise's affairs.'" *Yellow Bus Lines v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948, 954-55 (D.C. Cir. 1990) (quoting 18 U.S.C. § 1962(c)). Yet the Government has not shown that the alleged predicate acts were "the vehicle through which" each defendant "conduct[ed] or participat[ed] . . . in the conduct of [the] enterprise's affairs." In other words, to the extent that Defendants exercised any control over the supposed enterprise's affairs it did so through entirely legitimate activities.

Although the Government conclusorily and vaguely contends that "[e]ach Defendant had some part in directing the affairs of the enterprise by coordinating and causing the public dissemination of false, misleading, or deceptive statements," Gov. Brief at 23, it fails to explain how the commission of these acts actually enabled each Defendant to "direct" the enterprise. Again, the Government's contention, at most, suggests that the Defendants participated in the "operation" or "management" of the alleged racketeering *scheme*, rather than of the "*enterprise's* affairs." *See, e.g., Chisolm*, 851 F. Supp. at 763; *Stone*, 8 F.3d at 1092; *Goldfine*, 118 F. Supp. 2d at 404; *Biofeedtrac, Inc. v. Kolinar Optical Enters. & Consultants, SRL*, 832 F. Supp. 585, 591.

C. The Government Has Failed to Prove That Defendants Caused the Mailings or Wire Transmissions in Question

On the threshold issues of whether the items in question for each predicate act were ever mailed or wired at all – and whether Defendants "caused" such mailings – the Government's evidence is extremely thin and (in most cases) nonexistent. The Government refers only to the insufficient allegations in its Final Proposed Findings of Fact and Conclusions of Law in support of its assertion that it has proven that Defendants "caused" mailings, Gov. Brief at 133; Defs.' Final Proposed Concl. of Law at ¶ 280-282. At this stage, the Government must rely on actual evidence introduced at trial, not mere pretrial submissions. Before trial, this Court, over Defendants' opposition, granted the Government's request to take judicial notice that 26 publications were regularly mailed via the U.S. mails. Order # 595. Defendants continue to believe this ruling was error. *E.g.*, *United States v. Walters*, 997 F.2d 1219, 1223 (7th Cir. 1993).[57] The Government also relies upon two "declarations" to prove mailings. These declarations (by Patricia Tobin and Carlotta Figliulo) — which were not offered as trial exhibits until after the trial was over and which Defendants have objected to on hearsay grounds — are also objectionable because they clearly contain "expert" testimony but neither of the declarants was ever designated as an expert, deposed, or subject to *Daubert*.

As detailed in Defendants' Proposed Findings, there was a failure of proof as to the issue of whether Defendants caused a mailing or wire transmission as to a great number of the predicate acts. JDFOF Ch. 16, ¶¶ 48, 60, 132, 153, 156, 167, 190, 258, 269, 275, 290, 293, 305, 308, 310, 316, 325, 375, 396, 427, 441, 449, 477, 479, 489, 494, 523, 527, 529, 551, 567, 575,

[57] Defendants incorporate by reference their Opposition to Partial Summary Judgment on the Element that Defendants Have Caused Mailings and Wire Transmissions, dated 3/3/04, and their opposition to the United States' Motion for Judicial Notice, dated 7/23/04.

583, 589, 592, 599, 602, 607, 608, 622, 643, 645, 655, 686, 689, 691, 708, 726, 732, 748, 755, 763, 767, 776, 789, 795, 800, 807, 814, 829, 843, 846, 856, 878, 892, 898, 914, 916, 926, 933.

The Government cannot prove that a given document was mailed simply because Defendants often used the mails. Gov. Br. at 133.[58] Unless there is specific evidence beyond mere speculation that a Defendant actually caused a mailing, the Government has not satisfied its burden. Nor does the mere fact that a press release was issued necessarily mean that it was mailed or wired.

D. The Government Cannot Satisfy the Two Act Requirement by Seeking to Hold Other Defendants Liable for the Alleged Predicate Acts of CTR and TI.

The Government attempts to sidestep the requirement of proving that each defendant committed the requisite two predicate acts by asserting that the Defendants "aided and abetted" violations by others. By doing so, the Government seeks to attribute mail and wire fraud allegedly committed by others (mostly CTR and TI) to the manufacturer defendants. Gov. Br. at 133-134.

The Government raised this same aiding and abetting issue before trial, and the Court declined to rule on it at that time, noting that "a legal issue of this complexity and significance

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[58] *See, e.g., United States v. Sprick*, 233 F.3d 845, 854 (5th Cir. 2000) (when letters are regularly sent by private courier or similar methods of correspondence, "the inference that the United States mails . . . were employed is cast into serious doubt."); *United States v. Massey*, 827 F.2d 995, 999 (5th Cir. 1987) ("the use of circumstantial evidence does not relieve the Government of its burden of establishing use of the mails 'beyond a mere likelihood or probability' . . . or by more than mere speculation") (citations omitted); *United States v. Srulowitz*, 785 F.2d 382, 387 (2d Cir. 1986) (mere fact that letter was in company files was too "thin" to support fact of mailing); *United States v. Scott*, 730 F.2d 143, 147 (4th Cir. 1984) ("probability" of mailing insufficient); *United States v. Oldenburg*, 762 F. Supp. 272, 275 (N.D. Cal. 1991) ("mere probability" of mailing insufficient); *United States v. Wolfson*, 322 F. Supp. 798, 814 (D. Del. 1971) (requiring proof "of an *invariable* custom or usage") (emphasis added), *aff'd*, 454 F.2d 60 (3d Cir. 1972). Thus, for example mere "probability" is not sufficient to convict a defendant of mail fraud if the proximity of his office to the destination does not eliminate the possibility of delivery by other means. *See Scott*, 730 F.2d at147).

may well be illuminated by the factual context in which it is developed." *United States v. Philip Morris, USA, Inc.*, 327 F. Supp. 2d 13, 21 (D.D.C. 2004). But the Court also noted that the issue had "significant ramifications in terms of expanding the scope of RICO." *Id.*

The factual record at trial reveals that the Government wishes to use membership in and funding of CTR and TI as conclusive proof that Defendants "aided and abetted" any predicate acts committed by those organizations. Gov. Br. at 133, 135. Wholly apart from whether RICO permits aiding and abetting — and it does not — this evidentiary record is insufficient to prove aiding and abetting, "causation," or any similar theory.

Moreover, aiding and abetting liability under RICO is incompatible with the reasoning of the Supreme Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 176 (1994), which held that there was no aiding and abetting liability under the Securities Exchange Act. Aiding and abetting liability may not be imposed in the absence of express statutory language and "Congress has not enacted a general civil aiding and abetting tort liability statute." *Id*. at 182. The conclusion in *Central Bank* rings true in this civil RICO case as well. "If, as respondents seem to say, Congress intended to impose aiding and abetting liability, we presumed it would have used the words 'aid' and 'abet' in the statutory text. But it did not." *Id*. at 176-177.

The only aiding and abetting statute cited by the Government is the *criminal* aiding and abetting statute (18 U.S.C. § 2(b)), which has no application to this *civil* RICO proceeding.[59] Indeed, numerous courts have rejected "aiding and abetting" liability under civil RICO in the wake of *Central Bank*. *See, e.g., Pa. Ass'n of Edwards Heirs v. Rightenour*, 235 F.3d 839, 840,

[59] Likewise, the cases relied upon by the Government are all *criminal* cases and are thus irrelevant. *Central Bank* announced a principle for *civil* cases.

843-44 (3d Cir. 2000) (citing *Central Bank* for proposition that "in the absence of statutory authorization, there is no presumption in favor of recognizing a civil aiding and abetting claim" and rejecting "aiding and abetting" liability under RICO); *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 657 (3d Cir. 1998) (same), *overruled on other grounds, Forbes v. Eagleson*, 228 F.3d 471 (3d Cir. 2000). The Government cannot avoid these cases merely because the Government is the plaintiff in this case. *Central Bank*, for example, observed that aiding and abetting is not authorized "either for suits by the Government (when the Government sues for civil penalties or injunctive relief) or for suits by private parties." 511 U.S. at 182.[60]

And the cases also reject any distinction between aiding and abetting a RICO violation and aiding and abetting the underlying predicate acts. Gov. Br. at 135 n.90. *Rightenour*, 235 F.3d at 841 (no aiding and abetting liability when defendant "had aided and abetted RICO predicate acts of mail and wire fraud"); *Rolo*, 155 F.3d at 650 (plaintiff alleged that defendants "aided and abetted the pattern of racketeering activity").

E. Defendants Did Not Sell Directly To Consumers and Did Not "Obtain Money or Property" From Them

Finally, Defendants must intend to "obtain money or property," 18 U.S.C. §§ 1341, 1343, from the alleged victims of the fraud. *E.g.*, *United States v. Lew*, 875 F.2d 219, 222 (9th Cir. 1989) (reversing mail fraud conviction where government failed to prove "an intent to obtain

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[60] *Jubelirer v. Master Card Int'l*, 68 F. Supp. 2d 1049, 1054 (W.D. Wis. 1999) (same); *Touhy v. N. Trust Bank*, No. 98 C 6302, 1999 WL 342700, at *3 (N.D. Ill. May 17, 1999) (same); *Soranno v. N.Y. Life Ins. Co.*, No. 96 C 7882, 1999 WL 104403, at *8 (N.D. Ill. Feb. 24, 1999) (same); *Ross v. Patrusky, Mintz & Semel*, No. 90 Civ. 1356, 1997 U.S. Dist. LEXIS 5726, at *36-37 (S.D.N.Y. April 29, 1997) (same); *Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison*, 955 F. Supp. 248, 255-56 (S.D.N.Y. 1997) (same); *LaSalle Nat'l Bank v. Duff & Phelps Credit Rating Co.*, 951 F. Supp. 1071, 1088-89 (S.D.N.Y. 1996) (same); *Dep't of Econ. Dev. v. Arthur Andersen & Co.*, 924 F. Supp. 449, 476 (S.D.N.Y. 1996 (same); *Bowdoin Constr. Corp. v. R.I. Hosp. Trust Nat'l Bank*, 869 F. Supp. 1004, 1009 (D. Mass. 1994).

money or property from the victim of the deceit"); *United States v. Evans*, 844 F.2d 36, 39 (2d Cir. 1988) (scheme to defraud "must involve the deceptive obtaining of property"); *Monterey Plaza Hotel L.P. v. Local 438 of the Hotel Employees Union*, 215 F.3d 923, 926 (9th Cir. 2000) (mail and wire fraud statutes "explicitly require an intent to obtain 'money or property from the one who is deceived'") (quoting 18 U.S.C. §§ 1341 and 1343).[61] Here, the alleged victims are consumers. But Defendants do not "obtain" money from consumers in connection with the sale of cigarettes. Instead, consumers purchase cigarettes from retailers, who, in turn, purchase from wholesalers or distributors. It is the wholesalers or distributors who purchase from the defendant manufacturers — and from whom Defendants "obtain money or property." But the Government does not contend that the wholesalers and distributors were defrauded in any way by Defendants. Accordingly, the very structure of the Government's fraud allegations demonstrates that the Government's RICO claims must be dismissed because the Defendants are not alleged to have obtained money or property from the victims of the fraud.[62]

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[61] Any contention that the "obtain" requirement applies only to the second clause in 18 U.S.C. § 1343 but not to the first "scheme to defraud" clause is foreclosed by the Supreme Court's decision in *Cleveland v. United States*, 531 U.S. 12, 15, 26 (2000) (noting that the Supreme Court decision in *McNally v. United States*, 483 U.S. 350, 358 (1987) rejected the argument that the two uses of the mail fraud statute should be construed independently).

[62] Any concern that literal application of the statute would insulate manufacturers who sell only indirectly to consumers from RICO liability cannot overcome the plain words of the statute. But this need not be of concern since the intent behind RICO was not to federalize product liability law; it was to prevent organized crime from infiltrating legitimate businesses. In any event, numerous cases hold that, just as under the antitrust laws, indirect purchasers cannot sue alleged RICO violators for damages. *McCarthy v. Recorder Serv., Inc.*, 80 F.3d 842, 855 (3d Cir. 1996) (RICO plaintiffs cannot escape the absolute bar of the "direct purchaser" rule); *Carter v. Berger*, 777 F.2d 1173, 1175-76 (7th Cir. 1985) (indirect purchaser bar "should apply to RICO cases, not the least because the damages provision in § 1964(c) is practically verbatim the damages provision in the antitrust laws"); *Sperber v. Boesky*, 849 F.2d 60, 65 (2d Cir. 1988) (indirect purchasers cannot recover under RICO).

VII. THE GOVERNMENT HAS NOT PROVEN THE EXISTENCE OF A CONSPIRACY TO VIOLATE RICO

The Government contends that each defendant conspired in violation of 18 U.S.C. § 1962(d) by knowingly agreeing to the commission of a violation of 18 U.S.C. § 1962(c). Gov. Br. at 144. "To state a claim under subsection (d) of § 1962, a plaintiff must allege 'facts indicating *an agreement* by the Defendants that someone would commit two specific predicate acts on behalf of the enterprise." *Barry Aviation, Inc. v. Land O'Lakes Municipal Airport Comm'n*, 366 F. Supp. 2d 792, 806 (W.D. Wis. 2005) (emphasis added); *see also United States v. Smith*, 413 F.3d 1253, 1266 (10th Cir. 2005) ("*knowing about and agreeing to* facilitate the commission of two or more acts"). Intent (or agreement) to commit the underlying offense is a fundamental element of § 1962(d). *See Smith*, 413 F.3d 1253, 1273 (10th Cir. 2005) ("to decide whether there was sufficient evidence to convict Mr. Smith of conspiring to violate § 1962(c), we must first determine whether there was sufficient evidence for a jury to find that Mr. Smith knew about and agreed to facilitate the commission of at least two of those five predicate acts").

The Government identifies no evidence that any Defendant ever "agreed" that it or anyone else would violate RICO by committing two or more predicate acts. The Government argues instead for a conclusive presumption that if any defendant actually committed two or more racketeering acts, it agreed (*i.e.*, conspired) to commit those acts. Gov. Br. at 148-49. But if this were the law, *any* defendant who violated 18 U.S.C. § 1962(c) would also *automatically* violate 18 U.S.C. 1962(d). This ignores the fact that section 1962(d) imposes independent requirements. *See, e.g., United States v. Fernandez*, 388 F.3d 1199, 1231 (9th Cir. 2004) (quoting *United States v. Bennett*, 44 F.3d 1364, 1374 (8th Cir. 1995) ("[a] RICO conspiracy requires proof of the additional element of an agreement."). The Government's contention is

also inconsistent with this Court's decision in *United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 116, 127 (D.D.C. 2000), in which the Court rejected the Government's request to infer a conspiracy merely because BAT Industries allegedly "utilized the strategy and tactics of other Defendants," including promotion of the "false controversy" or "suppression of . . . research." 116 F. Supp. 2d at 127. Likewise, mere "coordinat[ion] [of] significant aspects of [the Defendants'] public relations, scientific, legal, and marketing activity" does not prove the requisite intent to facilitate two predicate acts. Gov. Br. at 148. Nor can mere membership in trade associations such as CTR or TI amount to *prima facie* proof of membership in a RICO conspiracy.[63]

VIII. SPECIFIC ARGUMENTS CONCERNING PARTICULAR DEFENDANTS

A. There Is No Conduct, On The Part Of BATCo, Over Which This Court Has Jurisdiction To "Prevent And Restrain"

Pursuant to 18 U.S.C. § 1964(a), federal courts are vested with limited equitable jurisdiction — *i.e.*, jurisdiction to "prevent and restrain" future RICO violations. *See United States v. Philip Morris USA Inc. et al.*, 396 F.3d 1190 (D.C. Cir. 2005). While it is not admitted — indeed, it is vigorously denied — that any of BATCo's past conduct was at all unlawful, there is certainly no future conduct, on the part of BATCo, over which this Court has jurisdiction to "prevent and restrain." This is because: (a) BATCo engages in no business or other activities in the United States, and (b) there is no evidence that BATCo's future

[63] In addition, although Defendants recognize that this Court ruled in the summary judgment context that the *Reves* operation and management test does not apply to RICO conspiracies, Defendants continue to respectfully disagree with this Court's decision. *See United States v. Philip Morris*, 327 F. Supp. 2d 13 (D.D.C. 2004). In addition, the facts described above (*supra* Section IV) evince withdrawal from any conceivable "conspiracy."

extraterritorial conduct will be intended to, and will result in, direct and substantial effects on the American public. Accordingly, the Government's claims against BATCo must be dismissed.

1. There Is No Evidence That BATCo Will Act In The United States, Going Forward

a. BATCo Conducts No Business And Makes No Public Statements In The United States

The Government failed to prove that BATCo, an English corporation, is reasonably likely to act in the United States, going forward. Indeed, the evidence shows quite the opposite. BATCo does not sell, market, or advertise its State Express 555 cigarettes in the United States — nor does it "control" the entity that sells this brand of cigarettes here. *See* JDFOF Ch. 12, § IV.F.1; GFOF § IV.C.[64] BATCo makes no public statements in the United States or via the Internet. *See* JDFOF Ch. 12, §§ IV.F.2, F.5. BATCo is not a member of any U.S.-based industry organization. *See* JDFOF Ch. 12, § IV.F.2. BATCo has no corporate affiliation with any manufacturer, distributor, or retailer of U.S. cigarettes. *See* JDFOF Ch. 12, § IV.F.3.

b. BATCo Does Not Engage In Domestic Conduct With The Other Defendants In This Case

Additionally, there is no evidence that BATCo will undertake to act domestically with any of the other Defendants in this case in furtherance of a RICO fraud or conspiracy. The evidence shows that the only Defendant with which BATCo ever had non-incidental U.S. contact in the past, was Brown & Williamson.[65] However, Brown & Williamson no longer exists as a

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[64] The Government seeks to attribute, to BATCo, a 1954 du Maurier advertisement appearing in *The New Yorker*. There is no evidence that BATCo manufactures or sells du Maurier cigarettes. Rather, the evidence shows that du Maurier is a cigarette brand of non-party Imperial Tobacco Limited. US 85077 (at 321989116) (@). The Government even admits this in its Final Proposed Findings of Fact, filed on July 1, 2004. GFOF § IV.F ¶ 2705. The Record further shows that BATCo cigarettes were not sold in the U.S. until 1985. US 77453 (at pp. 56-58) (@).

[65] "Incidental" U.S. contact with the Defendants in this case would, for example, include BATCo's interaction with CTR. While the Government asserts that "[c]ommunication and

[Footnote continued on next page]

cigarette manufacturer, and the Government does not even attempt to argue that there is any proof that Brown & Williamson Holdings, Inc., will engage in future RICO-violative conduct in the United States. *See* JDFOF Ch. 12, §§ IV.D.1, IV.F.4. The Government has provided no evidence or argument[66] that BATCo's U.S. contact with the other Defendants in this case will remain other than incidental. *See* JDFOF Ch. 12, § IV.F.4. Accordingly, there is simply no likelihood that BATCo will engage in U.S. conduct that violates RICO.

c. BATCo's Past Conduct Is Not Probative Of Future Domestic Conduct That May Give Rise To RICO Violations

There was an utter dearth of evidence, at trial, that BATCo engaged in any unlawful conduct, or that it was part of a RICO fraud or conspiracy. The record does not contain a single past public statement by BATCo, much less a BATCo statement made to the U.S. public.[67]

[Footnote continued from previous page]
contact between high level smoking and health research scientists at BATCo and scientists affiliated with TIRC/CTR was frequent and direct," Gov. Br. at 17, the evidence relied upon by the Government shows that BATCo scientists met with CTR scientists in the U.S. three times (once in 1958, once in 1979, and once in 1984) in CTR's 40+ year existence. And there was no evidence that any of these visits with CTR scientists was anything more than a "fact finding mission." *See* GFOF § I.B.

[66] At closing argument, counsel for the Government speculated that some unidentified interaction may at some future time occur between BATCo and R.J. Reynolds. Counsel provided not a scintilla of support for this speculation, and although encouraged by the Court to set forth its allegations in its post-trial brief, *see* 6/9/05 Tr. (a.m.) at 23416:14-19, the Government has apparently abandoned the claim.

[67] In its post-trial brief, the Government does not explain why the absence of any BATCo statements to the U.S. public is not fatal to its claim that BATCo participated in making fraudulent misrepresentations. Instead, it confusingly lumps BATCo in with the domestic Defendants and implies that BATCo's actions are U.S.-based while citing evidence only of foreign activities. For example, the Government argues that BATCo is "still, to this day, fraudulently denying the health effects of ETS exposure …." Gov. Br. at 41. Yet the only evidence that it can cite in support of its claim is a page from the U.K.-based website of BATCo's corporate parent, British American Tobacco plc, Gov. Br. at 42; JD-013221 (#) — a website which the Government concedes is not under the "control" of BATCo. *See* GFOF § IV.B.

JDFOF Ch. 12, § IV.F.5. Moreover, BATCo's past alleged RICO misconduct in the U.S. is premised entirely on its interactions with Brown & Williamson and its conduct in this litigation.

The Government argues in its post-trial brief that the intracorporate conspiracy doctrine articulated by the Supreme Court in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), does not apply in RICO cases. Gov. Br. at 149-50. However, several courts, including the Eighth Circuit, have relied on *Copperweld* in holding that corporate affiliates cannot, as a matter of law, conspire to violate RICO. *See, e.g.*, *Fogie v. Thorn Americas, Inc.*, 190 F.3d 889, 898 (8th Cir. 1999); *see also New Beckley Mining Corp. v. Int'l Union, United Mine Workers of Am.*, 18 F.3d 1161, 1164-65 (4h Cir. 1994). The D.C. Circuit, citing *Copperweld*, has held that a parent and subsidiary cannot enter into a common law civil conspiracy to take part in negligent conduct. *See Okusami v. Psychiatric Inst. of Washington, Inc.*, 959 F.2d 1062, 1064-65 (D.C. Cir. 1992). *Okusami* clearly suggests that the D.C. Circuit will follow the Eighth Circuit's holding in *Fogie*.

Furthermore, the record does not support the Government's claims. The gravamen of the Government's claims is that BATCo and Brown & Williamson engaged in the wrongful "suppression of information" about smoking and health. According to the Government, "[t]he issue before the Court regarding suppression of information is . . . whether important information regarding the health consequences of smoking and the addictiveness of nicotine was shared, as promised, with the American people." Gov. Br. at 87. However, even assuming, *arguendo*, that RICO liability could be predicated on a breach of state law fiduciary duty (which it cannot, *supra*), this is not an issue for BATCo. There is no proof that BATCo made any promises to the American public. BATCo never undertook a duty to disclose, and there was no proof of any fiduciary relationship between BATCo and the U.S. public that would create a legal duty to

disclose. Because BATCo has never assumed a fiduciary duty to disclose, and because the existence of such a duty would have to be a prerequisite for breach of same under RICO, no liability can attach to BATCo here, as a matter of law. *See United States v. Texas*, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law."). *See also Chiarella v. United States*, 445 U.S. 222, 227-228 (1980) (finding a duty to disclose based on a "fiduciary or other similar relation of trust and confidence" to be an indispensable element of fraudulent concealment at common law); *id.* at 235.

In the absence of any evidence of fraudulent breach of its duty to disclose, the Government argues that BATCo's conduct which led to two contempt orders in this litigation "Demonstrates a Reasonable Likelihood of Future Wrongdoing" that requires remedies far beyond traditional injunctive relief. Gov. Br. at 156-161. This argument fails because the Government has not demonstrated that BATCo's past litigation conduct was part of a RICO fraud or conspiracy, nor has it demonstrated a likelihood that BATCo will violate RICO in the future by failing to comply with discovery orders in the future — and has introduced no evidence that additional remedies to ensure discovery compliance are needed.

Indeed, the conduct that led to the contempt orders of the Court — the failure to produce documents of BATCo's sister affiliate in Australia,[68] and the failure to produce a 30(b)(6)

[68] BATCo respectfully submits that the Court erred in finding that BATCo "controlled" its affiliate BATAS for purposes of document production and further erred in not applying the correct foreign law in ruling on BATCo's ability to comply with Order ## 343, 354, and 411. *See* R. 2030; R. 2060; R. 2351; R. 2374; R. 2301; R. 2261; R. 2296; R. 2627; R. 2647; R. 2676; R. 2686; R. 2744; R. 2835; R. 2954.

witness with personal knowledge of the privileged Foyle Memorandum[69] — is most unlikely to ever occur in future U.S. litigation. And BATCo has never been requested to produce documents of its sister affiliates, nor has it ever been requested to provide testimony about its privileged documents, in any other previous U.S. litigation.

Finally, the most competent and effective entity to police compliance with discovery obligations in future litigation is the court with jurisdiction over the litigation, not Court-appointed officers. This record is devoid of any evidence that would support a finding that U.S. trial courts lack the means to enforce their discovery orders.

2. The Court Is Without Subject Matter Jurisdiction To Regulate BATCo's Foreign Conduct

In short, the evidence proves that the only conduct BATCo is reasonably likely to engage in, going forward, will occur outside of the territorial bounds of the United States. The Court, however, is without subject matter jurisdiction to regulate BATCo's foreign conduct.

As courts have recognized, the "RICO statute is silent as to any extraterritorial application." *See North South Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996). Therefore, RICO must be read in light of the longstanding "legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application." *Small v. United States*, 125 S. Ct. 1752, 1755 (2005); *see also EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). This "presumption against extraterritoriality" can only be overcome upon a showing, by

[69] BATCo respectfully submits that the Court erred in finding on reconsideration that BATCo had violated Order #341. BATCo complied by producing a witness with knowledge of the *McCabe* decision even though the witness had not read the actual Foyle Memorandum. *See* R. 1681; R. 1682; R. 1713; R. 3220; R. 4998. Moreover, the Court erred in imposing a sanction on BATCo that went far beyond the preclusion of evidence requested in the 30(b)(6) notice at issue and was not justified by any of BATCo's conduct. *See* R. 3220; R. 4998; R. 5018; 5/3/05 Tr. (p.m.) at 20168:1-20170:12. Finally, the Court erred in accepting into evidence portions of the Foyle Memorandum. *See* R. 4917; 2/15/05 Tr. (a.m.) at 13273:11-13289:8.

the Government, that BATCo's foreign conduct is intended to, and will result in, direct and substantial effects on the American public. *See North South Fin. Corp.*, 100 F.3d at 1051-1052; *see also Environmental Defense Fund v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993); *In re South African Apartheid Litig.*, 346 F. Supp. 2d 538, 556 (S.D.N.Y. 2004) ("The effects test is satisfied where the foreign activities have substantial direct effects in the United States"); *Nuevo Mundo Holdings v. PricewaterhouseCoopers, LLP*, No. 03 Civ. 0613, 2004 WL 2848524, at *2 (S.D.N.Y. Dec. 9, 2004) (party "seeking to invoke the subject matter jurisdiction of the district court bears the burden of demonstrating that there is subject matter jurisdiction in the case."); *id.* at *3 to *4. The "ultimate inquiry" is "whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to [regulating foreign conduct] rather than leave the problem to foreign countries." *North South Fin. Corp.*, 100 F.3d at 1052 (internal quotations omitted).

For an effect to be "direct" it must be the "immediate consequence of the defendant's activity." *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004) *citing Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). An effect that is "remote" or not the "foreseeable result of the conduct outside of the United States" is not a direct effect. *Doe I v. Unocal Corp.*, 395 F.3d 932, 961 (9th Cir. 2002); *In re South African Apartheid Litig.*, 346 F. Supp. 2d at 556.

Significantly for this case, the "effects" test requires proof of a specific, articulated, loss or injury. *See Unocal*, 395 F.3d at 961 ("the 'effects' test establishes jurisdiction for *foreign conduct that directly causes domestic loss or injury*.") (emphasis in original); *id.* at 962 (requiring "specific facts" to support finding of substantial effects in the United States); *Nuevo*

Mundo, 2004 WL 2848524 at *4. By contrast, "generalized effects in the United States are insufficient to meet this standard." *In re South African Apartheid Litig.*, 346 F. Supp. 2d at 556.

There has been no proof — nor even an articulation — of a specific and substantial loss or injury by the American public that will result as a consequence of any extraterritorial conduct by BATCo. *See* JDFOF Ch. 12, § IV.F.5. The Government implicitly concedes as much, as it does not even attempt to argue otherwise in either its findings of fact or post-trial brief.

Moreover, the Government has utterly failed to identify or quantify any specific loss or injury that was the consequence of BATCo's *past* extraterritorial conduct — including BATCo's: (1) membership in non-U.S. industry organizations, (2) alleged public statements, and (3) alleged document management practices (including document management practices of BATCo's affiliates). *See* JDFOF Ch. 12, § IV.F.5; *see also* JDFOF Ch. 8, §§ III-IV.

For instance, while the overwhelming focus of the Government on BATCo concerned the implementation of the document management practices of its affiliate W.D. & H.O. Wills ("Wills"), there was no proof offered that anything happened in the U.S. as a result. There was no proof of the identity of any of the alleged documents destroyed,[70] and no evidence of what would have occurred if the documents had not been destroyed. It would be sheer speculation to find, on this record, that if not purportedly destroyed, the documents at issue would have been

[70] To the extent the Government seeks to rely on the now-reversed *McCabe* judgment to prove that documents were destroyed by Wills, those proposed findings should be disregarded because the *McCabe* judgment (US 75779) was excluded from evidence by this Court. *See* 10/4/04 Tr. (a.m.) at 1517:9-13. Counsel for the Government should further be held to its representation at trial that "just to be clear in case there's any confusion on this issue, we obviously are not asking the Court to in any way adopt what is in the *McCabe* decision." 2/15/05 Tr. (a.m.) at 13299:23-25. But if the Court is inclined to consider the Government's arguments based on the facts found by the *McCabe* trial court, it should properly consider the facts as found by the appellate court in reversing *McCabe*. *See British American Tobacco Australia Serv. Ltd. v. Cowell* [2002] VSCA 197 (finding that Wills' document retention practices complied with Australian law, and that Justice Eames' view of the evidence was tainted by bias).

produced in Australian litigation; and if produced in Australian litigation would have been published in the U.S., or requested in U.S. litigation; and even ranker speculation to conclude that these unidentified documents, produced or published in the 1990s, would have had any effect, much less a direct and substantial one, on anyone in the U.S. It would be equally speculative to find that any of *BATCo's* past or future extraterritorial conduct had a direct and substantial effect on the U.S. public because this record is simply devoid of any evidence of such effect.[71]

Compounding the Government's failure to prove that BATCo's extraterritorial conduct will be intended to, and will result in, direct and substantial effects on the American public, is its absolute failure to address — let alone prove — that it would be *reasonable* for the Court to regulate BATCo's foreign conduct. *See* Restatement (Third) of Foreign Relations Law § 403; *see also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 812-822 (1993) (Scalia, J. dissenting).[72]

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[71] While the Government makes certain generalized claims about the "enormous, deleterious impact" on the American public of the alleged fraud of Defendants, Gov. Br. at 94, nowhere does it specify or quantify the precise loss or injury, and certainly there is no attempt to identify or quantify the contribution, if any, of BATCo's foreign conduct to this generalized "impact."

[72] On a related point, the Court should deny the Government's request for the drawing of adverse inferences against BATCo based on Nicholas Cannar's invocation of the *Australian* right against self-incrimination, for all of the reasons set forth in Defendants' briefs on this issue. *See* R. 5298; R. 5374. In addition, contrary to the Government's assertion, § 139 of the *Restatement (Second) of Conflicts of Laws* does *not* differentiate between the right to assert the privilege against self incrimination and the inferences that may be drawn from that assertion. Moreover, the Government's reliance on § 135 is misleading and misplaced because that section of the Restatement is specifically made subject to § 139 — which dictates that Australian law controls. Section 135 also, by its terms, only applies to rules for the management of litigation — not rules that are designed to affect the decision on particular issues, such as the Australian rule against drawing adverse inferences. *See* Restatement §§ 133-35. Further, because the right against self incrimination is a substantive right, and Australia's categorical bar against the drawing of adverse inferences from same is "an integral part of the right . . . [and] inseparably bound [to that right, such] that application of the usual procedural rule of the forum would substantially impair the enforcement of the right," the Court should apply Australian law. *Maryland Casualty Co. v.*

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3. Dismissal Of BATCo Is Required Because Any Judgment Rendered Against BATCo Will Amount To Nothing More Than An Advisory Opinion

Because there is no conduct, on the part of BATCo, which this Court may "prevent and restrain" under the RICO statute, dismissal of the Government's claims against BATCo is required. *See Wymbs v. Republican State Exec. Comm. of Florida*, 719 F.2d 1072, 1085 (11th Cir. 1983) ("If the court cannot relieve the harm of which a plaintiff complains, the court should not take the case, in the absence of an effective remedy its decision can amount to nothing more than an advisory opinion. Article III courts must follow the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive."). *See also North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

B. The Government Failed to Prove Its RICO Claim Against Altria

1. The Government Failed To Prove That Altria Directs And Controls The Actions Of Its Subsidiaries

The Government must prove each element of its RICO claim against each defendant. *E.g., Aetna Cas. & Sur. Co. v. Rodco Autobody*, 43 F.3d 1546, 1558 (1st Cir. 1994). The Government suggests that it need not do this against Altria because Altria allegedly "direct[s] and control[s] the actions of Philip Morris." Gov. Br. at 24. The Government is wrong.

A plaintiff seeking to pierce the corporate veil must show that "there [is] such unity of interest and ownership that the separate personalities of the corporation and the [shareholder] no

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Williams, 377 F.2d 389, 395 (5th Cir. 1967). BATCo's and Mr. Cannar's settled expectations with respect to the application of Australian law further militate in favor of application of Australian law. And it would be unduly prejudicial to apply such an inference against not only BATCo, by whom Mr. Cannar was formerly employed, but the other Defendants, who have never exercised any control over him. *See* Fed. R. Evid. 403. Also the Court should reject the Government's invitation to consider the Australian judge's assessment of Mr. Cannar's crediblity. Gov. Br. at 91. Not having observed Mr. Cannar's testimony itself, the Court cannot rely on the credibility assessment of another jurist from another country.

longer exist." *E.g., Labadie Coal Co. v. Black*, 672 F.2d 92, 96 (D.C. Cir. 1982); *Greenberg v. Commonwealth*, 499 S.E.2d 266, 272 (Va. 1998). A plaintiff relying upon an agency theory must show that the parent company "so dominate[s] the activities of [its subsidiary] that it is necessary to treat the dominated corporation as an agent of the [parent]." *E.g., Baker v. Raymond Int'l, Inc.*, 656 F.2d 173, 180 (5th Cir. 1981); *Florida v. American Tobacco Co.*, 707 So. 2d 851, 855 (Fla. Dist. Ct. App. 1998). Accordingly, the "[e]xercise of some degree of supervision by a 100% stockholder is not sufficient to render the subsidiary its instrumentality or alter ego." *E.g., Lowell Staats Mining Co. v. Pioneer Uravan, Inc.*, 878 F.2d 1259, 1264 (10th Cir. 1989).

The Government did not even attempt to show that Altria "so dominated the activities" of Philip Morris USA that it should be regarded as nothing more than an agent of Altria. Rather, the evidence in this case shows that Altria exercised the degree and kind of supervision over Philip Morris USA that one would expect of a 100% stockholder. *See* JDFOF Ch. 15, § II. The degree of Altria's supervision over Philip Morris USA was entirely insufficient to render Philip Morris USA an instrumentality of Altria. For example, the record establishes that the CEO of Philip Morris USA has the authority to make decisions on behalf of Philip Morris USA (1/26/05 Tr. (a.m.) at 11190:24-11191:4 (Parrish)), including decisions as to the Philip Morris USA position on disease causation and addiction. Parrish WD at 9:14-17; Szymanczyk, *United States* Dep., 6/13/02, at 163:23-164:2 (#); Keane WD at 24:1-2.

The Government bases its argument upon the activities of three inter-company groups that were comprised almost exclusively of the subsidiaries' employees. Gov. Br. at 24-26. But the activities of these three groups are perfectly consistent with the typical holding company/subsidiary relationship. *See, e.g., Arch v. American Tobacco Co.*, 984 F. Supp. 830,

839 (E.D. Pa. 1997) (parent company's use of inter-company group (i) to transfer knowledge between parent and subsidiary and (ii) to improve coordination among subsidiaries was "consistent with a typical holding company/subsidiary relationship").

The Government egregiously misdescribes the composition and activities of the three groups. The Government says that "Worldwide Scientific Affairs ('WSA') is a group established by Altria to coordinate science and science policy . . . across all of the Altria companies," Gov. Br. at 24, but the evidence makes clear that WSA was comprised exclusively of scientists and support staff employed by Philip Morris International and Philip Morris USA. US 89153 (#); US 46071 (#). The Government states that "Altria has a Scientific Research Review Committee ('SRRC') . . . with authority to review and approve all funding of scientific studies related to [tobacco, smoke and/or smoking]," Gov. Br. at 24-25, but it fails to note that the committee was comprised almost entirely of Philip Morris USA and Philip Morris International scientists. *See* US 27074 and US 43545 (marked but not introduced by the Government at trial). The third inter-company group — Worldwide Regulatory Affairs ("WRA") — provided support to Altria's operating companies, 1/19/05 Tr. (a.m.) at 10485:5-7 (Keane); Keane WD at 13:12-21, but the president of Philip Morris International and the CEO of Philip Morris USA had the final authority and made the final decisions. *See* Szymanczyk, *United States* Dep., 6/13/02, at 163:23-164:11 (#); Parrish WD at 9:16-17; 1/25/05 Tr. (p.m.) at 11027:22-23 (Parrish); 1/26/05 Tr. (p.m.) at 11231:16-20 (Parrish); Keane WD at 23:22-24:2.

Thus the groups pointed to by the Government provide no basis for its argument that Altria directs and controls the actions of Philip Morris USA.[73]

[73] The Government's argument that Altria controls Altria Corporate Services, Inc. ("ALCS") through reporting relationships, Gov. Br. at 10 n.5, is likewise meritless. The case law expressly

[Footnote continued on next page]

2. The Government Failed To Prove That Altria Conducted The Affairs Of The Alleged Enterprise Through A Pattern Of Racketeering Activity

a. The Government Failed To Prove That Altria Engaged In Any Racketeering Acts

As demonstrated in detail in chapter 15, section III of the Joint Defendants' Proposed Findings of Fact, the Government failed to prove at trial that Altria engaged in any RICO predicate acts.

The Government erroneously asserts that "[a]ll Defendants, except for BATCo, are charged in the Amended Complaint with various mailings and wire transmissions of CTR and the Tobacco Institute while they were members of or involved in those organizations." Gov. Br. at 133. In fact, Altria is not charged in the Amended Complaint with any of the alleged predicate acts of CTR and TI, and (as shown at JDFOF Ch. 15, § IV.B.1) Altria was not a member of those organizations.

b. The Government's Belated and Irresponsible Attempt To Establish Fraud On The Part Of Altria's Current General Counsel Is Without Any Basis in Fact

In its post-trial brief, the Government for the first time singles out Charles Wall, Altria's current General Counsel and a lawyer at the company since 1990, as the Altria employee who allegedly "direct[ed] and participate[d] in activities and projects designed to protect and further Defendants' fraudulent scheme." Gov. Br. at 124-27. The Government's belated focus on Altria's General Counsel is a desperate ploy, and nothing more. Wall was never deposed in this case. He was never called as a witness. He was never mentioned by the Government in either

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recognizes that reporting relationships are "of low or no probative value" in determining a parent company's liability for its subsidiary's conduct. *Richard v. Bell Atl. Corp.*, 946 F. Supp. 54, 62 (D.D.C. 1996); *see also, e.g.*, *Lowell Staats Mining Co. v. Pioneer Uravan, Inc.*, 878 F.2d at 1263-64.

opening or closing statements, or even interim summations. He was never the focus of the Government's claims until the Government's post-trial brief. The Government's untimely attempt to single out Wall lacks any support and should be expressly rejected by this Court.

The evidence shows that Wall acted at all times as a lawyer in representing and advising his clients. There is no evidence of wrongdoing on his part, and certainly no evidence that he had any specific intent to defraud consumers of money or property. The Government's conclusory suggestions to the contrary are specious.

First, the Government alleges that Wall's "service of the Enterprise and its objectives" began while he was a lawyer at Shook, Hardy & Bacon from 1970 to 1990. *Id.* at 124-25. This, of course, was before Wall first joined Altria in 1990. The Government failed to show that Wall had any specific intent to defraud while at Shook, Hardy & Bacon (or at any other time).

Second, the Government alleges that in the early 1990s Wall "plotted" with the other Defendants "to promote scientific 'controversy' on [the] health effects of secondhand smoke." *Id.* at 125. Citing US 16174 (^), it alleges that Wall was "involved in the formation of Defendants' jointly created International ETS Management Committee, and urged that it be organized to address the various 'battlefields' upon which Defendants sought to fight on ETS." *Id.* Again, there is not a shred of evidence of an intent to defraud. The cited exhibit itself confirms that Philip Morris believed in the correctness of the industry's position on the science, and does not indicate that Wall was involved in the formation of the International ETS Management Committee. *See* US 16174 (^). Moreover, there is no evidence that the Defendants' position on ETS was in the early 1990s — or, for that matter, is today — false or misleading. On the contrary, there was and continues to be a reasonable scientific basis for disagreement about ETS and disease causation. *See* JDFOF Ch. 5, § II.A.2.

Third, the Government also alleges that Wall "continued to direct . . . the Defendants' fraudulent scheme" after he began working at Altria by reviewing various requests for the funding of scientific research by Philip Morris USA and Philip Morris International. Gov. Br. at 125-26. But there is zero evidence that Wall believed that any of the research projects for which he reviewed funding requests constituted illegitimate science. On the contrary, Wall relied upon the advice of highly qualified scientists in assessing the merits of the research projects. *See, e.g.*, US 75121 (@) (letter addressed to Wall attaching list of Dr. Sterling's publications and stating that "[a] quick review of this list reveals that Dr. Sterling and colleagues have published 24 scientific papers in respected research journals"); US 22850 (@) (e-mail cc'ed to Wall recommending funding of proposal by Dr. Wynder with "excellent" peer review comments); US 89416 (#) (memorandum by Wall explaining in first paragraph that he "discussed merits of each research project" with five "senior scientists" from Philip Morris USA). Moreover, as explained in detail in the Joint Defendants' Proposed Findings of Fact, there is no basis for any argument that such research was funded with the specific intent to defraud consumers of money or property. *See* JDFOF Ch. 15, § III.A.1.

Finally, the Government argues that Wall was involved in "maintaining international industry uniformity in its public statements on smoking and health" and in "plotting the course for Altria's and Philip Morris's statements on smoking and health issues" during the 1990s, pointing among other things to Wall's 1991 letter to five European lawyers enclosing an explanation of the term "risk factor." Gov. Br. at 126-27. The allegation is absurd. One lawyer discussing the meaning of the term "risk factor" with other lawyers is not fraudulent or improper conduct. That is especially the case here, where the evidence clearly establishes that Wall believed in good faith that this position was supported scientifically, and that he did not even

urge anyone to take this position. Indeed, he cautioned the recipients of his 1991 letter that "[a]nyone using the ['risk factor'] language must be prepared to explain its meaning and scientifically support its usage." US 22725 (@). The record confirms that there was a scientific basis for this position. *See* JDFOF Ch. 15, § III.A.3.

In all of these activities, Wall was acting as a lawyer should for his client. The Government has utterly failed to show that he acted with any fraudulent intent, let alone with specific intent to defraud consumers of money or property. Accepting the Government's position here would have dangerous implications far beyond the confines of this case, chilling appropriate advocacy and functioning by in-house counsel across the board. Having failed to call Wall as a witness, the Government cannot now prove that he was guilty of fraudulent intent by its own belated interpretation of documents, which is unsupported by the record and was never advanced before or at the trial.[74]

c. The Government Failed To Prove That Altria "Conducted" The Affairs Of The Enterprise

An association-in-fact enterprise must combine the elements of "(1) common purpose among the participants, (2) organization and (3) continuity." *United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 131, 152 (D.D.C. 2000). Further, a defendant's association with the enterprise must be "purposeful." *United States v. Griffith*, 660 F.2d 996, 1000 (4th Cir. 1981).

The Government failed to establish that Altria shared the alleged enterprise's supposed common purpose of defrauding the public about the health effects of smoking. *See* JDFOF Ch. 15, § III. The Government also failed to establish that Altria was part of the alleged

[74] The Government's arguments, relegated to a footnote (Gov. Br. at 127 n.75), about the lawyer's letters to DeNoble, Mele, and Farone likewise fail to show any specific intent to defraud. *See* JDFOF Ch. 15, §§ III.A.2, III.B.1.

enterprise's organization. *Id.*, § IV.B. In particular, Altria was never a member of CTR, TI or any other entity alleged to be a vehicle of the enterprise. *Id.* There is no evidence in the record supporting the Government's assertion in its post-trial brief that Altria agreed to fund, or did fund, the activities of TI. Gov. Br. at 18.

A parent company's provision of services to its subsidiary does not satisfy the "operation or management" test. *See In re Sumitomo Copper Litig.*, 104 F. Supp. 2d 314, 324-25 (S.D.N.Y. 2000). As set forth in chapter 15, section IV.B of the Joint Defendants' Proposed Findings of Fact, the Government totally failed to prove that Altria conducted the affairs of the alleged enterprise. Although certain Altria employees did participate in meetings of CTR and TI, there is no evidence that they participated in any alleged fraudulent activities in connection with those organizations. JDFOF Ch. 15, § IV.B. The Government does not dispute these proposed findings in its post-trial brief.

3. The Government Failed To Prove That Altria Conspired With The Other Defendants To Violate RICO

To establish liability for conspiracy, the Government must prove that the defendant knowingly participated in a conspiracy with "the specific intent . . . to advance or further the unlawful object of the conspiracy." *United States v. Haldeman*, 559 F.2d 31, 112 (D.C. Cir. 1976). Where, as here, the object of the alleged conspiracy is to defraud, the Government must prove (among other things) that the defendant knowingly participated in the conspiracy with the specific intent to defraud. *See United States v. Dale*, 991 F.2d 819, 851 (D.C. Cir. 1993). As shown above and in chapter 15, section III of the Joint Defendants' Proposed Findings of Fact, the Government failed to prove that any Altria employee possessed any specific intent to defraud.

Even if a parent company could conspire with its subsidiary — which it cannot, *see supra* at § VIII.A.1.c — the Government failed to prove an illegal agreement between Altria and Philip Morris USA. *See United States v. Philip Morris Inc.*, 116 F. Supp. 2d 116, 123-24 (D.D.C. 2000) (holding that "[a]t most, BAT Ind. was merely acting in its role as a holding company and sole shareholder by exercising a certain degree of influence over its subsidiaries to protect its investments").

The Government also failed to prove an illegal agreement between Altria and its non-affiliated co-defendants. *See United States v. Philip Morris Inc.*, 116 F. Supp. 2d 116, 127 n.10 (D.D.C. 2000) ("There is no authority stating that parallel conduct alone could give rise to an inference of complicity in a RICO context, when it cannot suffice in an antitrust context.").

Finally, the Government failed to establish that Altria agreed to "further or facilitate" a RICO violation. *See Salinas v. United States*, 522 U.S. 52, 65 (1997). A RICO conspirator "must knowingly agree to perform services of a kind which facilitate the activities of those who are operating the enterprise in an illegal manner." *Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961, 967 (7th Cir. 2000). There is no evidence of such an agreement here.

4. The Government Failed To Prove That Altria Is Reasonably Likely To Violate RICO In The Future.

As shown in chapter 15, section V of the Joint Defendants' Proposed Findings of Fact, the Government totally failed to show that Altria is reasonably likely to engage in future criminal conduct. The Government has not attempted to address this showing.

For all these reasons, the Government's claims against Altria should be dismissed.

C. The Government Failed to Prove Viable Claims Against Those Defendants Which No Longer Exist

As described above, the dissolution of CTR and TI requires judgment for all Defendants because without them the Government does not even have an argument that an enterprise currently exists. *See supra* § 3. In addition, the dissolution of CTR and TI clearly demands dismissal of these two Defendants. The Government has never adequately explained how these Defendants could possibly threaten future RICO violations when they no longer exist. Indeed, before trial, this Court stated that it was not "unsympathetic" to TI's and CTR's argument in this regard because "they have effectively ceased to exist and seem to have no actual ability to continue alleged past RICO allegations." 319 F. Supp. 2d at 12 n.5. Notwithstanding this Court's hope that the Government "will exercise good litigation judgment in its assessment of what, if any, value there is in proceeding against CTR and TI," *id*. at 6 n.5, the Government continued to press its claims against these Defendants. Judgment for TI and CTR is now appropriate. Likewise, Brown & Williamson — which no longer exists as an entity that manufactures and sells cigarettes, JDFOF Ch. 12, §§ IV.D.1, IV.F.4. — poses no risk of future RICO violations and should have judgment entered in its favor as well.

IX. MOST OF THE GOVERNMENT'S "REMEDY" PROPOSALS ARE WELL BEYOND THE COURT'S AUTHORITY, AND THOSE THAT ORDINARILY WOULD BE AVAILABLE ARE IMPROPER IN THE UNIQUE CIRCUMSTANCES OF THIS CASE

Even if the Government had proven past RICO violations as well as a reasonable likelihood of future violations, most of its remedies proposals would be patently improper under settled law. As detailed above, the government's failure of proof on RICO violations, coupled with its inability to show a reasonable likelihood of future violations, alone forecloses any relief in this case. Moreover, the proposed remedies also suffer from a host of legal infirmities that

offer additional, compelling reasons to reject virtually every facet of the Government's Remedies Order. Indeed, for the most part, the Government's proposals represent a naked attempt to have this Court create, under the guise of a "remedy" order, a comprehensive national smoking policy that various factions within the Government have previously attempted to have enacted by Congress. A court of equity, however, is no place to enact social policy.

Instead, as Section 1964(a) makes clear, and as the D.C. Circuit has recently confirmed, a court's proper role is simply to "prevent and restrain" future RICO violations. *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1198-1200 (D.C. Cir. 2005). That does not mean a court is strictly limited to injunctions that prohibit specific conduct. But such traditional injunctive relief should ordinarily form the core of any remedy order, which must be "aimed at" future conduct, not just designed to have an incidental or indirect effect on that conduct. *Id.* at 1200; *see also* Defendants' Brief in Support of Rule 52(c) Motion at 6-16 (filed July 20, 2005); Reply Brief in Support of Rule 52(c) Motion (filed September 5, 2005).

In the unique circumstances of this case, however, even much of the traditional prohibitory relief requested is not available to the Government. That is so in part because of the Government's failure to provide adequate notice of the relief it seeks, in part because its proposals are too vague, and in part because the more specific relief sought by the Government is *already* a part of the MSA.

These points are elaborated in the following discussion. As shown in Section A, the Government has simply ignored most of the principles that govern any award of equitable relief in a RICO case. Section B shows, in turn, that when those principles are fairly applied to the Government's Proposed Final Judgment and Order ("Remedies Order") no aspect of that order can survive.

A. The Government Ignores Most Of The Constraints On The Court's Remedial Authority And Seriously Misinterprets The Two It Addresses.

Contrary to the impression conveyed in the Government's brief, the courts do not have virtually unlimited discretion in shaping equitable remedies in RICO cases. Limits to that discretion include the requirements of RICO itself and other relevant federal statutes; basic principles of equity jurisprudence; structural and substantive mandates of the United States Constitution; and basic procedural and evidentiary requirements applicable in all federal litigation. Indeed, as shown below, this Court's remedial authority is constrained by at least sixteen distinct principles. Of these, the Government's discussion of the "legal *standards* governing remedies" (Gov. Br. at. 167-170, 198) (emphasis added) addresses only two – and even then the Government misstates their import. Because the Government has ignored most of the pertinent principles, we set them out here in some detail, as a prelude to demonstrating that each of the Government's proposed remedies runs afoul of one or more of these limitations on the Court's discretion.

1. No Remedy May Be Adopted Unless The Defendants Have Received Fair And Timely Notice And An Adequate Opportunity To Respond With Appropriate Evidence

First, a defendant must be given fair notice and an opportunity to respond, with appropriate evidence, to a proposed remedial order. To be sure, in simple cases, a court choosing an appropriate remedy often need make no factual determinations beyond what was necessary to establish liability. This is not so, however, where a proposed remedy goes beyond a simple injunction and attempts to restructure a business or an industry. Far-reaching remedial orders of this kind raise a host of factual issues beyond the court's liability determination. A court cannot issue a remedial order in such complex cases without making all necessary factual findings. As the Supreme Court put it in *United States v. E. I. Du Pont De Nemours & Co.*, 366 U.S. 316

(1961), a "trial court is not authorized to order relief which it is without findings to support. 'A full exploration of facts is usually necessary in order properly to draw such a decree.'" *Id.* at 375 (*quoting Associated Press v. United States*, 326 U.S. 1, 22 (1945)); *accord United States v. Ward Baking Co.*, 376 U.S. 327, 330-31, 334 (1964). Indeed, a defendant's "right to litigate the issues raised" is "a right guaranteed to him by the Due Process Clause." *United States v. Armour*, 402 U.S. 673, 682 (1971).

The principle that a defendant has a due process right to litigate issues underlying a proposed injunctive remedy was specifically confirmed in the D.C. Circuit's decision in *United States v. Microsoft Corp.*, which reversed an order splitting Microsoft into two separate companies because the district court had conducted no evidentiary hearing on the issue. 253 F.3d 34, 101 (D.C. Cir. 2001) ("It is a cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings."); *see also Hyundai Mipo Dockyard Co., Ltd. v. AEP/Borden Indus.*, 261 F.3d 264, 269 (2d Cir. 2001) ("On a motion for an injunction, 'where . . . essential facts are in dispute, there must be a hearing and appropriate findings of fact must be made.'") (citation omitted); *United States v. McGee*, 714 F.2d 607, 613 (6th Cir. 1983). The Government argues vehemently that *Microsoft* did not "establish[] a procedural requirement that a proposed order be submitted in advance of a remedies trial." Gov. Br. at 198. But that misses the point. Whether by a proposed order, answers to interrogatories, or some other means, a plaintiff must give a defendant fair notice of the specific relief it seeks to have imposed, so that any factual issues raised by that proposed

relief can be fairly litigated at trial. The Government simply ignored that requirement with respect to most of its proposed remedies.[75]

2. Each Remedy Must Be "Aimed at" Preventing and Restraining Likely Future RICO Violations by the Defendants, Not at Remedying the Effects of Alleged Misconduct.

As the Government acknowledges (Gov. Br. at 167-170), Section 1964(a) only authorizes the Court to issue appropriate orders "to prevent and restrain violations" of the RICO Act. 18 U.S.C. § 1964(a). This language limits relief to that which is *forward-looking* and *aimed at* preventing future violations, and does not permit the Court to issue orders intended to remedy the effects of RICO violations. *See United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1198-1200 (D.C. Cir. 2005). As this Court noted, that decision "simply does not permit non-disgorgement remedies to prevent and restrain the effects of past violations of RICO. Rather, this Court's 'jurisdiction is limited to forward-looking remedies that are aimed at future violations' of RICO." Order #886 at 5 (quotation omitted).

The D.C. Circuit's opinion identified additional benchmarks, all of them ignored by the Government's brief, that guide the analysis of whether a proposed remedy is or is not forward-looking. First, the Court reasoned that disgorgement is quintessentially backward-looking because it is measured by "*past* conduct" (*i.e.* the amount of prior unlawful gains) and is awarded irrespective of whether the defendant will act unlawfully in the future. *Philip Morris USA, Inc.*, 396 F.3d at 1198 (emphasis in original). Accordingly, any remedy that is measured by the extent of Defendants' past wrongful conduct is impermissibly backward-looking. Second, a remedy is

[75] Joint Defendants are also this day filing their Offer of Proof, which describes the types of evidence that they would have introduced had the Government timely notified them of the issues that were involved in the remedies claim. Defendants incorporate that Offer of Proof into their arguments here.

not forward-looking merely because, by "inflicting pain," it has the effect of discouraging potential RICO violations. As the Court noted, "If this were adequate justification, the phrase 'prevent and restrain' would read 'prevent, restrain, and discourage,' and would allow any remedy that inflicts pain." *Id.* at 1200 (quotation omitted). Thus, merely establishing that a remedy may "discourage" RICO violations does not establish that it "prevents and restrains" violations.

The Government attempts to evade these aspects of the D.C. Circuit's opinion by claiming that the Defendants are "suggesting that equitable relief … is limited to an admonition to violators not to repeat their misconduct in the future" (Gov. Br. at 169) and arguing that the statute allows more than "a simple prohibition on defined conduct." *Id.* at 170. Both the premise and the conclusion are wrong: A court order backed by a threat of contempt and criminal penalties is far more than an "admonition." And Defendants do *not* argue that only prohibitory injunctions satisfy the "prevent and restrain" requirement. Courts have allowed remedies that "prevent and restrain" misconduct by depriving Defendants of the *means* of committing future RICO violations. But such remedies are rare, not because they fail the "prevent and restrain" requirement, but because they often run afoul of other legal, equitable and constitutional constraints. As we show below, that is true of each of the non-prohibitory remedies proposed by the Government here.[76]

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[76] In addition, the Court's authority under Section 1964(a) is limited to remedies that are equitable in nature. *See Philip Morris, Inc.*, 273 F. Supp. 2d at 9. Yet many of the Government's proposed remedies, such as the smoking cessation program, the public education campaign, and the Gruber remedy, impose monetary awards that are plainly remedies at law. Under the Seventh Amendment, such legal remedies may only be entered after a jury trial.

Defendants acknowledge that the Court previously denied Joint Defendants' Motion to Enforce Jury Demand on the basis, among others, that smoking cessation programs and public education campaigns are equitable in nature, *see id*. at 11, a conclusion with which Defendants

[Footnote continued on next page]

3. Each Remedy Must Be Directed at Preventing and Restraining Acts Similar or Closely Related to the Acts by which the Defendants Conducted or Participated in the Conduct of the Enterprise.

Not only must the remedy be forward-looking, it must also be directed at preventing and restraining the specific acts found unlawful or *acts closely related* to such conduct. A federal court's equitable power is limited to orders that enjoin "'acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past.'" *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 132 (1969) (quoting *NLRB v. Express Publ. Co.*, 312 U.S. 426, 435 (1941)); *accord SEC v. Savoy Indus., Inc.*, 665 F.2d 1310, 1318-19 (D.C. Cir. 1981) (striking clause in injunction that encompassed "future acts by [the defendant] that may be completely unrelated to his lawbreaking in the past"); *see also New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 144-47 (D.D.C. 2002) (the court not at liberty to remedy conduct for which no liability is ascribed).

In the RICO context, the requirement that there be a close nexus between the conduct that an order seeks to "prevent and restrain" and the violation found by the court has an additional, related component. All the remedies identified in § 1964(a), as the D.C. Circuit put it, "are … directed toward future conduct and *separating the criminal from the RICO enterprise* to prevent future violations." *Philip Morris USA Inc.*, 396 F.3d at 1200 (emphasis added). This statement echoed the court's earlier statement in *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers*

[Footnote continued from previous page]
respectfully disagree on grounds previously articulated in their briefs. The Court's ruling, however, did not address the proposed Gruber remedy. As discussed more fully below, Defendants believe that, as a remedy at law, the Gruber remedy is impermissible under both the statute and the Seventh Amendment. Indeed, it is even more clearly a legal remedy than the Government's proposed cessation and public education programs.

Local Union 639, 913 F.2d 948 (D.C. Cir. 1990), that "Congress, in enacting the RICO statute, did not purport to outlaw the commission of the predicate acts. It sought rather to outlaw the commission of the predicate acts only when those acts were the vehicle through which a defendant 'conduct[ed] or participat[ed] . . . in the conduct of [the] enterprise's affairs.'" *Yellow Bus Lines, Inc.*, 913 F.2d at 945-55 (quoting 18 U.S.C. § 1962(c)). Accordingly, any remedy must be aimed not only at preventing and restraining unlawful acts, but at preventing and restraining acts that are at least similar to the acts by which Defendants either conducted or participated in the unlawful enterprise. A mere "tangential" connection between the relief and the prior violations is insufficient. The Government simply ignores this bedrock requirement.

4. Each Remedy Must Be Narrowly Tailored to the Accomplishment of Its Legitimate Objective, i.e. Preventing and Restraining Likely Future RICO Violations by the Defendants

Injunctive or other equitable relief must also be closely tailored to remedy or prevent the specific harm alleged – in this case, *future* RICO violations. *See Alpo Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 972 (D.C. Cir. 1990) ("The law requires that courts closely tailor injunctions to the harm that they address") (citing *Gulf Oil Corp. v. Brock*, 778 F.2d 834, 842 (D.C. Cir 1985) (articulating "requirement that an injunction must be narrowly tailored to remedy the harm shown")). Implicit in this "narrowly tailoring" requirement is the equally important proposition that "[i]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to plaintiffs." *Tamiko Roofing Prods., Inc. v. Ideal Roofing Co.*, 282 F.3d 23, 40 (1st Cir. 2002).

These principles thus prohibit injunctions that unnecessarily burden lawful activity or enjoin the commission of unlawful acts not related to the unlawful conduct currently before the court. *See N.L.R.B. v. Express Pub. Co.*, 312 U.S. 426, 436 (1941) (holding that courts may not

place "restraints upon the commission of unlawful acts which are thus dissociated from those which a defendant has committed"); *Woods v. Polis,* 180 F.2d 4, 6 (3d Cir. 1950) (equity cannot "hold subject to the drastic remedy of contempt a defendant whose past offenses are far narrower in scope than the future misconduct enjoined."). Once again, the Government's analysis – like its proposed order – ignores this fundamental requirement.

5. Each Remedy Must "Mak[e] Due Provision for the Rights of Innocent Persons"

Section 1964(a) also requires that, in fashioning relief, courts "mak[e] due provision for the rights of innocent persons." 18 U.S.C. § 1964(a). The "innocent persons" provision protects those persons acting "in good faith and without knowledge of incriminatory circumstances, or of defects or objections." *United States v. Kramer,* 957 F. Supp. 223, 228 n.5 (S.D. Fla. 1997). Thus, as a practical matter, the "innocent persons" protection is concerned with shielding "those individuals who become involved in business plans with 'racketeers' without suspecting the unlawful source of funds" or the unlawful nature of the enterprise's activities. *Ashland Oil, Inc. v. Gleave,* 540 F. Supp. 81, 85 (W.D.N.Y. 1982); *see also United States v. Mandel,* 408 F. Supp. 673, 679 (D. Md. 1975). Here again, the Government's brief ignores this requirement.

6. Each Remedy Must "Be Specific in Terms" and "Describe in Reasonable Detail, and Not by Reference to the Complaint or Other Document, the Act or Acts Sought to be Restrained"

Rule 65(d) of the Federal Rules of Civil Procedure requires that an injunction "shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . . ." Fed. R. Civ. P. 65(d). Rule 65(d) serves three goals: (1) to prevent uncertainty and confusion on the part of those to whom the injunction is directed; (2) to avoid imposing contempt citations based on an order that is too

vague to be understood; and (3) to enable the appellate court to know precisely what it is reviewing. *Calvin Klein Cosmetics Corp. v. Parfums De Coeur, Ltd.*, 824 F.2d 665, 669 (8th Cir. 1987) (citing *Schmidt v. Lessard*, 414 U.S. 473, 476-477 (1974)); *see also, e.g.*, *Int'l Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967) (Rule 65(d) requires that a federal court "frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid."). Several of the Government's proposals violate this bedrock requirement.

7. Each Remedy Must Be Judicially Manageable and Enforceable and Not Unduly Entangle the Court in Defendants' Day-to-Day Management Decisions

Any injunctive relief also must be "enforceable, workable, and capable of court supervision." *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 369 F.3d 293, 315 (3d Cir. 2004) (*citing, inter alia, Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (noting that "equitable remedies are a special blend of what is necessary, what is fair, and what is workable" (footnote omitted)); *accord* Restatement (Second) of Torts § 943 (1979) ("In determining the appropriateness of injunctive relief, the court must give consideration to the practicability of drafting and enforcing the order or judgment. If drafting and enforcing are found to be impracticable, the injunction should not be granted."). For example, in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 161-66 (1948), the Court concluded that the district court's decree "involve[d] the judiciary so deeply in the daily operation of this nation-wide business and promises such dubious benefits that it should not be undertaken." *Id*. at 162. The Court also commented that "[t]he judiciary is unsuited to affairs of business management; and control through the power of contempt is crude and clumsy and lacking in the flexibility necessary to make continuous and detailed supervision effective." *Id*. at 163. Many of the

Government's remedies would improperly involve the Court or its appointees in the day-to-day management of Defendants' businesses, yet the Government fails to acknowledge that this is an issue with which the Court should be concerned.

8. No Remedy May Require A Defendant To Do Something Beyond Its Control

Another important principle is that, "because the violation of an equitable decree is punishable as a contempt of court, the decree should not command the defendants to do something that is . . . beyond their control." *People Who Care v. Rockford Bd. of Ed., Sch. Dist. No. 205*, 111 F.3d at 528, 533 (7th Cir. 1997); *see also* 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 2.1(1), at 56 (2d ed. 1993). Applying this principle, a recent Seventh Circuit decision vacated a decree that required a school district to cut in "half the gap in test scores between . . . white and minority students" because the school district could not be required, "under pain of contempt sanctions if it fails, to achieve a goal that depends to a significant degree on circumstances beyond its control . . . ." *Rockford Bd. of Ed.*, 111 F.3d at 537. Likewise, courts have refused to enforce contempt sanctions for conduct that is beyond a defendant's control. *See, e.g., Int'l Rectifier Corp. v. Samsung Elecs. Co.*, 361 F.3d 1355, 1631 (Fed. Cir. 2004) (reversing contempt ruling where defendant had no control over an unaffiliated customer who exported products in violation of an injunction against infringement); *Tegal Corp. v. Tokyo Electron Co.*, 248 F.3d 1376, 1379 (Fed. Cir. 2001) ("[C]ourts have held parties in contempt based on the conduct of others, but in that circumstance they have required proof that the party subject to contempt sanctions had control over those who engaged in the conduct proscribed by the injunction."). The Government's proposed remedies violate this principle as well.

9. Each Remedy Must Satisfy the Balance of Equities Test and Not Be Subject to Affirmative, Equitable Defenses

Another equitable constraint on the Court's authority is the requirement that the balance of the equities favor issuance of the injunction. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (before resorting to injunctive relief, courts must balance the interests of the parties, giving particular attention to the public consequences of an injunction); *see generally Washington Metro. Area Transit Comm. v. Holiday Tours, Inc*., 559 F.2d 841 (D.C. Cir. 1977). Thus, for example, injunctive relief is improper where valid affirmative defenses against equitable relief, such as laches and unclean hands, exist. *See Northwest Women's Ctr., Inc. v. McMonagle*, 665 F. Supp. 1147, 1154 (E.D. Pa. 1987) ("An exercise of equitable jurisdiction that is otherwise proper is nonetheless precluded by the assertion of a valid equitable defense."); *United States v. Philip Morris USA Inc.*, 396 F.3d 1190, 1222 (D.C. Cir. 2005) (Tatel, J., dissenting) (commenting that the district court, in fashioning equitable relief, is limited by equitable doctrines); *see also United States v. Philip Morris Inc.*, 300 F. Supp. 2d 61, 76 (D.D.C. 2004) (leaving open the applicability of equitable doctrines to issues related to equitable relief, should liability be established).

As the Government points out (Gov. Br. at 177-78), part of the "balance-of-the-equities" analysis also requires consideration of the public interest. Indeed, Courts may *deny* injunctive relief on the basis that it is not in the public interest. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citing *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500 (1941)); *see generally Holiday Tours, Inc*., 559 F.2d 841. However, contrary to the Government's suggestion, any perceived benefit to the public interest cannot determine the outcome if consideration of *all* the equities – and all of the private interests at stake – tip the balance the

other way. And, of course, "public interest" considerations do not authorize the Court to ignore other statutory, equitable, or constitutional constraints on the Court's authority.

10. No Remedy May Interfere With or Displace the Regulatory Authority of Agencies Created by Congress to Regulate the Conduct at Issue

Courts are also obliged not to interfere with the Congressionally-conferred prerogatives of executive agencies, "lest a carefully erected legislative scheme – often the result of a delicate balance of Federal and state, public and private interests – be skewed by the courts." *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 989 (D.C. Cir. 1973). Accordingly, RICO remedies cannot be used to displace an otherwise highly specific and exclusive regulatory regime. *See Danielsen v. Burnside-Ott Aviation Training Ctr., Inc.*, 941 F.2d 1220 (D.C. Cir. 1991) (dismissing RICO claim); *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296 (1963) (dismissing antitrust action that threatened to interfere with an administrative agency's exclusive jurisdiction); *Verizon Communication, Inc. v. Trinko*, 540 U.S. 398 (2004) (antitrust laws could not be used by private parties to usurp FCC and state public utility commission oversight under 1996 Telecommunications Act).

These concerns are paramount in this context, where, as the Supreme Court explained in *Lorillard*, "Congress has crafted a comprehensive federal scheme governing the advertising and promotion of cigarettes." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001). The primary means by which Congress has addressed the issue of tobacco regulation is the Federal Cigarette Labeling and Advertising Act, or "FCLAA." Under that statute, the FTC has "long regulated unfair and deceptive advertising practices in the cigarette industry." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 513 (1992). Thus, in FCLAA, Congress chose administrative methods to enforce tobacco regulations, even reaffirming the FTC's exclusive jurisdiction when

the FCC and the States sought to intensify their regulation of cigarette labeling and advertising. *See* Public Health Cigarette Smoking Act, Pub. L. 91-222, 84 Stat. 87 (codified as amended at 15 U.S.C. §§ 1331-1341).[77]

Any equitable remedy crafted by a court pursuant to RICO – even in response to an asserted fraud – should therefore avoid interfering with the regime Congress has adopted, and thereby usurping the role of the FTC. *See, e.g., Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 21 (2d Cir. 1994) (affirming dismissal of RICO action because "[i]f courts were licensed to enter this process under the guise of ferreting out fraud in the rate-making process, they would unduly subvert the regulating agencies' authority and thereby undermine the stability of the system.").

11. The Court May Neither Assume Powers Assigned by the Constitution to the Executive or Legislative Branches, Nor Delegate Its Own Article III Powers to Court-Appointed Officers

Any order must also respect the Constitution's allocation of powers to the three separate branches of Government, and in particular its allocation of policy-making or legislative power to Congress rather than the courts. *E.g. Loving v. United States*, 517 U.S. 748, 757 (1996). As Madison put it, "'[w]ere the power of judging joined with the legislative, the life and liberty of

[77] Courts have long recognized that the FTC is empowered by Congress to direct and control the testing and marketing practices of the cigarette industry. For example, in *Watson v. Philip Morris Cos.*, No. 04-1225, 2005 U.S. App. LEXIS 18251, at *25 (8th Cir. Aug. 25 2005), the U.S. Court of Appeals for the 8th Circuit addressed the issue of whether the FTC's role in regulating the tobacco industry was sufficient to establish removal to federal court under 28 U.S.C. § 1442(a). *Watson*, 2005 U.S. App. LEXIS 18251, at *3. In deciding whether the defendant cigarette manufacturer was acting under the direction of a federal officer in marketing light cigarettes, the Court looked to the fact that the FTC exercised a "comprehensive, detailed regulation" of the tobacco industry and engaged in "ongoing monitoring" regarding the testing procedures employed by the tobacco industry. *Id*. at *13. Noting that the "FTC involved itself in the tobacco industry to an unprecedented extent," the Court found, based upon the FTC's comprehensive and detailed control over the tobacco industry, that the Defendants had acted under the direction of a federal officer for purposes of removal under 28 U.S.C. § 1442(a). *Id*. at *22-23.

the subject would be exposed to arbitrary control, for the judge would then be the legislator.'" *Buckley v. Valeo*, 424 U.S.1, 120 (1976) (quoting The Federalist No. 47 (James Madison)). It follows that, as the D.C. Circuit has noted, "[p]olicymaking of any sort is likely to run afoul of the 'case or controversy' requirement of Article III, and the legislative function is more antithetical to the judiciary, more foreign to its very nature." *Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 20 (D.C. Cir. 1982). Thus, it is inappropriate for a court to engage in policy-making under the guise of equitable relief, particularly where the proposed remedy is "a type of relief that has never been available [in equity] before …" *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc*., 527 U.S. 308, 322 (1999).

Similarly, the Court may not impose a remedy that encroaches on the Executive's powers. Illustratively, in *Cobell v. Norton,* the D.C. Circuit held that the district court erred in appointing a monitor "charged with an investigative, quasi-inquisitorial, [or] quasi-prosecutorial role." 334 F.3d 1128, 1142 (D.C. Cir. 2003). According to the Court, such a judicially-appointed monitor would conflict with "our constitutional system of separated powers." *Id*. at 1143.

Finally, courts are also forbidden from delegating to others their own powers under Article III of the Constitution. Accordingly, federal appellate courts have regularly vacated orders seeking to invest court-appointed officers with the authority to create duties or adjudicate liabilities. *See La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957); *In re Bituminous Coal Operators' Ass'n., Inc*., 949 F.2d 1165, 1168 (D.C. Cir. 1991); *Prudential Ins. Co. v. United States Gypsum Co*., 991 F.2d 1080, 1086 (3d Cir. 1993); *United States v. Microsoft Corp.*, 147 F.3d 935, 954 (D.C. Cir. 1998); *In re United States,* 816 F.2d 1083 (6th Cir. 1987). These cases establish that a Court may not delegate adjudicatory powers, over a party's objection, to any

court-appointed officer. Yet the Government's proposals violate that principle and the other separation-of-powers constraints discussed above.

12. No Remedy May Violate Defendants' Constitutional Right to Free Speech

Any injunctive relief must also respect Defendants' own constitutional rights, including their First Amendment right to free speech. Prohibitions against making specific false or misleading statements are, of course, permissible after a finding of liability. But even in those cases the First Amendment requires that the prohibition be no broader than necessary to prevent repetition of the specific false statements giving rise to liability. *Standard Oil of California v. FTC*, 577 F.2d 653, 662 (9th Cir. 1978). As stated by the D.C. Circuit in *Warner-Lambert Co. v. F.T.C.*, 562 F.2d 749 (D.C. Cir. 1977), the "First Amendment. . . . triggers a special responsibility on the [decisionmaker] to order corrective advertising only if the restriction inherent in its order is no greater than necessary to serve the interest involved." 562 F.2d at 758 (citations omitted); *see also Encyclopaedia Britannica, Inc. v. FTC*, 605 F.2d 964, 972 (7th Cir. 1979) ("A remedy … for deceptive advertising which is broader than is necessary to prevent future deception or correct past deception is impermissible under the First Amendment.").

Orders compelling a party affirmatively to make statements – such as "corrective advertising" – are even more problematic. That is because a party cannot, consistent with the First Amendment, be compelled to make statements that it believes to be false. *United States* v. *Nat'l Soc. of Prof. Eng'rs*, 555 F.2d 978, 984 (D.C. Cir. 1977) ("To force an association of individuals to express as its own opinion judicially dictated ideas is to encroach on that sphere of

free thought and expression protected by the First Amendment.").[78] The Government's proposals violate these principles as well.

13. An Injunction May Only Enjoin Parties To the Action, Their Agents and "Those Persons in Active Concert or Participation With Them"

Consistent with settled equitable principles, Rule 65(d) also requires that an injunction be "binding *only* upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them. . . ." Fed. R. Civ. P. 65(d) (emphasis added). In *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9 (1945), the Supreme Court explained that, under Rule 65(d), "courts . . . may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently [of the parties] and whose rights have not been adjudged according to law." *Id.* at 13. And the Court in *Zenith Radio Corp.* held that it was an error under Rule 65(d) for the trial court to have entered an injunction against the parent company of a party, without having determined that the parent was "in active concert or participation" with its subsidiary. 395 U.S. at 112.

Here, the Government's order seeks to impose obligations upon Defendants' subsidiaries, which are not parties, were not shown to be "controlled" by any of the Defendants, and were not shown to be "participating" in the alleged fraud. Remedies Order, § III. That raises an obvious issue under Rule 65(d), yet the Government makes no effort to explain how its proposal

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[78] Other than prohibitions of specific statements that have been adjudicated to be false, restrictions on commercial speech are analyzed under the four-factor *Central Hudson* test. Under that test, courts must consider (1) whether the restricted speech "concern(s) lawful activity and [is] not . . . misleading"; (2) "whether the asserted Governmental interest is substantial"; (3) "whether the regulation directly advances the Governmental interest asserted"; and (4) whether the restriction "is not more extensive than is necessary to serve that interest." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (quoting *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)). The Government's proposals violate these requirements as well.

comports with that provision.

14. No Remedy May Enjoin or Regulate Conduct Outside the U.S. Unless that Conduct Has a Direct and Substantial Effect on the U.S.

By attempting to regulate conduct outside the United States, the Government's proposals also raise a serious issue as to a court's ability under § 1964(a) to reach extraterritorial conduct. To be sure, the Supreme Court has held that U.S. courts sometimes have jurisdiction to enjoin violations of an analogous statute, the Lanham Act, outside the United States. *See Steele v. Bulova Watch Co.*, 344 U.S. 280, 285 (1952). But the courts have made clear that, consistent with constitutional constraints on Congress' power, such authority exists *only* when the extraterritorial conduct has a direct and substantial effect in the United States. *See supra* § VII. A.2.[79]

Here again, the Government appears oblivious to this requirement. Although its order seeks to regulate extraterritorial conduct, it makes no effort to establish that the conduct at issue has any effect, much less a direct and substantial effect, in the United States.

15. No Injunction May Enjoin Conduct that is Already the Subject of an Existing, Enforceable Injunction

It is also settled that equitable relief is unnecessary – and should not be issued – when the Defendants have already been judicially barred from engaging in the alleged misconduct. *See, e.g., SEC v. American Bd. of Trade, Inc.*, 751 F.2d 529, 538 (2d Cir. 1984); *Nat'l Farmers' Org. v. Associated Milk Producers, Inc.*, 850 F.2d 1286, 1309 (8th Cir. 1988) ("there is nothing to be gained by entering an injunction that substantially duplicates the relief already available.").

[79] Indeed, if the statute were interpreted to permit injunctive relief without such an effect, that interpretation would raise a serious constitutional issue, given that neither Article I nor any other provision of the Constitution gives Congress authority to regulate extraterritorial conduct with no impact on domestic commerce.

Here, the Government's proposal makes no effort to accommodate the fact that much of the relief the Government seeks is already part of the MSA.[80]

16. Each Remedy Must Have Been Proven Necessary and Effective by Competent, Admissible Evidence to Prevent and Restrain the Proven Unlawful Acts to Which It Is Addressed

Finally, any injunctive relief must satisfy a bedrock evidentiary requirement, *i.e.*, that it has been proven to satisfy the relevant substantive constraints by competent, admissible evidence. For example, to comply with Section 1964(a), any remedy must be demonstrated – through reliable, empirical evidence – to be *effective* at preventing and restraining violations. *See, e.g., Bradley v. Brown*, 852 F. Supp. 690, 700 (N.D. Ind. 1994), *aff'd*, 42 F.3d 434 (7th Cir. 1994). Moreover, to the extent the proponent of any injunctive relief relies upon expert testimony (or is required to rely upon such testimony), he must satisfy Rule 702 of the Federal Rules of Evidence and the requirements of *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993). As we showed in our proposed findings of fact, and as we summarize below, the Government has failed to make the requisite showing with respect to any of its proposed remedies.

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[80] Nor may a court assume that a defendant will violate an existing injunction, or even an injunction to be entered by the same court. Such an assumption contravenes not only traditional equitable principles but also the bar against using a defendant's alleged "propensity" to violate the law or "earlier bad act[s]" to establish guilt of a subsequent alleged violation. *See, e.g.*, *Old Chief v. United States*, 519 U.S. 172, 180-82 (1997); *Michaelson v. United States*, 335 U.S. 469, 475-76 (1948); *South Central Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 570 F. Supp. 227, 234 (M.D. La. 1983) (rejecting injunction based on assumption that the defendant would not comply in good faith with a court order requiring it to follow FCC policies); *Knowles v. United States Coast Guard*, 924 F. Supp. 593, 604-05 (S.D.N.Y. 1996) (denying injunction and explaining that "the Court [is] unable to assume that [the defendant] will not comply with [statutory] obligations" in the future) (internal citations omitted).

B. Each Of The Government's Proposed Remedies Violates One Or More Of These Constraints

When one examines the Government's specific proposals in light of the principles discussed above, it appears that the Government was unaware of most of them when it drafted its proposed order. And to the extent the Government's brief betrays any awareness of the pertinent principles, it seriously distorts and misapplies them.[81]

1. Smoking Cessation

Nowhere is this more apparent than in the Government's proposed smoking cessation remedy. Although the Government previously sought a smoking cessation program valued at $130 billion, the Government's Remedies Order submitted after the trial was concluded demands payments by Defendants of $10 billion to fund a national smoking cessation program. Remedies Order, § IV.B. (p.6). Under the proposal, the Defendants would be obligated to fund the smoking cessation program for an *additional* five years for every year that any Defendant is found to have engaged in conduct prohibited by the Court's order "with the intent to prevent smokers who want to quit from doing so or with the intent fraudulently to induce new smokers to begin daily smoking." *Id*. § IV.B.4. (p. 8).

Like the Government's original $130 billion proposal, which is now pressed only by the plaintiff-intervenors, the proposed smoking cessation program is impermissible on several grounds. One of those – that it exceeds the Court's authority under Section 1964 because of that

[81] The Government also appears to have abandoned some of the specific proposals in its Remedies Order. For example, Section VII.D. of that order proposed a remedy designed to grossly restrict the ability of the Defendants to dispose of their assets. The Government failed to raise this point in its Post-Trial Brief and thus has presumably abandoned the issue. If, however, the Government seeks to revive this remedy proposal, it should be rejected for several reasons, including (1) that fundamentally, this transfer provision simply has no bearing on preventing and restraining future RICO violations *by the Defendants*; (2) the proposal is not narrowly tailored; and (3) Defendants were not provided with adequate notice so as to permit them to respond or have the opportunity to litigate the issues this provision raises, as required under *Microsoft.*

statute's "prevent and restrain" requirement – has already been discussed at length in the briefs in support of Defendants' motion for judgment under Rule 52(c). Those briefs, which are incorporated herein by reference, demonstrate that the Government's proposal does nothing to "prevent and restrain" future violations, but instead attempts to remedy or undo the effects of past violations or, alternatively, to *undo* hypothetical effects of *future* violations (which the Government thinks the Court may simply assume will occur, not withstanding any remedial order entered.) Gov. Br. at 218. Either way, this proposal flatly violates the "prevent and restrain" requirement, inasmuch as undoing a violation after it occurs is a far cry from preventing and restraining the violation.

Under the Government's bizarre logic, the Court would today order Defendants to disgorge future profits from anticipated future RICO violations, even though it plainly could not impose that remedy for proven prior RICO violations. But there is no logical support for the contention that a Court may impose a forbidden retrospective remedy — not to prevent and restrain — but to undo the effects of a supposed future violation, when it lacks authority to do so for a proven, actual violation. On the contrary, future violations of any order entered by the Court can be punished if and when they occur through the Court's contempt powers.

Here, Defendants will focus on several additional dispositive objections to this proposal.

a. The Government Failed To Give Adequate Notice And A Fair Opportunity To Respond To Its New Cessation Proposal, And Its Adoption Would Violate Several Due Process Guarantees

First, it was not until closing arguments that the Government announced for the first time its new rationale for the proposed smoking cessation program.

> [The] proposal of a $10 billion five-year program was based on an initial factual finding that we asked the Court to make that Defendants would be highly likely to continue violating RICO

> immediately following judgment. Your Honor can make such a factual finding that Defendants will continue to commit fraud for at least one year. . . .

6/09/05 Tr. (p.m.) at 23385:12-18. The Government thus injected a new factual issue into these proceedings, *i.e.*, whether, notwithstanding any judgment and order entered by the Court, Defendants *will* continue to commit RICO violations for at least one year following the entry of judgment.[82]

Putting aside whether the requested "finding" of a future violation of an as-yet unformulated injunction is a fact susceptible to determination by this or any other Court, the issue plainly was never litigated and was raised for the first time after the close of evidence. Granted, whether there exists a reasonable likelihood of violations in the future, absent any prohibitive order issued by the Court, was contested throughout the trial. But that is not the same as whether Defendants *will* engage in those violations in the next year and will do so despite any restrictions this Court imposes in its final judgment. At no point were Defendants on notice that the Government specifically sought to establish that Defendants "would be highly likely to continue violating RICO immediately following judgment" or "will continue to commit fraud for at least one year," regardless of any prohibitive injunction the Court may issue. But that is now the factual predicate for the Government's proposed smoking cessation program. Had Defendants been on notice of that intention, their cross-examination of the Government's experts

[82] The Government raises other factual issues in support of the smoking cessation remedy for which no record has been developed. For example, the Government claims that "the existing marketing and advertising in the marketplace will not disappear overnight." Gov. Br. at 210. Putting aside the fact that the continued presence of advertisements in old issues of magazines would not be a RICO violation because it would not require an intentional act by Defendants, the Government's assertion highlights its own failure to develop the record. The Government, of course, could have introduced evidence concerning how long magazines stay in circulation.

and testimony offered by their own experts would have addressed this and other issues. For this reason, *Microsoft* requires rejection of the Government's new proposal.

As a substantive matter, the Government's request for a finding that Defendants *will* violate the law in the future also contravenes basic notions of due process. At bottom, the Government is contending that Defendants' alleged prior wrongdoing – their supposed propensity to violate RICO – allows this Court not only to find that they are likely to commit violations in the future, but to presume conclusively that those yet-to-occur violations will in fact take place, even in the face of a potential injunction. This argument runs afoul of: (1) the bar on use of a defendant's "propensity" to violate the law or "earlier bad act[s]" to prove guilt for a subsequent alleged violation (*see supra*); (2) the more general due process proscription against "irrebuttable presumption[s]" where "th[e] presumption is not necessarily or universally true in fact" (*Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 644-45 (1974)),[83] and (3) the imposition of automatic sanctions for contempts of court that have yet to occur. *See Evans v. Williams*, 35 F. Supp. 2d 88, 93 (D.D.C. 1999), *rev'd on other grounds*, 206 F.3d 1292 (D.C. Cir. 2000). Far from being "necessarily or universally true in fact," a conclusive presumption that civil RICO Defendants will violate an injunction and incur the penalties for doing so is, as Judge Williams explained at length, wholly counterintuitive. *Philip Morris USA Inc.*, 396 F.3d at 1204-05 (Williams, J., concurring); *see also New York v. Microsoft*, 224 F. Supp. 2d 76, 181 (D.D.C. 2002) ("Plaintiffs' proposal . . . also presumes that Microsoft will constantly fail to be in compliance with the decree [although] [g]enerally, courts presume that parties will adhere to

[83] As the Supreme Court has explained, "irrebuttable presumptions have long been disfavored under the Due Process Clause," and are forbidden "when th[e] presumption is not necessarily or universally true in fact and when the [Government] has reasonable alternative means of making the crucial determination." *Lafleur*, 414 U.S. at 644-45.

orders of the Court."). Accordingly, the Government's proposed conclusive presumption – not to mention the imposition of billions of dollars of penalties on Defendants now for presumed future violations that may never occur — cannot be squared with due process.[84]

b. The Government's Proposal Bears No Causal Relation to Activities that the Government Alleges To Be Illegal, Much Less Activities By Which the Defendants Participated In or Managed the "Enterprise" Alleged by the Government

As noted earlier, basic equitable principles, in connection with Section 1964(a), require that there be a close relationship between the future conduct the Court seeks to prevent and restrain and the specific proven RICO violations, including the activities by which the defendants participated in or managed the pertinent RICO enterprise. *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948 (D.C. Cir. 1990). Here, the requirement that Defendants pay enormous sums to fund the Government's proposed smoking cessation initiative flatly violates this bedrock principle. The act of paying money to fund a smoking cessation program, however worthy, has no relationship, much less the close "causal" relationship required by the case law, to Defendants' allegedly illegal acts. Nor do those payments have any relationship to the means by which Defendants participated in or managed the alleged RICO enterprise.

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[84] As we discuss at greater length below in connection with the Government's proposed Independent Hearing Officer, the penalty the Government seeks would constitute a criminal contempt sanction. *See United Mine Workers v. Bagwell*, 512 U.S. 821 (1994). That being true, the imposition of that penalty here would deprive Defendants of all of the rights of the criminally accused. *See F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1139 (9th Cir. 2001) ("An individual charged with an indirect criminal contempt is entitled to the right to be advised of the charges; the right to a disinterested prosecutor; the right to assistance of counsel; a presumption of innocence; proof beyond a reasonable doubt; the privilege against self-incrimination; the right to cross-examine witnesses; the opportunity to present a defense and call witnesses; and the right to a jury trial if the fine or sentence imposed will be serious.")

c. The Proposed Smoking Cessation Program Does Not Satisfy the Narrow Tailoring Requirement

Apart from the fact that the Government's proposal will not "prevent and restrain" future RICO violations, as § 1964(a) requires, it plainly is not "narrowly tailored" to that objective. That is, even if the funding of massive social programs might somehow "deter" future misconduct – which is in any event inadequate as a matter of law to satisfy the "prevent and restrain" standard – the "fit" between the means and the objective is not sufficiently tight.

Indeed, even if one assumed (contrary to Section 1964(a)), that an injunction could appropriately be aimed at redressing the effects of *prior* violations, the Government's proposed cessation program is not narrowly tailored to that objective either. The evidence at trial shows that the proposed program is far broader than necessary, even if a violation were proven, because it does not take into account existing cessation-related resources at both the state and federal level. *See* JDFOF Ch. 13, ¶¶ 140-157. Accordingly, the Government has not carried its burden of demonstrating that the program is "no more burdensome to the defendant[s] than necessary to provide complete relief to plaintiffs." *Tamiko Roofing Prods.*, 282 F.3d at 40.

In addition, if the proposed smoking cessation remedy is to be justified as an advance sanction for an inevitable future act of contempt (as the Government has most recently argued), the proposed program violates the "narrowly tailored" requirement to such an extent as to be arbitrary and capricious. For example, if we assume that Defendants will in the next twelve months commit a violation of the proscription on misleading cigarette advertising, and if we assume (contrary to Section 1964(a)), that a remedy can legitimately seek to cure the effects of a violation, any sanction must be narrowly tailored to curing the effects of that offense. Thus, the sanction would have to be based on proof of the number of people who will have been deceived into smoking cigarettes as a result of the specific violation. The remedy would also require proof

of the specific measures required to undo the effect of the misleading advertising for that specific cohort of people who began smoking as a result. But such proofs have not been attempted.

Instead, the Government simply predicts the total number of youths who will start smoking in the next year (regardless of any violation of this Court's order) and the total number of persons who will switch to low tar cigarettes, and then demands that Defendants provide cessation funding for that group of people. Gov. Br. at 210-211. Thus the Government implicitly assumes that *every* youth who will begin to smoke, and that *every* person who switches to light cigarettes, will do so because of some unspecified future RICO violation. Yet the Government's own experts have previously admitted that any such assumptions are "preposterous" and "highly unlikely." Fisher Dep., 4/10/02, at 84; Gruber Dep., 4/22/02, at 55-56.

In another respect as well, the Government fails to ensure an adequate "fit" between the persons assumed to be injured and those afforded relief under the Government's proposal. Relief would not be given to the 2.3 million alleged "victims" of the future fraud; instead, it would be given to the first 2.3 million smokers who signed up, regardless of whether they had been impacted by the future (or any) fraud.

d. The Government's Proposed Program Would Entail An Unconstitutional Assumption of Legislative Functions

The proposed cessation program also violates the principle that no remedy may entail the assumption by the court or court-appointed officers of powers assigned by the Constitution to the legislative branch rather than the judiciary. The Government's proposal is essentially a social welfare program. As such, it lies within the exclusive province of Congress, and falls well outside the "judicial power" that Article III authorizes Congress to confer upon federal courts.

See Grupo Mexicano, 527 U.S. at 322 ("Congress is in a much better position than [the judiciary] . . . to design the appropriate remedy" when the requested remedy is "a type of relief that has never been available [in equity] before").

Indeed, the Government's proposal bears a striking resemblance to the failed National Tobacco Policy and Youth Smoking Reduction Act ("McCain Bill"), S. 1415, 105th Cong. (1997), which encompassed various grants, funds, and other programs to restructure the tobacco industry. *See* Myers WD at 23:14-17. Congress declined to enact the McCain Bill. If this Court is to remain within its proper sphere as an Article III court, it cannot appropriately impose that same program under the guise of equitable relief.

e. The Government Did Not Prove That Its Cessation Program Would Be Effective at Either Preventing and Restraining Future RICO Violations or Reducing Smoking, or Provide any Evidentiary Basis for the Proposed Funding Levels

The Government's proposal is also plagued by numerous evidentiary deficiencies. The most obvious is the Government's complete failure to *prove* that its proposal will actually "prevent and restrain" RICO violations. At trial, while the Government introduced testimony about how a smoking cessation program – albeit not the one now proposed – might be designed, and opinion about why it would be good social policy, the Government simply did not confront – let alone overcome – this central defect in its proposed smoking cessation remedy. Dr. Fiore focused on the impact such a program would have on public health,[85] and offered no testimony that in any way addressed Defendants' conduct, either now or in the future.

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[85] *See, e.g., id.* at 16-17 ("Reducing tobacco use is a public health issue of paramount and unparalleled importance. . . ."); *id*. at 18 (proposed remedy "hold[s] tremendous promise for producing dramatic decreases in tobacco use and its resulting human and economic costs"); *id.* at 20 ("Having barrier-free access to evidence-based smoking cessation therapy is absolutely essential if a program is going to reach the largest number of smokers and thereby help the maximum number of smokers to quit."); Tr. at 21303 ("I would hope that any program would

[Footnote continued on next page]

Indeed, on cross-examination, Dr. Fiore explicitly disclaimed any intention to offer testimony about how the proposed smoking cessation remedy would prevent and restrain future misconduct by Defendants:

> Q: Is it correct that the Department of Justice lawyers who retained you in this lawsuit instructed you that it was not your responsibility to address the capacity of your cessation plan to prevent and restrain future misconduct by the Defendants?
>
> A: I believe I was told that other expert witnesses would be addressing that topic.
>
> Q: And *you are not offering any expert opinion testimony on whether your national cessation plan will prevent and restrain future misconduct by the tobacco companies*; correct?
>
> A: *That's correct*.

Tr. at 21547 (emphasis added). No "other expert witnesses" ever offered any testimony to "address[ ] that topic."[86] In short, the Government's evidence failed to support the cessation program advocated by Dr. Fiore (JDFOF Ch. 13, ¶¶ 168-235).

[Footnote continued from previous page]
really be built around an outcome, and that outcome is to be able to ensure that every one of those 32 million Americans who tell us today they want to quit are able to achieve that goal.").

[86] *See also* Trial Tr. at 13619 (Burns) (purpose of cessation program is to "mitigate the damage that has been caused by Defendants' past conduct."). Conversely, Defendants offered testimony that demonstrated the backward-looking nature of this proposed remedy. As Dr. Dennis Carlton testified, the proposed smoking cessation remedy would not reduce or prevent future misconduct by the Defendants:

> Professor Fiore's proposed remedy appears to be independent of future defendant misconduct. Professor Fiore does not demonstrate – or even claim – that his proposed remedy would reduce or prevent future misconduct by Defendants. Indeed, Professor Fiore acknowledged that he was not charged with the task of determining whether his proposed remedy might, or might not, prevent or reduce future misconduct, that he had not conducted any independent analysis into the subject, and that he

[Footnote continued on next page]

In addition, the dollars requested in the new proposal, well exceed amounts deemed sufficient by several Government representatives. *Id*. at ¶¶ 232-235. Most telling, however, is the Government's last-minute assertion that the current figures represent a calculation of smokers affected by Defendant's *future* violations (6/9/05 Tr. (a.m.) at 23388:1-7) – a subject on which there is no evidence whatsoever.

In sum, the Government's proposed cessation program, like the program the Government abandoned just prior to closing arguments, suffers from numerous fatal deficiencies. It is beyond the Court's authority, and well beyond the bounds of sound discretion, to impose either program on the Defendants.

2. The Gruber "Look-Back" Remedy Violates Pertinent Statutory, Equitable, and Constitutional Standards

Under Dr. Gruber's proposal, each defendant manufacturer would be assessed a $3,000 penalty for each "youth" smoker of that manufacturer's brands in excess of a proposed annual target. The targets reflect "reductions in youth smoking of 6% per year between 2007 and 2013, for a total of a 42% reduction in youth smoking by 2013, compared to a 2003 baseline. Gruber WD at 15; *see also* Gov. Br. at 232. The fines would be assessed regardless of the reason that the number of youth smokers exceeds the target. JDFOF Ch. 13, § V.B., ¶¶ 257-60, 266, 273, and 296-98. The proposed remedy violates statutory, equitable, and constitutional standards.

[Footnote continued from previous page]

> was not offering any expert opinion on the subject. (5/18/05 Tr. (a.m.) 21547.)

Carlton WD at 28-29; *see also* Weil WD at 10-11.

a. The Gruber Penalty Violates Basic Restrictions On Equitable Remedies As Well As The Limitations Imposed By § 1964(a)

Dr. Gruber's remedy is not "closely tailor[ed] . . . to the harm" alleged by the Government, *Aviation Consumer Action Project v. Washburn*, 535 F.2d 101, 108-09 (D.C. Cir. 1976), and does not prevent and restrain Defendants from committing future RICO violations, 18 U.S.C. § 1964(a). *See supra* at § IX.A.2 to IX.A.4. The Government does not, and cannot, allege that youth smoking or the marketing of tobacco products to youths constitutes a RICO violation. Rather, the Government alleges that Defendants violated RICO by falsely denying, often in response to claims and inquiries by Government officials, that they marketed tobacco products to youths. A narrowly tailored response to such a scheme, if RICO liability were established, would be to enjoin false denials of youth marketing.

Yet the Gruber look-back penalty is not directed at such denials or even any actions by Defendants regarding marketing to youth or, for that matter, any action by *Defendants*. Rather, it is tied to the smoking habits of youth and seeks to reduce that youth smoking as an end unto itself. This is so even though youth smoking may result —and is likely to result —from various factors far removed from any allegedly false denials of youth marketing by the Defendants. Indeed, Dr. Gruber does not even attempt to "tie [his proposed remedy] specifically to RICO-violating activities" by the Defendants, and he does not show that the proposed target levels of youth smoking are the levels that would be reached in the absence of future misconduct by Defendants. 5/10/05 Tr. (a.m.) 20625, 20654-55 (Gruber); *see also* JDFOF Ch. 13, § V.B., ¶¶ 257-60, 266, 273-78, 296-99.

Consequently, the Gruber look-back penalty is not tailored to provide economic incentives that elicit Defendants' future compliance with RICO, much less narrowly so. Defendants must pay penalties if youth smoking levels fail to reach targeted reduction goals—

regardless of why a given manufacturer fails to meet the targeted reduction level. JDFOF Ch. 13, § V.B, ¶¶ 257-60, 273-74, 296-98. Indisputably, "defendants may have to pay Dr. Gruber's assessment even when they commit no future RICO violations at all, and they may avoid payments even when they do commit future RICO violations." Weil WD at 6; *see also id.* at 14; JDFOF Ch. 13, § V.B., ¶¶ 226, 278, 285-93.

In short, the Gruber look-back remedy is, by definition, not tied to future RICO violations and is inherently overbroad. If there is a causal connection between Defendants' RICO violations and increases in youth smoking, then preventing those violations prospectively will eliminate whatever youth smoking is attributable to them. Conversely, if Defendants' RICO violations are not a substantial or contributing factor to youth smoking, then, by definition, penalizing Defendants for the absence of reductions in such smoking is not remotely tailored to any future RICO violations.

The Government's only justification for the Gruber remedy is that it may be difficult to effectively prevent future RICO violations through the normal injunctive process, even with the extraordinarily intrusive monitors the Government proposes. *See* Gov. Br. at 172-75. But such nihilistic pessimism is not a basis for imposing unnecessary penalties. As noted above, in shaping equitable relief, a court may not make an unfounded assumption that a defendant will continue to violate the law even in the face of an injunction. Here, there is no evidence, or reason to believe, that this Court will somehow be unwilling or unable to effectively identify, detect and prevent future RICO violations in the future. This is particularly true since, by definition, any future RICO violations must be done in *public*. Defendants cannot market to youth, or falsely deny doing so to government officials, behind closed doors. They can only do so through public pronouncements which will be readily available to the Court. Thus, it would

be far easier to prospectively foreclose any RICO violations by these Defendants than it would be in the typical RICO case, where extortion or bribery or other illegal activity is necessarily and traditionally done in secret.

The Gruber remedy is particularly indefensible because not only would it be imposed on the basis of conduct that is not a RICO violation, but it is not based on Defendants' conduct at all. As noted, "[a] decree should not command the defendants to do something that is . . . beyond their control." *Rockford Bd. Of Ed.,* 111 F.3d at 533; *see supra* at § IX.A.8. Dr. Gruber conceded that there are many reasons other than Defendants' actions that his proposed youth-smoking levels might not be met, including exposure to smoking by family members and peers and even the depiction of smoking in movies. *See* 5/10/05 Tr. (p.m.) 20715:22 to 20716:4 (where Gruber agrees it is "certainly possible" that "the targeted reductions in youth smoking that [he] propose[s] might not be met for reasons that have nothing to do with defendants' conduct at all"); 5/10/05 Tr. (p.m.) at 20714:4-7 (where Gruber agrees that "[i]t is certainly true . . . that other factors, factors not within the exclusive control of these defendants, have been associated with youth smoking initiation"). Indeed, Gruber admitted that it is "hard to pin down" what causes youth smoking levels to fluctuate. *See* 5/10/05 Tr. (p.m.) at 20718:5-6. He offered only that there has been "speculation" that Defendants' conduct may have caused youth-smoking levels to rise. (5/10/05 Tr. (p.m.) 20718:1-3 (Gruber)).

At best for the Government, the Gruber remedy might be said to have the same deterrent effect as disgorgement. The Government does not have sufficient evidence of any such effect, however. Contrary to its repeated assertions, no expert for Defendants testified that the Gruber

remedy will provide economic incentives to avoid future RICO violations.[87] In any event, as noted, a deterrence rationale is plainly not sufficient to support the Gruber remedy, for the same reason it could not support disgorgement. *See supra* § I.B., IX.A.2.

b. The Gruber Penalty Violates The First Amendment

Even if the overbroad penalties in the Gruber penalty were permissible, they are plainly improper where, as here, their purpose and effect is to control speech; *i.e.*, the alleged marketing to youth. As noted, any injunction that implicates Defendants' First Amendment rights must be tailored with particular care so as not to chill protected speech. *See supra* § IX.A.12. Here, "[t]o the extent that . . . lawful advertising . . . has 'spillover' effects on the number of youth smokers . . . Dr. Gruber's remedy could chill defendant's perfectly lawful advertising . . . in the market for adult smokers." Weil Written Direct Examination, at 19-20. Specifically, manufacturers concerned about monetary penalties may curtail their advertising altogether, or modify their advertising in a way that "reduc[es] the adult population . . . to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

So too here: if the Gruber look-back penalty is to have any effect on reducing youth smoking, it must be precisely because it will cause Defendants to curtail their protected marketing speech. The purported virtue of the "outcome-based" Gruber remedy is that it will

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[87] Contrary to the Government's account (Gov. Br. at 233, 238), Dr. Weil testified that the Gruber remedy would *not* be effective in preventing and restraining RICO violations because it was "aimed at" reducing youth smoking instead of preventing future RICO violations. Weil WD at 14-20; JDFOF Ch. 13, §§ V.B.2 and V.B.3. Indeed, the Court recognized this failure of the Gruber remedy: "As an expert economist, have you considered … whether adjustments could be made to the Gruber remedy, proposed remedy, that would take into account those situations … *where the remedy he proposes does not exactly hit the target that the statute is aimed at, namely preventing future RICO violations*?" 5/31/05 Tr. (a.m.) at 22297:3-22298:3 (Weil) (emphasis added). In response, Dr. Weil testified that any attempt to repair the Gruber remedy would fail because "the fundamental theory is it's pointed in the wrong direction." *Id. See also* JDFOF Ch. 13, §§ V.B.2 and V.B.3.

have a broader deterrent effect on marketing practices that are presumed to be related to youth smoking than would a precise injunction proscribing particular practices. Conversely, if it is not more effective in deterring RICO violations than a narrowly drawn injunction proscribing identified practices, then it is impermissible because it is broader than necessary. In short, the Court can no more penalize Defendants for failing to reduce youth smoking (and thereby attempt to induce them to curtail protected speech in the form of marketing) than it could fine a television network for failing to reduce youth violence (and thereby attempt to induce it to reduce the level of violence in television programming).

c. The Gruber Penalty Is Contrary To The Public Interest

Dr. Gruber's proposed remedy is also broader than necessary in another respect: It "likely would reduce defendants' incentives to compete—both on price and non-price dimensions—because any action that increases a defendant's sales could increase the number of youth smokers it attracts and thus its expected assessments." Carlton WD, at 21; *see also* JDFOF Ch. 13, § V.B.2.a., ¶¶ 269-72; and § V.C.5, ¶ 374. But the price competition that Dr. Gruber's proposal would deter is *not* a RICO violation, and raising prices in no way prevents or restrains Defendants from violating RICO.

Moreover, there is no evidence that the 42-percent price increase contemplated by Dr. Gruber to reduce youth smoking could feasibly be implemented in a competitive market or that, if it were feasible to do so, it would deter youth smoking. Such a substantial price increase by Defendants might well cause them to lose significant market share to the non-defendant tobacco manufacturers who already control approximately 15% of the domestic market – and who are not subject to the strictures of the MSA. JDFOF Ch. 13, § V.C.1.b., ¶¶ 315-16, and § V.C.3.d., ¶ 359.

In addition, the 42-percent price increase Gruber foresees to reduce youth smoking would impose a severe financial burden on adult smokers, who surely are "innocent persons" within the meaning of 18 U.S.C. § 1964(a). Likewise, if Defendants are bankrupted or impaired by reductions in smoking or by the fines and assessments that the Government seeks to impose on them, shareholders, creditors, employees, and retirees of defendants, as well as states that receive payments from Defendants through the MSA, will be severely harmed. JDFOF Ch. 13, § V.C.2., ¶¶ 327-37.

* * *

In sum, Dr. Gruber's look-back penalty, far from being narrowly tailored to prevent and restrain Defendants from violating RICO in the future, is an attempt to use the RICO violations alleged in this case as a pretext for "launch[ing] the . . . cour[t] on [an] ambitious schem[e] of social engineering" designed to reduce smoking. *Rockford Bd. of Ed.*, 111 F.3d at 534. This the Court may not do.

d. The Gruber Penalty Cannot Be Imposed Without A Jury Trial

Wholly apart from the lack of any basis for the Gruber remedy under basic remedial principles and § 1964, the Gruber look-back penalty is plainly a remedy at *law* rather than an equitable remedy, and is therefore impermissible for two independent reasons: (1) under the Seventh Amendment, it can only be entered after a jury trial, and (2) it is not authorized by § 1964(a) because "*only* equitable relief may be granted" under that section. *United States v. Philip Morris, Inc.*, 273 F. Supp. 2d 3, 9 (D.D.C. 2002) (emphasis added).

In determining whether a right to a jury trial attaches under the Seventh Amendment, the "important" question is whether "the remedy sought" is "legal or equitable in nature." *See id.* at

9.[88] As this Court has explained, "monetary damages are traditionally considered legal relief." *See id.* at 9 (citing *Teamsters v. Terry*, 494 U.S. 558, 565 (1990)). The Supreme Court has found an "exception to the general rule," *Terry*, 494 U.S. at 570-71, that a jury must order monetary relief —purely restitutionary actions, and monetary awards that are incidental to or intertwined with injunctive relief. *Id.* at 8. But the Gruber remedy bears no resemblance to either of these exceptions.

First, the Gruber remedy is not and cannot be a form of equitable restitution. If it were, it would, of course, be impermissible under § 1964(a) because, under the D.C. Circuit's square holding, such "backward-looking" restitutionary efforts to "remedy the effects of past conduct to restore the *status quo*" do not "prevent and restrain." *Philip Morris USA Inc.*, 396 F.3d at 1198. Rather, the Government seeks to justify the Gruber penalty as a forward-looking effort to induce future compliance. Gov. Br. at 232. Although that characterization is inaccurate for the reasons discussed above, the relevant point is that all agree that the Gruber remedy is not fairly characterized as restitutionary. Rather, the remedy's avowed goal is to punish or deter youth smoking (or, as the Government contends, future RICO violations). Thus, it is quintessentially legal in nature. *See, e.g., Tull v. United States*, 481 U.S. 412, 422 (1987) ("Remedies intended to punish culpable individuals . . . were issued by courts of law, not courts of equity."); *Curtis v. Loether*, 415 U.S. 189, 196 (1974) ("[A]ctual and punitive damages . . . is the traditional form of relief offered in the courts of law.").

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[88] Specifically, to determine whether a suit is one at "common law" where the Seventh Amendment requires a jury trial, "the Court must (1) compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity, and (2) examine the remedy sought and determine whether it is legal or equitable in nature." 273 F. Supp. 2d at 9. "The Supreme Court has repeatedly asserted that the second part of this test is more important than the first." *Id.*

The Supreme Court's opinion in *Tull* is illustrative. In that case, the district court required the defendant to pay the Government $35,000, reflecting the profits the defendant received on the sale of polluted wetlands, as well as additional sums for other properties and for the failure to restore property that had been polluted. *Id.* at 415. The Court held that the district court was without authority to do so because the civil penalties imposed were not "calculated solely on the basis of equitable determinations," but also based on the "need for retribution and deterrence, in addition to restitution." *Id.* at 422. Even though, in some respects, "the District Court determined the amount of penalties by multiplying the number of lots sold by [defendant] by the profit earned per lot," the money judgment could not properly be analogized to "disgorgement of improper profits" because the purpose of the monetary remedy was "by no means limited to restoration of the status quo." *Id.* at 424. Consequently, it was a legal remedy that required a jury to adjudicate liability.

Here, similarly, the Gruber remedy is purportedly justified only because it will "punish"[89] and/or "deter" future wrongdoing—precisely the purposes that *Tull* held are furthered only by *legal* remedies. Indeed, the Gruber look-back penalty is even more obviously a civil penalty than the remedy in *Tull* because it is based on a "fixed formula." *Tull*, 481 U.S. at 423 n.7.[90] *See*

[89] The Gruber penalty also runs afoul of the Excessive Fines Clause of the Eighth Amendment, which limits the Government's power to "extract payments, whether in cash or in kind, as *punishment* for some offense." *Austin v. United States*, 509 U.S. 602, 609-10 (1993) (internal citations omitted; emphasis in original). A punitive forfeiture is excessive if it is "grossly disproportional to the gravity of the defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 337 (1998). Here, as noted, the Gruber penalty is disproportionate to any offense alleged by the Government because it is not even tied to an underlying RICO violation. Moreover, it is calculated to be disproportionate to any financial gain by Defendants from youth smoking. Gov. Br. at 232.

Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998). In short, the Gruber civil penalty bears no resemblance to any restitutionary remedy known at equity.

Second, the proposed Gruber remedy is not "incidental to or intertwined with injunctive relief." *Tull*, 481 U.S. at 424; *cf.* Gov. Br. at 232 ("[T]he Gruber penalty 'exceeds Defendants' financial gain."). For the reasons stated, a "court of equity" could *not* order the Gruber legal relief, so this exception is inapposite. As *Tull* held, because "a court in equity" could "not enforce civil penalties," such relief could not be characterized as "an adjunct to injunctive relief" or ordered without a jury trial. *Id.* at 424. Second, a monetary penalty that could amount to billions of dollars, JDFOF Ch. 13, § V.C.2, ¶ 331; 5/10/05 Tr. (p.m.) at 20773: 6-18 (Carlton), can hardly be deemed incidental to injunctions governing youth marketing. *See* Tull, 481 U.S. at 424-25 (explaining that a "potential penalty of $22 million hardly can be considered incidental to the modest equitable relief sought in this case."). Finally, as the D.C. Circuit has made clear, a monetary award can be characterized as "equitable" only if, as with the back pay award in *Mitchell v. DeMario Jewelry*, 361 U.S. 288 (1960), the power to award arises "*derivatively* from the equitable injunction powers granted by the statute" or where the statute "explicitly describe[s] money damages as equitable." *Croker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 748-749 (D.C. Cir. 1995) (emphasis added). Needless to say, the Gruber penalty, unlike the back pay in *Mitchell*, or, for example, the cost of a monitor, cannot reasonably be characterized as derivative of the power to enjoin. Rather, the sole justification for this remedy is that it is "outcome-based" and thus takes a far different approach than enjoining particular RICO

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[90] If the Gruber penalty is alternatively characterized as punitive damages, it is also a legal remedy that can only be entered after a jury trial. *Tull*, 481 U.S. at 423 n.7; *Curtis v. Loether*, 415 U.S. at 189-90.

violations, on the grounds that such injunctions are somehow ill-equipped to detect and redress future RICO offenses. *See* Gov. Br. at 237-38. It is thus entirely independent of, and in addition to, any injunctive relief, so it cannot possibly be an "adjunct to" such injunctions. Where, as here, the Government is "free to seek an equitable remedy in addition to, or independent of, legal relief," the legal monetary award and the equitable injunction cannot be viewed as "intertwined." *Tull*, 481 U.S. at 424. *See Croker*, 49 F.3d at 749 ("[T]he inference that Congress intended a full range of remedies . . . undercuts any assertion of a statutory basis for viewing the court's power to award back pay as merely 'incidental to or intertwined with' its ability to grant equitable relief.")

Finally, even if the Government seeks to (inaccurately) recharacterize the Gruber penalties as *contempt sanctions* for noncompliance with injunctive orders, it still cannot be entered by the *Court*, but could only be imposed following a *jury* trial on noncompliance. The Supreme Court has held that monetary sanctions for non-compliance must be treated as *criminal* contempt and imposed only following a jury trial. *United Mine Workers v. Bagwell*, 512 U.S. 821, 828 (1994); *see also Law v. NCAA*, 134 F.3d 1438, 1443 (10th Cir. 1998). At that trial, the Government would have to prove beyond a reasonable doubt that the target youth smoking levels had been exceeded. *See United Mine Workers*, 512 U.S. at 838, 834. Moreover, the court could not enforce the fines unless a defendant *willfully* violated the Court's injunction—that is, unless defendants willfully intended to escalate youth smoking above the target levels. *See, e.g., In re Levine*, 27 F.3d 594, 595 (D.C. Cir. 1994). Thus, the Government would need to make the absurd and impossible showing that defendants willfully intended to cause a violation beyond their control.

For all these reasons, the Gruber remedy exceeds this Court's equitable authority.

3. The Government's Proposed Public Education and Countermarketing Remedies Violate Multiple Legal, Equitable, and Constitutional Principles

In section IV.C of its Remedies Order, the Government also asks the Court to order Defendants to fund the American Legacy Foundation ("ALF"), at a cost of $400 million per year for ten years "to continue and supplement its activities and funding, as established by and specified in Section VI of the Master Settlement Agreement" and to carry out "a nationwide, sustained advertising and education program to educate smokers and nonsmokers of all ages about the comparative disease risks of low and ultra low tar cigarettes and the disease risks associated with exposure to secondhand smoke." The proposed public education and counter-marketing campaign violates several constraints on the Court's authority to issue injunctive relief.

a. The Proposal Is Barred by RICO's "Prevent and Restrain" Requirement

As Defendants have demonstrated in their Rule 52(c) Motion, the proposed public education and countermarketing remedy is foreclosed by the Court of Appeals' decision in *Philip Morris*. *See* Defendants' Brief in Support of Rule 52(c) Motion at 16-19 (filed July 20, 2005); Reply Brief in Support of Rule 52(c) Motion at 12-16 (filed September 5, 2005). The Government argues that the proposal would prevent and restrain future fraudulent conduct, because it would reduce the profitability of such conduct by reducing its effectiveness and by reducing the population of adult and youth smokers. Gov. Br. at 220-229; *see also* Tr. at 23053 ("[A] counter-marketing campaign will prevent and restrain future misconduct . . . by inoculating youth who are subject to defendants' continuing marketing"); U.S.' Mem. Regarding Non-Disgorgement Equitable Remedies Pursuant to Order #875 at 11 (arguing that a public education and counter-marketing campaign "will tend to prevent the public from being adversely affected

by any future fraudulent or misleading public relations efforts by Defendants."). For a number of reasons, this argument fails to transform an inherently remedial program into one that meets the standard articulated by the Court of Appeals.

First, while the Government has offered evidence that the program it seeks would "change the informational environment" in which the Defendants operate, the Government has offered *no* evidence that such a campaign would actually affect Defendants' future conduct.[91] The Government simply argues that such a campaign, by reducing either the population of smokers or the effectiveness of marketing, will as a theoretical matter reduce the returns to fraudulent conduct. But theory cannot substitute for evidence. And in all events, one might just as easily argue that a public education and counter-marketing campaign would make the Defendants *redouble* their advertising efforts to maintain market share. The ambiguous effect of this proposal's effect on Defendants' incentives highlights the fact that its true goal is something other than preventing and restraining future violations. It is, in truth, a public health policy measure dressed up as civil RICO remedy.

Second, the Government's argument presumes that any remedy that reduces the profitability of possible fraudulent conduct is permissible under the statute. Adopting that presumption, however, would require this Court to ignore the clear holding of the Court of Appeals in favor of an expansive (and erroneous) reading of Judge Williams' concurrence—something it should decline to do. Holding that it "will expand on the remedies explicitly

[91] It is true, of course, that the Government sought to prove at trial that public education and counter-marketing campaigns are effective at reducing adult and youth smoking prevalence. The question of whether a campaign has a propensity to reduce smoking prevalence, however, is a very different question from whether the public education and counter-marketing campaign proposed by the Government here will prevent and restrain future RICO violations.

included in the statute only with remedies similar in nature to those enumerated," the Court of Appeals rejected disgorgement as "a very different type of remedy" from the three exemplar remedies in the statute—divestment, restrictions on future activities or investments, and dissolution. *Philip Morris USA Inc.*, 396 F.3d at 1200. Like disgorgement, the proposed public education and counter-marketing campaign is qualitatively different from the remedies enumerated in the statute. Moreover, although the Government relies heavily on Judge Williams' concurrence to the effect that the forces most affecting the likelihood of criminal conduct are "the returns to crime versus the possible costs, all adjusted for risk (such as the risk of getting caught)," Gov. Br. at 220 (quoting *Philip Morris USA Inc.*, 396 F.3d at 1203 (Williams, J., concurring)), the Government overlooks Judge Williams' catalogue of "the whole available panoply of genuinely forward-looking remedies—express controls over substantive conduct, transparency-enhancing orders, and contempt penalties for violations," *Philip Morris USA Inc.*, 396 F.3d at 1204 (Williams, J., concurring). None of those "genuinely forward-looking remedies" remotely resembles the proposed public education and counter-marketing campaign.

Third, the Government's arguments in its trial brief merely repeat arguments the Government made in its February memorandum, which Order #886 held were foreclosed by the D.C. Circuit's opinion. *See* Order #886 at 4 ("Virtually all of the arguments made by the United States in its Memorandum were arguments relied upon by this Court in its original opinion"). Likewise, to the limited extent this argument addresses future violations at all, it is simply a reprise of the Government's "deterrence" argument – *i.e.*, Defendants might have less incentive to engage in less profitable future frauds if those who might otherwise be deceived can successfully be "inoculated." This is no different from saying that the threat of disgorgement

deters fraud by threatening the confiscation of any profits thereby derived—the precise argument rejected by the Court of Appeals in this case.[92]

b. The Public Education and Countermarketing Campaign Lacks the Necessary Connection to the Alleged Violations

Separate and apart from its violation of § 1964(a)'s "prevent and restrain" requirement, as interpreted by the D.C. Circuit, the Government's proposal violates § 1964(a)'s implicit requirement that each remedy be directed at preventing and restraining the specific acts found to be unlawful or acts closely related to such conduct. *See, e.g., Zenith Radio Corp.*, 395 U.S. at 132; *Microsoft Corp.*, 253 F.3d at 105; *Yellow Bus Lines*, 913 F.2d 948; *Philip Morris USA Inc.*, 396 F.3d at 1200 (RICO remedies all directed toward separating the criminal from the RICO enterprise to prevent future violations). Again, the act of paying money to fund any kind of public policy program has no relationship, much less the close "causal" relationship required by the case law, to Defendants' allegedly illegal acts. Nor do those payments have any relationship to the means by which Defendants participated in or managed the alleged RICO enterprise. Here again, this proposed remedy does not serve to "separate" Defendants from "the RICO enterprise." 396 F.3d at 1200.

c. The Government's Proposal Violates the Equitable Requirement That an Injunction Be Narrowly Tailored

The public education proposal also violates the narrow tailoring requirement. *See Alpo Petfoods, Inc.*, 913 F.2d at 972. The only testimony regarding whether any aspect of the

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[92] There is also an independent reason for rejecting the Government's public education/youth smoking prevention program: that youth marketing is indisputably not a RICO violation. Rather, the Government contends that Defendants' alleged *misrepresentations* about whether they marketed to youth amounts to mail or wire fraud under RICO. Any appropriate remedy in this case must be directed at stopping the allegedly illegal conduct—*i.e.*, lying about youth marketing—rather than the youth marketing itself, which is not illegal under RICO.

proposed ALF remedy is narrowly tailored at possible future misconduct of the Defendants was from Dr. Carlton, and his unrebutted opinion was that it is not. Carlton WD at 29:19-20 (remedy "appears to be *independent* of future defendant misconduct.")

Indeed, some aspects of this proposed remedy have nothing to do even with Defendants' alleged misconduct in the past. Most obviously, the Government's proposed subsidization of ALF's activities related to substance abuse and tobacco products other than cigarettes (JDFOF Ch. 13, § VI, ¶¶ 381, 386, and 407) has nothing to do with any activity by Defendants.[93]

d. The Government Failed To Make a Specific Disclosure of the Public Education Remedy During the Trial of This Action

Although the Government provided notice that it would seek some form of corrective advertising and public education, it did not give Defendants enough notice to allow them to litigate those issues fairly under *Microsoft*.

First, the Government's Proposed Remedies Order specifies for the first time that the amount of funding requested for such programs is $4 billion over a ten-year period. *See* Remedies Order, § IV (C). But there is no basis in the record to support funding for ALF in the amount of $400 million annually for public education and counter-marketing. This amount is far in excess of the funding that ALF has received in the past. The Government's failure to disclose this figure during trial deprived Defendants both of the opportunity to cross-examine Dr. Healton about the uses to which such a level of funding would be put and to offer their own evidence that

[93] In addition, the Government wrongly asserts that this Court need not decide whether funding ALF would violate the vilification clause (Section VI(h)) of the MSA based upon ALF's past and likely future advertising even though that clause is contained in the MSA provision which the Government wants ALF to continue to carry out. Gov. Br. at 231 n.142.

such funding levels would be excessive, wasteful, and far out of proportion to any need for such programs.

Second, the Government seeks to force Defendants to fund a campaign about low-tar cigarettes, but never even asked Dr. Healton about that possibility when she testified. Likewise, the Government failed to elicit testimony concerning an ETS campaign, other than a scant mention by Healton that ALF was already beginning such a campaign on its own. The crux of Dr. Healton's testimony was ALF's "truth" campaign directed to youth. And finally — especially since the Government did not disclose that ALF would be the recipient of any "counter marketing" award — it also did not disclose that part of any award would simply go to the general budget of ALF without specific allocation to any particular campaign. JDFOF Ch. 13, ¶¶ 398-401, 497, 513.

e. The Government's Proposal Arrogates Legislative Power to the Court

The Government's public education and counter-marketing remedy is essentially a social welfare program. Such an initiative is beyond the authority of an Article III court. *See supra* § IX.A.11. It is instead within the exclusive province of Congress, and should not be imposed in the guise of a civil remedy in a RICO lawsuit.

f. The Government's Proposal Would Violate the First Amendment

The Government's public education and counter-marketing proposals also raise serious First Amendment issues because they would compel Defendants either to make, or to fund, speech that they believe to be untrue. Orders compelling a party affirmatively to make statements must be carefully scrutinized. First, under the First Amendment, a court may "order corrective advertising only if the restriction inherent in its order is no greater than necessary to

serve the interest involved." *Warner-Lambert v. FTC,* 749, 562 F.2d at 758 (D.C. Cir. 1977) (citations omitted). Second, a party cannot be compelled to make statements that it believes to be false. *Nat'l Soc. of Prof. Eng'rs*, 555 F.2d at 984 ("To force an association of individuals to express as its own opinion judicially dictated ideas is to encroach on that sphere of free thought and expression protected by the First Amendment.").

ALF routinely makes public statements on which there is ample scientific debate and with which some or all of the Defendants disagree, as well as statements that contain attacks on Defendants. JDFOF Ch. 13, § VI.B.5, ¶¶ 508-509, 600. For First Amendment purposes, there is no difference between compelling a party to make statements itself and compelling a party to pay others to make those same statements.

g. The Government Did Not Prove by Empirical Evidence That the Proposed Counter-Marketing Campaigns Will Reduce Smoking

A final problem with the proposed counter-marketing campaigns is the Government's failure to present empirical evidence demonstrating that the remedy will even reduce smoking, much less "prevent and restrain" RICO violations. *See* JDFOF Ch. 13, § VI.B.5, ¶¶ 408-494 (discussing in detail the Government's failure to prove that the ALF's activities have been effective in reducing youth smoking).[94] Dr. Eriksen, the only Government remedies expert to recommend counter-marketing, did not validate his opinion by sound scientific methodology or support it by empirical evidence as required by Rule 702. Because Dr. Eriksen could not provide scientific research into the validity of his opinions, "there is simply too great an analytical gap

[94] The Government suggests that Defendants have admitted to the effectiveness of ALF's efforts to reduce youth smoking. Gov. Br. at 230. To the contrary, Defendants specifically deny that ALF has been proven to be effective at reducing tobacco use generally and youth smoking in particular. JDFOF Ch. 13, § VI.B.5, ¶¶ 408-484.

between the data and the opinion proffered." *General Electric v. Joiner*, 522 U.S. 136, 146 (1997).

Dr. Eriksen had no evidence that either his proposed youth-focused counter-marketing campaign or his "smoking and health" counter-marketing campaign would have the effect of decreasing smoking. He could not identify *any* controlled study where a "particular mass media campaign" even "as part of a state comprehensive program" was compared against other states and demonstrated a causal effect on youth smoking. 5/16/05 (p.m.) 21182; *see* JDFOF Ch. 13, § VI.B.5, ¶ 412. The one study he did cite "can't isolate [the] effect" on youth smoking of the youth-focused media campaign alone because "these media campaigns have been adopted in the context of a broader program" that involves different kinds of interventions. 5/16/05 (p.m.) 21189-90. *Id*. He was unaware of any study that isolates the effect of a "smoking and health" campaign from the broader context of a state program. *Id.* at 21192-93. Accordingly, the Government has not proven with empirical evidence that the proposed public education and counter-marketing remedy will reduce smoking prevalence.[95]

4. The Government's Proposed Corrective Communications Remedy Violates Statutory, Equitable and Constitutional Requirements

The Government's proposed corrective communications remedy (Remedies Order, § IV.E) suffers from many of the same flaws that plague the Government's other proposed remedies. *See* JDFOF Ch. 13 § VII, ¶¶ 535-562. Despite the Government's arguments to the contrary, constitutional and statutory limits on the available remedies in this case offer further,

[95] Nor can the Farrelly studies funded by ALF that played such a prominent part of Dr. Healton's testimony provide the support the Government needs. Tellingly, Dr. Eriksen did not even mention those studies, and they were convincingly shown to be fatally flawed by Dr. Wittes. JDFOF Ch. 13, ¶¶ 408-93.

independently compelling reasons why the proposed corrective communications remedy does not pass legal muster.

a. The Government Failed To Make A Specific Disclosure Of The Proposed Corrective Communications Remedy During The Trial Of This Action

The Government first disclosed the specifics of the substantive and procedural aspects of the proposed corrective communications remedy — including the contents of the compelled affirmative statements, as well the extensive distribution schedule — well after the close of evidence. *See* JDFOF Ch. 13 § VII.B, ¶¶ 539-545. Because Defendants were not given a full and fair opportunity to be heard on the issues raised by the remedy, entering the Government's proposed corrective communications remedy would violate Defendants' due process rights. *Microsoft Corp.*, 253 F.3d at 101-02.

b. The Proposed Corrective Communications Remedy Is Barred By RICO's "Prevent And Restrain" Requirement

Section IV.E of the Remedies Order is largely predicated upon past conduct rather than continuing violations and, thus, the proposed corrective communications remedy is in conflict with the D.C. Circuit's opinion. *Philip Morris USA Inc.*, 369 F.3d at 1200; JDFOF Ch. 13, § VII.C.2, ¶¶ 547-549.

c. The Government Did Not Prove That Its Proposed Corrective Communications Remedy Would Be Effective at Preventing and Restraining Future RICO Violations Nor Did It Offer Evidence on the Consistency of This Remedy With the Public Record

The Government neither proffered nor elicited any reliable evidence showing that this proposed remedy would be effective at achieving public health goals — let alone its efficacy at achieving the only legally salient relevant goal — *i.e.*, preventing or restraining future RICO

violations. *See* JDFOF Ch. 13 § VII.C.3, ¶¶ 550-559. As a corollary to the absence of evidence surrounding the efficacy of this remedy, the Government also completed the trial without offering any evidence of or apparent consideration for the potential adverse effects this remedy may have on the public interest. *See* JDFOF Ch. 13 § VII.C.4, ¶¶ 560-561.

d. The Corrective Communications Remedy Is Not Narrowly Tailored To Prevent And Restrain Future Misconduct.

The Government does not dispute that Dr. Eriksen (its only witness to address this remedy — albeit in an abbreviated, non-specific fashion) conceded that the alleged misrepresentations that would purportedly be corrected by these statements emanate at least in part from "defendants' conduct in the *past*." *See* JDFOF Ch. 13 § VII, ¶ 547. In an effort to evade the D.C. Circuit Court's ruling that all remedies must be "directed toward future conduct," the Government offers the following equally unavailing theories. *Philip Morris USA Inc.*, 396 F.3d at 1200.

First, the Government claims that "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 further effects that will be caused if Defendants are permitted to continue their promotion of cigarettes without such statements." Gov. Br. at 250. However, the appellate court ruling does not countenance remedies that prevent and restrain *future effects* from *past misconduct* — but rather only *future misconduct*. *Philip Morris USA Inc.*, 396 F.3d at 1200.[96]

[96] *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977) — a non-RICO case — fails to show that the proposed Corrective Communications would comport with the appellate court's directive. Although the *Warner-Lambert* opinion recited the potential that failure to make corrective communications would allow the persistence of "erroneous consumer beliefs" and the "implicit[]" continuation of the "deception" (*see id.* at 769), neither of these findings provides a

[Footnote continued on next page]

Second, the Government offers a few examples that it claims show that Defendants continue to make material misrepresentations or omissions regarding the health effects of smoking. *See* GFOF ¶¶ 252-255 (discussing alleged issues regarding certain Defendants' statements about disease causation, addiction, and "light" cigarettes). However, these references fail to justify the corrective communications remedy not only because they are not false or otherwise in furtherance of a scheme to defraud, but also because the Government's proposal goes far beyond correcting these limited examples. Instead, the Government's proposed corrective statements run the gamut of issues raised in this case — from ETS to alleged youth marketing. *See* Remedies Order, § IV.E. Consequently, the proposed remedy violates the mandate that injunctive relief in general — and injunctive relief implicating free speech concerns in particular — be narrowly tailored to achieve the desired result.

e. The Government's Proposal Would Violate First Amendment Restrictions On Compelled Speech.

Perhaps most obviously, the Government's proposed "corrective communications" would violate First Amendment restrictions on compelled speech. The Government claims that "Defendants' interests in avoiding compelled speech are in this case easily overcome by the government's interest in preventing future consumer deception or confusion." *See* Gov. Br. at 249. But the only Government interest that may properly be furthered in this case is the prevention of future RICO violations — not the prevention of unintentional consumer deception or lingering consumer confusion. In addition, the Government's cavalier statement that compelled speech concerns are "easily overcome" flies in the face of precedent from the D.C.

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legal hook upon which to enter an order compelling these disclosures. Only remedies aimed at preventing RICO violations — *i.e.* intentional acts — are permissible.

Circuit and elsewhere that carefully limits the types of compelled speech that are permissible. The D.C. Circuit has explained:

> To force an association of individuals to express as its own opinion judicially dictated ideas is to encroach on that sphere of free thought and expression protected by the First Amendment. Any such regulation by the state should not be more intrusive than necessary to achieve fulfillment of the governmental interest. The decree provision commanding the Society to state that in its view certain practices were not unethical goes beyond this.

United States v. Nat'l Soc. of Professional Engineers, 555 F.2d 978, 987 (D.C. Cir. 1977). So, too, here: The Government's proposed corrective communications remedy goes well beyond what is necessary to "prevent and restrain" future RICO violations, and therefore runs afoul of the First Amendment.[97]

f. The Required "Onserts" Would Interfere With The FTC's Authority Under The Cigarette Labeling & Advertising Act.

The Remedies Order's requirement that Defendants include "onserts" containing the proposed corrective communications (*see* Remedies Order, § IV.E.3.a) would also contravene the preemption provision of the Federal Cigarette Labeling & Advertising Act ("FCLAA"), 15 U.S.C. §§ 1331-1341. That provision states that "[n]o statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package." 15 U.S.C. § 1334. The Supreme Court has made clear that, by enacting FCLAA, "Congress unequivocally preclude[d] the requirement of any additional statements on cigarette

[97] The First Amendment concerns raised by the Government's remedy have been highlighted by a recent attempt, under California's Proposition 65, Cal. Health & Safety § 2549.5, to enter a preliminary injunction requiring Philip Morris USA to fund an extensive media campaign alerting Californians to the hazards of environmental tobacco smoke ("ETS"). Judge Prager rejected this attempt based in part on its his observation that the relief proposed "raises the specter of a potential, and in fact likely, invasion of the collective Defendants' First Amendment rights [protecting against] compelled speech contrary to their interests." *See In re Tobacco Cases II*, JCCP 4042 (Cal. Super. Ct. Oct. 27, 1999) (slip op.) at 1.

packages beyond those provided" by FCLAA. *See Lorillard*, 533 U.S. at 542. Indeed, the Congressional intent in enacting FCLAA was to establish "a *comprehensive* Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." 15 U.S.C. § 1331 (emphasis added). Thus, the proposed corrective communications remedy would improperly infringe upon the province of a statutory scheme that Congress intended to be comprehensive in its regulation of cigarette labeling and advertising.[98]

g. The Proposed Corrective Communications Remedy Would Improperly Interfere With The FTC's Jurisdiction Over Tobacco Advertising.

In addition to violating statutory constraints, the Government's requested order requiring the Defendants to issue corrective statements concerning tobacco products improperly intrudes upon the regulatory scheme administered by the FTC, the federal agency that Congress has specifically charged with governing such conduct. *See supra* § IXA.9. Recently, the U.S. Court of Appeals for the 8th Circuit held that the FTC's "comprehensive and detailed control" over the cigarette industry, with respect to cigarette testing and advertising, was sufficient to establish that Defendants were acting under the control of a federal officer for purposes of removal under 28 U.S.C. § 1442(a). *Watson v. Philip Morris Cos.*, No. 04-1225, 2005 U.S. App. LEXIS 18251, at *23 (8th Cir. Aug. 25 2005). *See* JDFOF Ch. 13 § VII.D, ¶ 562.

Where Congress has reserved cigarette advertising regulation exclusively to the FTC, *see Cipollone*, 505 U.S. at 513, the proposed corrective communications remedy also must be

[98] The Government provides no support for its unilateral contention that its proposed onserts are somehow exempt from the FCLAA preemption because they "are affixed to the cigarette package, and are not a part of it." *See* Gov. Br. at 251-25, n.51.

rejected because it would constitute an improper attempt to "usurp the functions of the coordinate branches of Government." *See Nat'l Coal Ass'n*, 510 F. Supp. at 806-807.

5. The Government's Proposed Prohibitory Injunctions Violate Statutory, Equitable, and Constitutional Requirements

Although prohibitory injunctions can often satisfy the "prevent and restrain" requirement, the prohibitory injunctions proposed by the Government here are objectionable for several reasons. In Section V of its proposed remedies order, the Government seeks to prohibit Defendants from: (1) engaging in any acts of racketeering; (2) associating with CTR, TI or CIAR or any successor or affiliated entities known to the Defendants to be engaged in acts of racketeering, and from reconstituting the form or function of CTR, TI or CIAR; (3) making false, misleading or deceptive statements or representations, including distorting or misrepresenting the conclusions of any past or future reports of the Surgeon General; (4) failing to disclose material health or safety information; (5) engaging in activities that misrepresent or suppress information concerning the health risks of smoking or the addictive nature of nicotine; and (6) engaging in marketing activities having an appeal to youth in the United States. Remedies Order, §V.1-5 (pp. 34-37). In its trial brief (Gov. Br. at 261), the Government has essentially abandoned requests (1), (2), and (4) by failing to offer any support for them. The Government now prefers instead to focus upon (a) false or deceptive statements, (b) health descriptors, and (c) youth marketing efforts. For reasons discussed below, even those proposals violate a variety of legal principles and requirements.

a. The Government's Proposed Prohibition on "False or Deceptive Statements" Violates Rule 65(d) and the First Amendment, and Would Intrude Impermissibly Into the FTC's Domain

Section V.3 seeks to enjoin any "material false, misleading or deceptive statement or representation," and defines certain specific prohibited acts. This general prohibition runs afoul of Rule 65(d) in that it fails adequately to define the prohibited acts. In *Savoy Industries, Inc*., 665 F.2d at 1318, the D.C. Circuit held that a clause in the injunction not "to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person," was vague and "put the whole conduct of [defendant's] business at the peril of a summons for contempt." *Id*. at 1319 (quoting *Hartford-Empire Co.*, 323 U.S. at 410); *see also United States v. Vitasafe Corp.*, 345 F.2d 864, 871 (3d Cir. 1965) (enjoining defendant from making statements that are "otherwise false and misleading" was insufficiently specific).

Rule 65(d) also bars issuance of the specific provision in Section V.3.c, prohibiting Defendants from "[f]ailing to publicly disclose any information concerning an actual or potential health or safety risk with which a reasonable consumer of cigarettes would be concerned or attach importance to its existence or non-existence in determining whether to purchase or smoke cigarettes." This directive provides no clue as to the types of health risks that are covered. Also, the standard for compulsory disclosure (a potential health or safety risk "with which a reasonable consumer of cigarettes would be concerned") is impossibly vague. Accordingly, the ambiguity of the proposed relief would unreasonably subject Defendants to the threat of contempt in violation of Rule 65(d). *Calvin Klein Cosmetics, Inc.*, 824 F.2d at 669.[99]

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[99] The Government's proposed injunction against false or misleading statements should also be rejected because it duplicates MSA Section III (r):

> (r) Prohibition on Material Misstatements. No Participating Manufacturer may make any material misrepresentation of fact regarding the health consequences of using any Tobacco Product, including any tobacco additives, filters, paper or other ingredients.

[Footnote continued on next page]

The proposed prohibition against false and misleading statements would also violate the First Amendment. An injunction against speech must define clearly what is prohibited, lest it deter constitutionally protected speech. In *Metropolitan Opera Ass'n, Inc.*, for example, the Second Circuit reviewed a broad injunction that restrained the defendant labor unions from, *inter alia*, "engaging in fraudulent or defamatory representations regarding the MET and/or its donors, directors, officers and/or patrons . . ." 239 F.3d at 176. The court's analysis focused on the fact that the injunction as worded was a prior restraint on speech and, further, the text of the injunction was too vague to enable the Defendants to determine what future statements would subject them to the risk of contempt. *Id*. at 178. That is equally true of Section V.3's prohibition against "*any* material false, misleading or deceptive statement" about cigarettes.

In addition, portions of Section V.3 would improperly enjoin speech concerning matters of public importance about which there is currently a reasonable scientific debate. The proposed prohibitions on "[d]istorting or misrepresenting any of the conclusions reached in any" published report by the Surgeon General, past and future (Remedies Order, § V.3.a & b (pp. 34-35)),

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[Footnote continued from previous page]

> Nothing in this subsection shall limit the exercise of any First Amendment right or the assertion of any defense or position in any judicial, legislative or regulatory forum.

MSA, US 64359 (at § III(r)) (@). The Government cannot obtain the requested relief without showing that MSA III(r) will not be effective to prevent and restrain any future RICO violations by the Defendants relating to false statements about the health consequences and marketing of cigarettes. *See*, *e.g.*, *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261 (1972); *Nat'l Farmers' Org., Inc.*, 850 F.2d at 1309. In the face of a valid prior settlement agreement, the Government bears the burden of showing that Defendants have not complied with the prior agreement. *Saksenasingh v. Sec'y of Educ.*, 126 F.3d 347, 350 (D.C. Cir. 1997). The Government has not carried its burden. *See* JDFOF Ch. 12, ¶¶ 56-101.

The broad prohibition in Section V.3 is also totally unconnected to any specific RICO violations that the Government claims to have occurred. It therefore violates the principle that a RICO injunction must be aimed at preventing a recurrence of proven violations, and can be no broader than the specific types of violation that have been proven.

clearly are directed at chilling any expression by Defendants of their opinions concerning matters of public concern, and are therefore improper. *See*, *e.g.*, *Senart v. Mobay Chem. Corp.*, 597 F. Supp. 502, 506 (D. Minn. 1984); *Oxycal Labs., Inc. v. Jeffers*, 909 F. Supp. 719, 726 (S.D. Cal. 1995). The notion that a private party cannot express criticism, disagreement, or reservation about conclusions in a Government report without suffering massive penalties should alarm any civil libertarian and is better befitting Stalinist Russia than the United States Department of Justice. Moreover, the reference to conclusions in Surgeon General's reports, some of which have not even been published or written yet, violates Rule 65(d)'s prohibition against incorporation "by reference to the complaint or other document, the act or acts sought to be restrained." Fed. R. Civ. P. 65(d). Finally, in response to the Government's claim that the MSA shows that a general prohibition is insufficient to prohibit false and misleading statements, Defendants reference their proposed findings on the issue of the effective enforcement of the MSA. *See* JDFOF Ch. 12, ¶¶ 52-101.

Finally, this proposed remedy would improperly intrude upon the regulatory scheme administered by the FTC. *Cipollone*, 505 U.S. at 513 (pursuant to the FCLAA, the FTC has "long regulated unfair and deceptive advertising practices in the cigarette industry.").[100] Acting pursuant to its authority under FCLAA, the FTC has addressed many of the issues presented in this lawsuit, including low tar, low nicotine, and similar claims; youth marketing; and warning

[100] By Order #356, the Court denied Defendants' motion for partial summary judgment based upon the argument that cigarette advertising, promotion, marketing and warning claims were within the exclusive jurisdiction of the FTC. *United States v. Philip Morris USA Inc.*, 263 F. Supp. 2d 72, 80 (D.C. Cir. 2003). Even apart from their disagreement with the decision, however, Defendants submit that the factual record developed at trial established that the Government's specific proposed remedies would impermissibly involve the Court in regulating conduct over which Congress has given the FTC exclusive regulatory authority. *See* JDFOF Ch. 13, ¶¶ 63, 562, 588, and 599.

labels. *See, e.g., FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 44 (D.C. Cir. 1985) (reversing an overly broad injunction concerning the advertising of low-tar cigarettes); *see also* JDFOF Ch. 9, § III.I.4; Ch. 10, §§ V and VI B-D and IX.B.2 and XI.C.

Given the FTC's general authority to prohibit false and misleading statements by the Defendants, any remedy entered by the Court must respond *directly* and specifically to the false statements proven by the United States. Otherwise the District Court will effectively be usurping the FTC's authority in this area in violation of separation of powers and preemption principles.

b. The Government's Proposed Prohibition On "The Use of Brand Descriptors for Low Tar Cigarettes" Is Barred by the First Amendment and by the Government's Own Laches and Waiver, and Would Likewise Intrude Into the FTC's Domain

The Government's proposed prohibition on low-tar brand descriptors is equally unlawful. The Government's trial brief focuses on Defendants' use of brand "descriptors." This request is unlawful under the First Amendment and is barred by the Government's own laches and waiver.[101]

As to the First Amendment: A debate exists within the scientific community over whether low-tar cigarettes have reduced health consequences. *See supra*. Compelling a political or even scientific orthodoxy of opinion in this fashion is unlawful. *See, e.g., Mobay Chem. Corp.*, 597 F. Supp. at 506; *Oxycal Labs., Inc.*, 909 F. Supp. at 726; *Brown & Williamson Tobacco Corp.*, 778 F.2d at 43.

[101] Moreover, insofar as it would seek to prohibit demonstrably false statements concerning the health consequences of smoking low-tar cigarettes (as opposed to statements at odds with Government orthodoxy), Section V.4 of the Remedies Order would essentially duplicate the MSA's prohibition on material misstatements. MSA § III(r).

The Government's proposed ban on such labels as "light" or "mild" or other health descriptors, moreover, cannot pass the four-factored *Central Hudson* test. *See Central Hudson*, 447 U.S. at 566. Given the existence of scientific support for these descriptors they cannot be considered "misleading" for purposes of the first prong of the *Central Hudson* test. *Id.* And even if the Government had proved that the use of "light" and "mild" is misleading, the Government's proposed ban on health descriptors would still fail the third and fourth *Central Hudson* factors. To pass the test, the injunction must (1) further the Government's interest in preventing RICO violations, and (2) be no broader than necessary to serve that interest. The restriction does not advance the Government's interest in enjoining future acts of racketeering since the Government has not established that Defendants have violated RICO in their advertising and promotion of low-tar cigarettes. *Central Hudson*, 447 U.S. at 566. And Section V.4 is more extensive than necessary because it would chill the discussion of controversial health issues about the health effects of low-tar cigarettes. *Id*.

The Government's request for a restriction on the use of health descriptors is also barred by laches and waiver because the Government has previously condoned and encouraged the use of such descriptors for cigarettes. *See* JDFOF Ch. 13, ¶ 603. Courts have long recognized that the equitable doctrine of laches is a bar to relief that is untimely or to conduct in which one party has long acquiesced.[102] *See City of Sherrill v. Oneida Indian Nation*, 125 S. Ct. 1478, 1491

[102] The equitable defense of laches is applicable regardless of the governmental character of the plaintiff. *See, e.g.*, *Nat'l Labor Relations Bd. v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 893-94 (7th Cir. 1990) ("laches is generally and we think correctly assumed to be applicable to suits by Governmental agencies as well as by private parties"); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 373 (1977) (equitable discretion is not curtailed by the government nature of the plaintiff); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 369 (1943) (laches is available to bar commercial claims brought by the Government).

(2005) (citing *Badger v. Badger*, 69 U.S. 87, 2 Wall. 87, 94, 17 L. Ed. 836 (1865)). Thus, when one side has engaged in substantial delay in prosecuting a claim, laches may serve to bar the action. *City of Sherrill*, 125 S. Ct. at 1491.

There are numerous instances in which the Government has waived any right to relief for conduct involving the use of health descriptors. JDFOF Ch. 13, ¶ 603. The Government should have acted decades ago if it believed that the use of such descriptors was unlawful. Taken together, the Government's silence and delay bar any such conduct restrictions under the doctrines of laches and waiver. *City of Sherrill*, 125 S. Ct. at 1491.

Finally, as with the Government's proposed prohibition on false and misleading statements, this proposal would improperly intrude upon the FTC's jurisdiction. Indeed, the FTC has specifically addressed the issues of low tar and low nicotine.[103] See *Am. Brands, Inc. v. Nat'l Ass'n. of Broadcasters*, 308 F. Supp. 1166, 1168 (D.D.C. 1969) (discussing FTC proceedings involving use of the terms "low tar"). In many respects, moreover, the Government's proposal asks the Court to impose liability for Defendants' adherence to FTC mandates. For example, since 1966, the FTC has *required* manufacturers to disclose the average tar and nicotine yields of cigarettes, despite challenges to the FTC's prescribed methodology by the Defendants. *See, e.g.*, FTC Statement of Considerations (Aug. 1, 1967); FTC Proposed Rule and Request for Comments, 42 Fed. Reg. 21,555 (1977); 48 Fed. Reg. 15,953 (1983); 50 Fed. Reg. 41,589

[103] In arguing that the proposed injunction would not invade an area of FTC regulation, the Government cites Dr. Henningfield's testimony in which he claims that the FTC does not impose, regulate, or require descriptors, and that it is the tobacco companies that define how descriptors are applied. Gov. Br. at 264 (citing Henningfield WD at 56:8-11). Dr. Henningfield, however, is not competent to offer an expert opinion on the scope of the FTC's jurisdiction. In any event, the FTC's inaction on a matter is not evidence that the matter falls outside the scope of the FTC's authority, because the choice not to regulate is as much an exercise of authority as the choice to regulate.

(1985); 62 Fed. Reg. 48,158 (1997). This Court should not interfere with the FTC's clear authority over and interest in these matters.

c. The Government's Proposed Restrictions on "Youth Marketing" Activities Violate the "Prevent and Restrain" Requirement of Section 1964(a), the Specificity Requirements of Rule 65(d), the First Amendment, and Due Process.

The Government's proposed prohibitions against "youth marketing" are likewise misguided and unlawful for several reasons. They are unrelated to the RICO conduct charged in this case, which was limited to the Defendants' allegedly false *denials* that they market to youth. *See*, *e.g.*, Am. Compl. ¶¶ 173-206. The obvious way to "prevent and restrain" any such false denials is simply to prohibit false denials. One does not "prevent and restrain" a false denial by prohibiting or regulating the practices that have been falsely denied – practices that, whatever they are, clearly are *not* RICO violations. Here again, the Government is simply trying to bootstrap a charge of fraud into a comprehensive regulatory regime.

The same is true of the specific prohibitions of Section V.5, none of which has any clear connection to any RICO violations. For example, the Government offered no evidence that price promotions were used to further a fraud or any RICO violation and, indeed, the Government's witnesses conceded that the tobacco industry does not use price promotions to target underage individuals. JDFOF Ch. 13, ¶ 619. Nor has the Government offered any evidence that any marketing activities involving Motor Sports Brand Sponsorship constituted or was in any way related to a RICO violation. JDFOF Ch. 13, ¶ 635. Similarly, there is no evidence that any Defendant is currently marketing reduced size cigarette packs or has plans to do so in the future. JDFOF Ch. 13, ¶ 633. Nor is there any evidence that the distribution or sale of flavored cigarettes was in any way related to any past or likely future RICO violations. *See* JDFOF

Ch. 13, ¶ 638. Since there is no evidence that these activities constituted RICO violations, the specific restrictions in Section V.5 are not narrowly tailored to prevent and restrain future RICO violations and are therefore impermissible. *Philip Morris USA Inc.*, 396 F.3d at 1200.

The Government's proposed prohibition against "any marketing activities which the IO finds have the effect of marketing cigarettes in a manner appealing to Youth in the United States" also violates Rule 65(d). By delegating the definition of prohibited marketing activities to the IO, the proposed injunction effectively incorporates by reference documents that do not yet exist and whose contents are unknown. Clearly, this reference violates the Court's duty to "frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid." *Common Cause v. Nuclear Regulatory Com.*, 674 F.2d 921, 927 (D.C. Cir. 1982) (quoting *Int'l Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 62, 76 (1967)).[104]

The proposal also violates the First Amendment. Specifically, the proposed prohibitions, including the prohibition against Motor Sports Brand Name Sponsorship, fail to satisfy the first *Central Hudson* factor because they would restrict Defendants' lawful speech about a lawful commercial activity that is in no way "inherently misleading." *Central Hudson*, 447 U.S. at

[104] In addition, the proposed prohibition on youth-appealing marketing essentially duplicates the MSA's prohibition on youth targeting. MSA § III(a). The proposed prohibition on youth-appealing marketing in Section V.5 also duplicates the MSA's restrictions in other respects. For example, Section V.5.c (p. 36) places restrictions on brand sponsorship for Motor Sports events, but such restrictions were already specifically agreed to under the MSA and have already been effectively addressed. MSA § III(c); s*ee also Star Scientific Inc. v. Beales*, 278 F.3d 339, 345 (4th Cir. 2002) (participating tobacco manufacturers agreed to limit tobacco brand-name sponsorships of athletic and other events under the MSA). These prohibitions are therefore unnecessary and improper. *Standard Oil Co.*, 405 U.S. at 261; *Nat'l Farmers' Org., Inc.*, 850 F.2d at 1309; *Saksenasingh*, 126 F.3d at 350.

566.[105] The proposed prohibition likewise fails to satisfy the third *Central Hudson* factor, because there is no relationship between a prohibition on Motor Sports sponsorships and the RICO violation alleged, *i.e.*, a fraudulent *denial* that Defendants market cigarettes to youth.

The ban on price promotions in Section V.5.a should also be denied because it would stifle lawful competition, does not make "due provision for the rights of innocent persons" and would be contrary to the public interest.[106] 18 U.S.C. § 1964(a); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001) (noting that, for "several hundred years," courts of equity have enjoyed "sound discretion" to consider the "necessities of the public interest" when fashioning injunctive relief) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944)). The proposed restriction on price promotions would have a detrimental effect on consumers by raising prices and is contrary to federal competition policy. JDFOF Ch. 13, ¶ 630; *see, e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 256 (1993) ("As a matter of economics, the Court reminds us that price cutting is generally procompetitive, and hence a 'boon to consumers' (Stevens, J., dissenting) (quoting *id* at 224)"). The prohibition on price promotion could further harm the public interest by encouraging smokers to switch to lower-priced non-Defendant brands. JDFOF Ch. 13, ¶ 631. For these reasons, the Court should

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[105] As the Supreme Court explained in *Reilly*, the narrow tailoring required by the First Amendment results from the fact that cigarette advertising to adults is entirely lawful and serves both the sellers', and the public's, interests: "[T]obacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products." 533 U.S. at 564.

[106] No Government witness has considered the likely impact that this prohibition would have on Defendants' ability to price compete with one another and other manufacturers. JDFOF Ch. 13, ¶ 627. Defendants currently employ price promotions as a means to compete with other cigarette manufacturers. *See* JDFOF Ch. 13, ¶¶ 628-630.

deny the relief sought in Section V.5.a of the Remedies Order as it is contrary to the public interest.

Finally, this portion of the Government's proposal should be barred as untimely under *Microsoft*. It was not until June 27, 2005 that Defendants first learned of the specific terms of the Government's requested injunctive relief regarding the prohibitory injunctions contained in Section V.5 of the Remedies Order. *See* JDFOF Ch. 13, ¶¶ 27-36. Dr. Eriksen's general recommendation to restrict "promotional devices that lower the price of cigarettes," *see* Eriksen WD (Remedies) at 24:19-25:2, did not provide Defendants with sufficient notice of the prohibition that the Government now seeks. JDFOF Ch. 13, ¶¶ 616-618.

d. The Government Appears To Have Abandoned Proposed Injunctions Against Violating RICO or Associating With CTR, TI, or CIAR, Which Are In Any Event Improper

The Court should also reject the other prohibitions proposed in the Government's June 27 Remedies Order. At page 261 of its trial brief, the Government makes a passing reference to the injunctions proposed in Sections V.1 and V.2 of the Remedies Order, but then offers no support whatsoever for either proposal. It appears that the Government has recognized that these proposals are unsupportable and has abandoned them.

In all events, neither of the proposed prohibitions is proper. Section V.1 would proscribe "[c]ommitting any act of racketeering, as defined in 18 U.S.C. § 1961(1), relating in any way to the manufacturing, marketing, promotion, health consequences or sale of cigarettes in the United States." But the courts have frequently invalidated injunctions like this whose language, contrary to Rule 65(d), simply echoes or incorporates the language of a statute.[107] The Supreme

[107] *See, e.g., Sterling Drug, Inc. v. Bayer AG*, 14 F.3d 733, 748 (2d Cir. 1994); *United States v. Dinwiddie*, 76 F.3d 913, 928 n.12 (8th Cir. 1996); *Burton v. City of Belle Glade*, 178 F.3d 1175,

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Court, "in accord with the policy of Rule 65(d)," has "denounced broad injunctions that merely instruct the enjoined party not to violate a statute," in part because such injunctions increase the risk of "unwarranted contempt proceedings for acts unlike or unrelated to those originally judged unlawful." *See Int'l Rectifier Corp.*, 383 F.3d at 1316-17.

The proposed prohibition against associating with CTR, TI, or CIAR (Remedies Order, § V.2) is also improper because (1) it would improperly duplicate restrictions imposed by the MSA (§§ III(o), III(o)(5));[108] (2) even apart from the MSA, the Government has not proven that the objectionable conduct is likely to recur; and (3) because the organizations in question no longer exist, the Government cannot satisfy its burden of showing that the requested relief is necessary. *See American Bd. of Trade, Inc.*, 751 F.2d at 537-38; *SEC v. Texas Gulf Sulphur, Inc.*, 446 F.2d 1301, 1306 (2d Cir. 1971).[109]

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1200-01 (11th Cir. 1999); *Calvin Klein Cosmetics Corp. v. Parfums De Coeur, Ltd.*, 824 F.2d 665, 669 (8th Cir. 1987) (citing *Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 444 (1974)). Section V.1 also violates: the requirement that an injunction be narrowly tailored to address the specific violations before the court (*Alpo Petfoods*, 913 F.2d at 972); the requirement that injunctive relief be no more burdensome to the defendant than necessary (*Tamiko Roofing Prods.*, 282 F.3d at 40); and the requirement that an injunction be limited to the specific kinds of misconduct that have been proven (*Zenith Radio Corp.*, 395 U.S. at 132).

[108] The Court has already heard argument about the MSA earlier in the litigation and concluded that when it reached the remedy stage it would consider arguments concerning the MSA's effect on the available remedies. *United States v. Philip Morris USA Inc.*, 327 F. Supp. 2d 1, 7 n.5 (D.D.C. 2004) (Order #586).

[109] Section V.2 would also violate Defendants' First Amendment associational rights. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918-19, 933 (1982); *Citizens Against Rent Control/Coalition for Fair Housing v. Berkley*, 454 U.S. 290, 295 (1981) (*citing NAACP v. Alabama*, 357 U.S. 449, 460 (1958)); *United States v. Int'l Bhd. of Teamsters*, 266 F.3d 45, 51 (2d Cir. 2001) (RICO case). Absent a specific finding that the Defendant manufacturers intend to engage in unlawful conduct with CTR, TI, CIAR, or their successors or affiliates, the First Amendment bars the requested injunction. *Claiborne Hardware Co.*, 458 U.S. at 918-19. The evidence in this case will support no such finding.

e. The Proposed Prohibitory Relief Impermissibly Extends to Non-Parties Over Whom the Court Lacks Personal Jurisdiction, and To Foreign Conduct Having No Substantial Effects in the United States

The Government's proposed prohibitory injunctions are objectionable on two additional grounds. First, Section III of its proposed Remedies Order would apply to non-party subsidiaries of Defendants who were never served with process or subject to the Court's personal jurisdiction. Yet the Court may not enjoin the conduct of an affiliate or subsidiary that is not a defendant in this action. *See, e.g., Zenith Radio Corp.*, 395 U.S. at 112; Fed. R. Civ. P. 65(d); *cf. United States v. Bestfoods, Inc.*, 524 U.S. 51, 62 (1998) (respect for distinction between parent and subsidiary is "bedrock principle" of law). This provision of the Remedies Order would unfairly bind non-parties who have been deprived of their "entitlement to contest their liability and the propriety of any injunctive relief in a lawsuit to which they are made parties." *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 96 F.3d 1390, 1395, 1397 (Fed. Cir. 1996). Further, by waiting until after the close of evidence to reveal that its proposed order would apply to non-party subsidiaries, the Government has violated the due process rights of such persons to notice and an opportunity to be heard. *See, e.g., Microsoft Corp.*, 253 F.3d at 101.

Second, the Government also asks the Court to place prohibitions on the Defendants' (and their subsidiaries' – *see* § III) otherwise lawful marketing activities, regardless of whether such activities have a direct and substantial effect within the United States. Remedies Order, § V.5.c (pp. 36-37). But this Court's authority does not extend to conduct that does not have a direct and substantial effect within the United States. *See supra*.

Accordingly, even if certain of the Government's proposed prohibitory injunctions were otherwise proper, they are clearly improper to the extent they would extend to non-parties or to international conduct with no direct and substantial effect on the United States.

6. The Government's Proposed Document Disclosure Proposals Violate Statutory, Equitable and Constitutional Requirements

Section IV.F of the Remedies Order requires that Defendants publish and maintain certain litigation-related documents and bibliographic information on their existing websites (or in the cases of BATCo and Liggett, to create a website). Remedies Order, § IV.F.3.a. Defendants must also produce documents to the Minnesota Depository created in *Minnesota ex rel. Humphrey v. Philip Morris Inc.*, 606 N.W. 2d. 676, 681 (Minn. Ct. App. 2000), or its successor. The Government also requests public production of Defendants' disaggregated marketing data. None of the requested relief should be granted.

a. The Court Should Not Require Disclosure of Competitively Sensitive Marketing Data Because Their Disclosure Is Not Narrowly Tailored to Prevent or Restrain Future RICO Violations, and Because the Government Failed to Provide Adequate Notice of Its Intention to Request Such Relief

The Government's request for disclosure of disaggregated marketing data has nothing whatsoever to do with Defendants' alleged misconduct. And it would be contrary to several core principles governing equitable relief.[110]

First, it is impermissible on competitive grounds. Trade secret and confidential business information is typically protected from public disclosure in litigation, even at trial. *See, e.g., In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 901 (E.D. Pa. 1981). The factors for a court to consider in making this determination are set forth in *United States v. Hubbard*, 650 F.2d 293,

[110] By way of background, on June 22, 2005, the Court issued Order #975 in response to PM USA's motion to seal portions of the testimony of Mr. Beran and Mr. Szymanczyk, which disclosed recent disaggregated marketing data. The testimony, "spell[ed] out in dollars and cents the financial resources Philip Morris has chosen to expend on various kinds of marketing, including advertising, price promotions, over-the counter retail and convenience store promotions, etc." Order #975 at 3.

317-22 (D.C. Cir. 1980), and overwhelmingly favor protection of the information at issue from disclosure. The public has no demonstrable "need" for access to the very specific and particular data. And, aside from certain highly aggregated summaries of the data (*see* Gov. Br. at 254-247), it has not been publicly revealed. Defendants have a manifest business need and competitive interest in protecting this proprietary information from disclosure. *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984). Even Dr. Eriksen agreed that "marketing data . . . could be potentially sensitive," and that "[t]here are potential concerns around marketing data depending on how the data would be released." 5/16/05 (a.m.) Tr. at 21215-216.

Second, the Government's proposal requiring disclosure of disaggregated marketing data is not aimed at preventing and restraining future RICO violations. Such disclosure would be required irrespective of whether Defendants are ever found to commit a RICO violation in the future. *See Philip Morris USA Inc.*, 396 F.3d at 1198 (finding disgorgement quintessentially backward-looking, in part, because it "is awarded without respect to whether the defendant will act unlawfully in the future."). No Government expert testified that these proposed disclosures will have any effect on Defendants' future conduct. The Government's expert Dr. Eriksen testified merely that the purpose of such disclosures is to provide "greater transparency to the public as to what is being spent and what effect it's having" and to "do more research." 5/16/05 Tr. (a.m.) at 21135-36; Gov. Br. at 247. The Government's mere assertions that "such disclosure is thus needed to prevent and restrain future frauds such as denying that . . . brand-level marketing expenditures have an impact on youth," *id.*, cannot substitute for *evidence* — even on the heroic assumption that a "denial" of an impact on youth can even constitute a fraud actionable under RICO. Rather than seeking to prevent and restrain future violations, the

Government is apparently seeking either retribution or fodder for academic study, neither of which is an appropriate goal of a remedy.[111]

Third, in all events, the Government failed to timely provide Defendants with details concerning its proposed data disclosure remedy. Defendants were thus deprived of the opportunity to present witnesses, evidence or argument on these issues, contrary to *Microsoft*.

b. The Court Should Reject the Government's Other Proposed Document Disclosures, Which Are Designed Not to Prevent and Restrain Future RICO Violations, But Primarily to Assist Plaintiffs' Lawyers in Other Litigation

Beyond disaggregated marketing data, the Government's Proposed Remedies Order requires Defendants to produce a broad array of litigation related documents, including all documents produced to the United States in this action and all documents produced on or after the date of this Final Judgment and Order in any court or administrative action in the United States concerning smoking and health, marketing, addiction, low-tar or low-nicotine cigarettes, or less hazardous cigarette research. The Government also proposes to require the Defendants to provide additional information about documents withheld on privilege grounds in this and other litigation. These requests are obviously meant not to prevent and restrain future RICO violations, but to assist plaintiffs' lawyers in other litigation against Defendants.

First, this document disclosure proposal is impermissibly backward-looking for a number of reasons. The Government has failed to offer any evidence, through Dr. Eriksen or any other

[111] Even if disclosure of the Defendants' disaggregated marketing data could somehow "prevent and restrain" future RICO violations, it is certainly not narrowly tailored to that objective. The creation of these data is not part of the means by which the Defendants participated in the alleged "enterprise," and is not similar to any acts by which that participation may have occurred. The data was, at most, a byproduct of any enterprise participation and therefore, disclosure is not an appropriate remedy.

witness, that the Government's proposals would in fact prevent and restrain future violations. The best the Government can do is to assert that information about smoking and health issues "would be of immediate and personal medical interest to the public." Gov. Br. at 248 (quoting Order #975 at 3). But the fact that information might be "of interest to the public" provides no basis for a conclusion that its disclosure will prevent and restrain future misconduct.

Moreover, any incidental impact of this remedy on Defendants' future conduct would only be indirect and incidental – even more indirect and incidental than the disgorgement remedy rejected by the D.C. Circuit. *See Philip Morris USA Inc.*, 396 F.3d at 1200. Moreover, under the Government's proposed Remedies Order, Defendants would have to make the required document disclosures until the year 2030, without regard to whether Defendants are ever shown to commit a RICO violation in the future. Accordingly, it is insufficiently forward-looking under the D.C. Circuit opinion. *See Philip Morris USA Inc.*, 396 F.3d at 1198 (finding disgorgement quintessentially backward-looking, in part, because it "is awarded without respect to whether the defendant will act unlawfully in the future.").

Indeed, aside from the Government's proposed disclosure of disaggregated marketing data (which appears designed to benefit those with a research interest in the tobacco industry), the Government's proposals appear designed to benefit plaintiffs' lawyers who are suing or wish to sue Defendants in other fora. It is difficult to imagine any other purpose for such proposals as the Government's request that Defendants provide more information about documents withheld on grounds of privilege or confidentiality, and waivers or adverse adjudications of privilege or confidentiality claims. *See* Gov. Br. at 243-45.

Although the Government argues that disclosure of such information "is the only way to allow transparency and ensure that Defendants do not engage in similar 'egregious' conduct in

the future" (Gov. Br. at 244), the Government has not presented any evidence that such disclosures would actually prevent and restrain future *RICO* violations. However "egregiously" the Government may think the Defendants have acted with respect to their handling of documents in litigation, that is not a RICO violation. And a proposal designed to "remedy" such behavior is plainly not designed to "prevent and restrain" future RICO violations. *See, e.g., New York v. Microsoft Corp.*, 224 F. Supp. 2d at 144-47 (court is not at liberty to remedy conduct for which no liability is ascribed).[112]

Second, the Government's document disclosure proposals (aside from disaggregated marketing data) have already been entered by other courts pursuant to the MSA. *See* MSA, US 64359, ¶ IV. Equitable relief is inappropriate when the defendant is already subject to similar relief in another court. *See American Bd. of Trade, Inc.*, 751 F.2d at 538; *see also Nat'l Farmers' Org.* 850 F.2d at 1309 ("[T]here is nothing to be gained by entering an injunction that substantially duplicates the relief already available.").

[112] Even if the Government's document disclosure proposals could have some effect on the Defendants' future conduct, they are certainly not "narrowly tailored" to preventing and restraining future violations. *See Alpo Petfoods*, 913 F.2d at 972 ("The law requires that courts closely tailor injunctions to the harm that they address"). There has been no showing that Defendants' failure to disclose documents in the past constituted predicate RICO violations. And there has been no effort to tailor the requested disclosure to those matters as to which transparency might have an appropriately prophylactic effect. Instead, the Government seeks disclosure of the kitchen sink: "all documents produced on or after the date of this Final Judgment and Order in any court or administrative action in the United States concerning smoking and health, marketing, addiction, low-tar or low-nicotine cigarettes, or less hazardous cigarette research" and all transcripts. Remedies Order, § IV.F. This massive disclosure (to be maintained through 2030 regardless of whether Defendants commit any future violations) must, moreover, be electronically catalogued by no fewer than 34 separate fields. § IV.F.3.c. This is a hugely burdensome undertaking, as to which no effort whatsoever has been made to tailor it to a legitimate objective. And that is further evidence that the Government's real objective is to assist plaintiffs' lawyers in their litigation against the Defendants.

Nor is there any evidence that any of the "additional" materials requested in the Remedies Order are not already publicly available through either the Defendants' websites or other means. In fact, the MSA requirements have resulted in extensive publication of Defendants' internal documents. *See* MSA, US 64359, ¶ IV. And Dr. Eriksen admitted that he had not "looked at the testimony of any of the experts in this case to determine whether in their view there was significant scientific information that was yet to be disclosed." 5/16/05 (a.m.) Tr. at 21141.[113]

7. The Government's "Court Monitors" Proposal Is Likewise Unlawful In Numerous Respects

The Government also proposes that the Court appoint both an Independent Investigation Officer ("IO") and an Independent Hearing Officer ("IHO") who would, among other things, investigate, prosecute, and adjudicate a broad range of potential misconduct. For a host of reasons, appointment of these proposed monitors is unnecessary and unlawful.[114]

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[113] A final, dispositive objection to the Government's proposal is that Defendants were deprived of the opportunity to present witnesses, evidence or argument on issues of fact relevant to the determination of the appropriateness of the Government's proposed requirement that Defendants disclose certain documents. Although Dr. Eriksen recommended at trial "that the tobacco companies make certain internal scientific materials publicly available," he failed to specify or identify what those materials actually were. Eriksen (Remedies) WD at 23:16-20. Nor did the Government produce any other witness who identified such materials.

[114] In its proposed order, the Government also sought the appointment of "internal compliance officers" for each Defendant. However, because the Government's trial brief, makes no effort to defend that proposal, it has been waived.

In all events, that proposal must be rejected for several reasons. First, because the Remedies Order creates such a broad array of generalized duties and proscriptions, the duty to "ensure that the Defendant complies with this Final Judgment and Order" violates the requirement in Rule 65 that the injunction "be specific in terms [and] describe [its requirements] in reasonable detail." To make matters worse, it creates mechanisms under which Defendants can be heavily fined for any noncompliance. *See* Remedies Order, § VI.C.1.m (p. 42). By its terms, this proposal means that if, anywhere in the company, any employee makes a false statement that violates the final order, the compliance officer will have failed to perform his duty "to ensure that the Defendant complies with this Final Judgment and Order." That would constitute an independent violation, leading potentially to another fine and also, perhaps, to an Order by the IO requiring the

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a. The Government's Monitors Proposal Is Barred By Microsoft

First, Defendants were not given sufficient notice of the Government's proposal. The qualifications and roles of the IO and IHO are substantially different from those proposed for "court monitors." After identifying various "structural changes for the defendant companies" that the Court should "consider" (Bazerman WD at 2), Dr. Bazerman testified that he was not recommending any specific remedy. *Id.* at 2-3. Dr. Bazerman reiterated throughout his live trial examination that he was only recommending the appointment of monitors to study Defendants' businesses and implement changes or make recommendations to the Court; he was not recommending any particular remedies or structural changes. *See, e.g.*, Tr. at 20358, 20359, 20383-84, 20410, 20415-16, 20420, 20423-24. In its closing argument, the Government for the first time proposed a radically different monitoring structure. Tr. at 23378-79. Defendants objected on the grounds that "this is something that we did not litigate" (*id.* at 23381), and the Court recognized that "these are all matters that are being presented for the first time . . ." (*id.*).

In its Remedies Order submitted on June 27, 2005, the Government made further modifications to its monitoring proposal. It now seeks the appointment of two individuals, an IO and an IHO who would be "attorneys." Remedies Order, § VI.A.3 (p. 38). The IO would have sweeping powers.[115] The IHO would hear and determine any complaint brought by the IO or

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defendant to "remove" the Compliance Officer. *Id.* § VI.C.1.h (p. 41). Third, the fact that the compliance officers would be responsible for enforcing duties to be created in the future by the IO or IHO (under §VI.C.1.B, for example) is a gross violation of the prohibition in Rule 65(d) against references to "other documents," because the documents upon which those duties will rest lie outside the four corners of the Remedies Order and, in fact, do not yet exist.

[115] These include the right to hire personnel, including experts; to bring charges for violations of the order; to inspect the books and records of Defendants and exercise subpoena powers; to attend meetings of senior management and the Directors of Defendants; to recommend removal of any officer, employee or other member of senior management; and to review the operations of each entity and recommend changes in operations, including the divestiture of Defendants' research and product development activities. *See id.* §§ IV.G (p. 32), VI.C (p. 38).

any dispute relating to any recommendation made by the IO pursuant to procedures specified in the order. *See id.* § VI.D. The Court would have jurisdiction to review the IHO's determinations, but only subject to the same deferential standard of review that applies under the Administrative Procedures Act. *See id.* § VI.F. (p. 50). None of these provisions were disclosed by the Government or litigated by the parties during trial in violation of *Microsoft.*

Moreover, most of the powers that the Government would lodge in the monitors were not supported by any evidence. The proposed powers for the IO, for example, include: (a) the authority to direct and restructure Defendants' business and personnel practices; (b) unlimited investigatory power; (c) the authority to impose new duties and prohibitions; and (d) the authority to monitor Defendants' compliance with every aspect of the Remedies Order (and with the new duties to be created by the IO himself) and to prosecute perceived misconduct and seek sanctions before the IHO. Dr. Bazerman talked about the Court's appointment of a monitor to propose ways to restructure Defendants' businesses "in the broadest, most general terms with no specifics whatsoever." 6/9/05 Tr. at 23383:10-11. Neither Dr. Bazerman, nor any other Government witness, testified at all about powers (b), (c), or (d). As a result, the Court was given no factual basis for concluding (and Defendants were given no opportunity to contest) whether the proposed remedies will not violate the constraints, among others, identified in Section IX.B *supra*.[116]

[116] Similarly, there are several issues regarding the proposed IHO that cannot be resolved without fact finding based on a proper hearing. For one example, permitting an IHO to make determinations to which this Court must give deference under an Administrative Procedures Act standard is deeply problematic. The Government never suggested that it would propose such a standard until closing arguments. Other issues that would require examination at trial include: the number and composition and expense of the staff that the IHO would retain under § VI.D.2; the ground on which the IHO would penalize Defendants for not removing a corporate officer, and the likely consequences for the Defendants' ability to manage their affairs (§ VI.C.1.a-c); what evidentiary principles, if any, would be applied in hearings before the IHO, in light of the

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b. The Government's Monitor Proposal Cannot Be Justified on the Basis of Any Perceived Need to Further Address the Defendants' "Corporate Policies, Practices and Conduct"

The Government's principal argument for monitors – that they are needed to conduct a review of and monitor "Defendants' corporate policies, practices and conduct" (Gov. Br. at 252) – provides no basis for the Government's proposal. Indeed, although court officers have been appointed in other RICO cases, the Government conceded during its closing argument that, in all but three of these cases, the appointment was made pursuant to a consent decree in which the Defendants expressly agreed to the officers' oversight. *See* 6/09/05 Tr. at 23375. More importantly, in all 20 of the cases identified by the Government during its closing argument, the court officer was appointed to oversee the operations of a union that had a long-standing history of violence and corruption by organized crime. *See id.* at 23377; *see also Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement*, 1989 Duke L.J. 903, 965-994 (1989) (discussing cases).[117] These cases do not stand for the proposition that courts may

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proposed rule that "the rules of evidence do not apply" (§ VI.E.4.d); the circumstances in which the IHO could impose sanctions that were not requested by the IO (§ VI.E.4.i); and under what circumstances the IHO would admit, and rely upon, the testimony of unidentified informants under § VI.E.4.f. Absent a meaningful exploration of these and other issues, the Court cannot reasonably impose the Government's Proposed Remedies Order. *DuPont*, 366 U.S. at 375.

[117] *United States v. Local 560, Int'l Bhd of Teamsters*, 581 F. Supp. 279 (D.N.J. 1984), *aff'd*, 780 F.2d 269 (3d Cir. 1986), relied upon by the Government (Gov. Br. at 181-82), is typical: *see* 581 F. Supp. at 282 (This is "a harrowing tale of how evil men, sponsored by and part of organized criminal elements, infiltrated and ultimately captured Local 560 of the International Brotherhood of Teamsters, ... This group of gangsters, . . . engaged in a multifaceted orgy of criminal activity. For those that enthusiastically followed these arrogant mobsters in their morally debased activity there were material rewards . . . . For those who attempted to fight, the message was clear. Murder and other forms of intimidation would be utilized to insure silence.") There the court found that, because the entire Executive Board of the Local was completely under the influence of the Provenzano mob it was necessary, "[i]n order to prevent and restrain such future violations of § 1962," to "remove the current members of the Local 560 Executive Board in favor of the imposition of a trusteeship for an appropriate period of time, which will terminate following the completion of supervised elections." *Id*. at 337. The trusteeship bore no resemblance to the monitors suggested here. Their function was to run the union only so long as

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appoint a monitor to oversee and investigate the affairs of corporate defendants.[118] The Government did not – and could not – point to any case in which a legitimate public corporation was subjected to the type of court-appointed oversight that the Government proposes.[119]

The Government again relies heavily on cases in which monitors were appointed by consent, but none of these cases provides support for the proposed appointment of the IO and IHO. The court in *Microsoft* held that, while special masters may be employed without the consent of the parties "to oversee compliance" with a court order, a special master cannot be

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it would take to hold new elections. The trustees exercised no judicial or investigatory powers of any kind.

[118] The Government (Gov. Br. at 255-56) cites *U.S. v. Local 30,* 686 F. Supp. 1139 (E.D. Pa. 1988). *Local 30* is inapposite. There the defendants urged the Court to impose a monitorship, but the court chose instead to implement a "Decreeship" that set forth a grievance procedure and appointed a Chief U.S. Court "Liaison Officer" to "assure compliance" with the terms of the decreeship. 686 F. Supp. at 1169. The officer was authorized to conduct an audit and supervise collective bargaining sessions, but was given nothing like the investigative powers of the proposed IO or the judicial powers of the IHO. The Government also cites *U.S. v. Local 295 of Int'l Bhd. of Teamsters*, 784 F. Supp. 15 (E.D.N.Y. 1992), another mob corruption case in which the authority of the trustee was left unresolved (and whose relevance here is therefore unknown). 784 F. Supp. at 22-23. The court also noted that, even in the case of unions corrupted by organized crime, appointment of a trustee "is clearly an extreme remedy. . ." 784 F. Supp. at 18 (quoting Federal Government's Use of the RICO Statute and Other Efforts Against Organized Crime, S. Rep. No. 407, 101st Cong., 2d. Sess., at Sec. XII, 1990 WL 201659 (Leg.Hist.)).

[119] In addition to *Local 30*, *Local 295*, and *Local 560*, the Government cites *United States v. Ianniello*, 646 F. Supp. 1289 (S.D.N.Y. 1986) as a precedent of this type (Gov. Br. at 192-93), but the case is wholly inapposite. There the court imposed a temporary receiver for a restaurant to prevent skimming of receipts *pendente lite*. 646 F. Supp. at 1300 ("The receiver's essential function would be to put an end to any continued skimming or improper diversion of Umberto's receipts into the hands of one or more of the individual Defendants" (who had already been criminally convicted)). While the Defendants did oppose the receivership, every single one of them had refused (invoking the Fifth Amendment) to answer a single question at depositions during the Government's effort to conduct discovery on its request for preliminary relief. Partly on this basis, the court ruled that a receiver could be appointed. 646 F. Supp. at 1300. The reported opinion did not actually make the appointment, however, because the court required the Government to prepare a proposed "order consistent with this Opinion . . . [that will] state in detail his duties and responsibilities, which are to include regular status reports to the Court." 646 F. Supp. at 1300. We therefore have virtually no idea what the receiver's powers were.

employed absent such consent where "the parties' rights must be determined, not merely enforced." 147 F.3d at 954. The Government's proposed IO and IHO would have extensive authority to "determine" duties and obligations that are not defined by the Government's Proposed Remedies Order. The IHO would be empowered, for example, to impose fines "for any violation of the IO's Final Orders." § VI.C.1 (pp. 38-42). Consent decree monitorships provide no precedent for the Government's monitors proposal, which is, instead, flatly prohibited by the Court of Appeals' *Microsoft* decision.

Nor can the Government justify its unprecedented proposal on the basis of any perceived need to conduct an additional review of Defendants' "corporate policies, practices and conduct." Gov. Br. at 252. One would have thought that would have been a principal purpose of *this* extended proceeding, including a nearly year-long trial. Indeed, the Government has already had the opportunity to present evidence on a wide variety of "corporate policies, practices and conduct" that it might wish to see changed, but it did so in only the most general way. JDFOF Ch. 13, ¶¶ 668-673. It makes no sense to extend this proceeding indefinitely into the future under the guise of a further review by any kind of court-appointed monitor. Enough is enough.

c. The Government's Proposal Would Flatly Violate the Requirement of Judicial Manageability

Aside from the Government's proposed review of Defendants' business practices, the powers of the proposed IO and IHO far exceed those that might be appropriate to monitor compliance with any prohibitory injunction the Court might issue. The proposed IO would be, in effect, a Governmental enforcement agency unto himself or herself. The powers requested for the IO are punitive, sweeping, and unprecedented. Section IV.G.1 would give the IO extensive authority to command Defendants' business and employment operations. But that is only the

beginning. The Government's Remedies Order would also give the IO virtually unlimited powers to investigate Defendants' personnel and operations.[120] And the proposal would give the IHO authority to make findings that are subject only to deferential review under APA-type standards. Given the IO's powers to tell Defendants how to run their business and his almost unlimited investigative and prosecutorial rights, coupled with the IHO's virtually unlimited powers to impose penalties, one must envision regular and endless disputes being brought to the court for resolution. This lawsuit, it would appear, will have been made eternal.

But the truth is even more problematic. The primary reason this scheme is not "judicially manageable" is that the Government has deliberately sought to create a shadow Government over which this Court has virtually no managerial power. No remedies are provided for abusive

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[120] The proposed IO's powers "include[], but [are] not limited to, the following:

- To hire and/or retain personnel, including attorneys, investigators, accountants, consultants, [and] experts, . . .
- To have complete and unfettered access to . . . all books, records, accounts, correspondence, files and other documents (including electronic documents), and to test or sample any tangible things. . . . and
- . . . to enter upon any land, property, or other premises in the possession or control of any Defendant . . . [and]
- to interview current or former directors, officers, agents (including attorneys), servants, representatives or employees of any Defendant, . . . [and
- to] compel the sworn statement or oral deposition of any current director, officer, agent (including attorneys), servant, representative or employee of any Defendant, . . .
- . . . the same subpoena power as a party to an action in the District Court, including 28 U.S.C. § 1783. . . .
- To monitor advertising, other marketing practices and marketing transactions and statements of the Defendants disseminated to the public in the United States, and, . . .
- To attend any meeting of senior management or of directors of any Defendants . . . [and]
- To retain an independent auditor or auditors to perform audits, on reasonable notice to the person or entity to be audited, upon the books and records of any Defendant . . ."

Remedies Order, § VI.C.1 (pp. 38-42).

investigative tactics by the IO. Where the IO and IHO would direct management decisions or mandate management policies, or where the IHO issues punitive fines at the IO's request, this Court's ability to review those orders will be strictly limited. This scheme would be judicially unmanageable not only because it creates a massive array of duties and powers that will inevitably yield constant friction, but also because the Government is attempting to *thwart* judicial management by such things as imposing on this Court a deferential standard of review.[121]

d. Appointment of the Proposed Monitors Would Violate Rule 65(d)'s Requirements of Specificity and Detail

The Government's proposal also violates FRCP 65(d). The D.C. Circuit has held that Rule 65(d) prohibits courts from appointing officers authorized to recommend injunctive remedies beyond those specifically enumerated by the court. For example, in *English v. Cunningham*, 269 F.2d 517, 523-35 (D.C. Cir. 1959), a "Board of Monitors" was established "in order to insure the enforcement and protection of all rights of the individual members and the subordinate bodies of the International Brotherhood of Teamsters." *Id*. at 533. One year after the initial consent decree took effect, the court modified the decree, without consent of the defendants, adding a requirement that they "comply promptly and fully with all future Board of Monitors' Orders of Recommendation that are reasonable and relevant to the basic purposes of the Consent Decree." *Id*. at 524. The D.C. Circuit set this new provision aside, reasoning that

[121] These broad powers also violate the settled principle that injunctive or other equitable relief must be closely tailored to remedy or prevent the specific harm alleged (*see Alpo Petfoods*, 913 F.2d at 972; *Gulf Oil Corp.*, 778 F.2d at 842; *Aviation Consumer Action Project*, 535 F.2d at 108-09; *Hartford-Empire Co.*, 323 U.S. at 410) and the equally important principle that "[i]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Tamiko Roofing Prods.*, 282 F.3d at 40 ("If injunctive relief is proper, it should be no broader than necessary to remedy the harm at issue.").

"Defendants may not, by this general court order, be placed under obligation to comply with future Monitors' recommendations the terms of which are not known. Violation, if it occurs, must be in respect of specific court orders. This is basic to correct judicial administration." *Id*.

Here too, the Government's proposed IO would have extensive authority to formulate and *impose* duties and prohibitions that are not defined by the Remedies Order itself. The IHO would thus be empowered to impose fines not only for a "violation of the Final Judgment and Order," but also "for any violation of the IO's Final Orders." Remedies Order, § VI.C.1 (pp. 38-42). Thus, for purposes of punishing Defendants for perceived improprieties, a "Final Order" of the IO would carry the same force and effect as this Court's final judgment.[122] Still more egregiously, the proposed IO and IHO would have the power to dictate "the business policies, practices and operations of each Defendant."[123] These powers constitute a wholesale violation of the principle that "Defendants may not . . . be placed under obligation to comply with future . . . recommendations the terms of which are not known." *English*, 269 F.2d at 524.

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[122] The orders contemplated (subject, in some cases, to approval by the proposed IHO), include: to extend Defendants' obligation to fund the National Smoking Cessation Quitline Network in five-year increments (§ VI.B.4 (p. 8)); to order Defendants to make as-yet-unknown "corrective communications" as the IO deems appropriate (§ IV.E.1 (p. 16)); "[t]o issue Final Orders prohibiting the continuation of any . . . marketing practices, . . . and/or to rescind any . . . marketing transactions which the IO determines are violative of any provision of the Final Judgment and Order" (§ VI.C.1.f (p. 40)); and to determine which of the Defendants' marketing activities should be proscribed because they appeal to "Youth," (§ V.5 (p. 36)).

[123] These include, without limitation the following: "Eliminating economic incentives for Defendants to sell cigarettes to Youth," § IV.G.1.a (p. 7); "Changing compensation and promotion policies for managers and executives to produce outcomes inconsistent with misconduct," § IV.G.1.b (p. 7). "Requiring subcontracting of certain research to independent third parties . . . ," § IV.G.1.c (p. 7); "Requiring Defendants to divest intact their research and development, current product development activities, and all other relevant material regarding less hazardous cigarettes . . . ." § IV.G.1.d (p. 7); "Requiring the institution of programs to educate managers in such a way to address bias in decision making," § IV.G.1.e (p. 7); "Creating internal mechanisms for employees, agents and contractors to report misconduct without fear of retribution," § IV.G.1.f (p. 7); "Changing oversight and reporting arrangements to produce outcomes inconsistent with misconduct," § IV.G.1.g (p. 7).

e. The Government's Proposed Monitors Would Violate Article III of the Constitution

The Government's monitor proposal would also be unconstitutional. The Government requests that this Court give the monitors substantial executive as well as judicial powers, including the authority to create and enforce a wide range of additional remedies as the IO deems appropriate. *See, e.g.*, Remedies Order, § IV.G.3 (p. 34). Once these additional remedies have been blessed by the "Independent Hearing Officer," they would become "final and binding on the parties," prior to any review by the District Court. Remedies Order, § VI.E.4.n (p. 49).

In two decisions in *Cobell v. Norton*, the D.C. Circuit addressed whether a court has "inherent power" to impose a monitorship on a defendant over the defendant's objection. *Cobell v. Norton*, 392 F.3d 461 (D.C. Cir. 2004) ("*Cobell II*"); *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003) ("*Cobell I*"). The court appointed a "Court Monitor" to "monitor and review all of the Interior Defendants' trust reform activities on behalf of certain Native American tribes and file written reports of his findings with the Court." *Cobell I*, 334 F.3d at 1133. The parties agreed to an order appointing the Monitor for a term of one year. *Id.* at 1134-35. Over defendants' objection, the District Court proposed to extend the agreed-upon Monitorship for at least an additional year. The D.C. Circuit reversed, framing the relevant question as "whether the district court had inherent power to appoint a monitor without the consent of the party to be monitored." *Id.* at 1141. The D.C. Circuit held that "the district court does not have inherent power to appoint a monitor – at least not a monitor with the extensive duties the court assigned to [the Monitor in this case] – over a party's [colorable] objection." *Id.*[124]

[124] The Court distinguished the numerous consent decrees creating monitorships by explaining that, "[w]hen the parties consent to such an arrangement, we have no occasion to inject ourselves into their affairs." *Id.* But "when a party has for a nonfrivolous reason denied its consent, . . . the district court must confine itself (and its agents) to its accustomed judicial role." *Id.*

The *Cobell* decisions establish that the court cannot authorize the monitor "to consider matters that go beyond superintending compliance with [whatever other injunctive relief is provided for in] the district court's decree." *Id.* at 1143. In particular, the Court lacks authority to appoint a monitor "charged with an investigative, quasi-inquisitorial, [or] quasi-prosecutorial role." *Id.* at 1142-43.[125] Yet the investigative and prosecutorial powers that the Government seeks to vest in the IO far exceed even those powers granted to the court-appointed officer in *Cobell* and condemned by the D.C. Circuit. *See also New York v. Microsoft*, 224 F. Supp. 2d 76, 180 (D.D.C. 2002) (declining to appoint a special master "empowered to monitor Microsoft's compliance with [a complex remedy for antitrust violations]" because such a system would "abdicate [Government plaintiffs'] responsibility for enforcement of the remedial decree").

f. Appointment of the Proposed IHO Would Violate Additional Requirements.

The Government proposes to give even more sweeping powers to the IHO, including "the authority to adjudicate . . . any complaint brought by the IO or Final Order [entered by the IO] addressing an alleged violation of the Final Judgment and Order, or any dispute arising under or related to any of the IO's recommendations" – including recommendations to remove one of Defendants' officers or employees, or to take any other measures "that would assist in accomplishing the purposes of the Court's decree." Remedies Order, §§ VI.D.1, VI.C.1.h, VI.C.1.i (pp. 41, 43). Although the decision of the IHO would be subject to review by the Court, the standard of review should be "the same standard of review applicable to final federal agency

[125] The Government stresses that the Court in *Cobell* did not hold that monitors may never be appointed. Gov. Brief at 197. This straw man is beside the point, which is that *Cobell* precludes the judicial appointment of a monitor having the inquisitorial powers proposed for the IO.

action under the Administrative Procedure Act." *Id.*, § VI.F.1. (p. 50). This proposal is meritless on numerous additional grounds.

(i) The Court of Appeals' Decision in *Microsoft* Establishes That Appointment of Monitors With the Powers Requested by the Government Would Violate Rule 53

First, it would violate Rule 53. In *Microsoft*, the Government brought a contempt charge, alleging that Microsoft had violated the terms of a previously-imposed consent decree. Over Microsoft's objection, the district court referred the matter to a master pursuant to Rule 53(b). 147 F.3d at 940. The master was responsible for overseeing discovery and "propos[ing] findings of fact and conclusions of law" in connection with the contempt proceeding. *Id*. The D.C. Circuit held that the reference to a master was improper. In order for the master to rule on the contempt charges, "the parties' rights must be *determined*, not merely *enforced*." *Id*. On that basis, the court granted the requested writ of mandamus and ordered the district court to revoke the reference.

Even more so than in *Microsoft*, the Government here asks the Court to appoint monitors with powers that extend far beyond superintending the parties' compliance with a remedial order. First, the monitors would be authorized to do exactly what *Microsoft* held they could not: to determine *whether* any party is in violation of the Court's order and to issue fines or sanctions for such violations. Remedies Order, §§ VI.D.1., VI.E.4.i (pp. 43, 49). Additionally, the proposed IHO would have the authority to require Defendants to adopt "procedures and measures" recommended by the IO. *See id.*, §§ VI.C.1.i; VI.E.4.i. (pp. 41, 49). Also, the proposed IHO would have the ability to order "removal of any officer, employee or other member of senior management of any Defendant after determining that he or she acted in concert

with one or more named Defendants in committing a civil RICO violation." *Id.*, § VI.D.1. (p. 43); *see id.*, § VI.C.1.h. (p. 41). To determine whether such individuals – whom the Government chose not to name as defendants in this case – "acted in concert with" Defendants in committing a RICO violation, the IHO would have to make a substantive determination of their liability (*i.e.*, that these individuals violated or aided and abetted the violation of RICO). But a special master cannot be employed absent the parties' consent where "the parties' rights must be determined, not merely enforced." *Microsoft*, 147 F.3d at 954. The D.C. Circuit, moreover, concluded that it had "effectively ruled out nonconsensual references in nonjury cases except as to peripheral issues such as discovery and remedy." *Id.* at 956 (quoting *In re Bituminous Coal Operators' Ass'n., Inc*., 949 F.2d 1165, 1168 (D.C. Cir. 1991)).

The power requested for the IHO here, is far greater than that condemned in *Microsoft*. In that case, the government argued that the appointment of the master "contains an implicit reservation by the district court of a power of *de novo* review, and that that unstated reservation saves the order." *Id.* Even if the district court had in fact reserved *de novo* review (which the Court of Appeals doubted), the D.C. Circuit ruled that the reference of liability issues to a master violated Rule 53 and also, probably, Article III. *Microsoft*, 147 F.3d at 955-56. In this case, however, the Government wants the IHO's orders and findings to receive only the highly deferential review accorded federal agency decisions. Remedies Order, § VI.F.1 (p. 50). The Government claims that "[t]his standard of review has been approved in civil RICO cases using independent hearing officers." Gov. Br. at 194 n.130 (citing *District Council of New York City*, 941 F. Supp. 349 (S.D.N.Y. 1996); and *United States v. Local 6A, Cement and Concrete Workers*, 832 F. Supp. 674 (S.D.N.Y. 1993)). The cited cases, however, involved consent

decrees, and are therefore irrelevant. *Cobell I*, 334 F.3d at 1143. So much more so, then, the IHO requested by the Government here is impermissible.[126]

(ii) The Hearing Procedures Proposed for the IHO Would Violate Due Process and Other Constitutional Rights

The IHO hearing procedures suggested in the Government's Remedies Order are also unconstitutional for several reasons. They would amount to the creation of an unconstitutional "Potemkin jurisdiction" that would "mock[]" Defendants' "rights." *Microsoft*, 147 F.3d at 954.

First, it would violate the right to trial by jury. According to the Government's proposal, the IHO would be empowered to impose fines "for any violation of the IO's Final Orders or any violation of the Final Judgment and Order . . ." Remedies Order, § VI.C.1 (p. 38). And as the Section quoted here makes clear, any such "Final Order" issued by the IO is to be a serious matter, because for any perceived violation of such a "Final Order," the IHO is empowered to levy virtually any sanction he or she pleases. Thus, for purposes of punishing Defendants for perceived improprieties, a "Final Order" of the IO, as well as the IHO's "final and binding" decisions (*id.* § VI.E.4.f. (p. 48-49)), are to carry the same force and effect as this Court's final judgment.

As the Government concedes (Gov. Br. at 219), the IHO's imposition of penalties would constitute the levying of contempt sanctions. Moreover, the sanctions contemplated by the

[126] As both the Supreme Court and the Court of Appeals have recognized, the scope of the district court's authority under Rule 53 is defined in part by the Constitutional requirements of Article III. *See La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957) (holding that reference to a master on issues of liability and "question[s] concerning the issuance of an injunction" "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation."); *Bituminous Coal* 949 F.2d at 1168; *Microsoft*, 147 F.3d at 954; *Prudential Ins. Co. v. United States Gypsum Co.*, 991 F.2d 1080, 1086 (3d Cir. 1993); *Beazer East, Inc. v. Mead Corp.*, 412 F.3d, 429 (3rd Cir. 2005); *In re United States*, 816 F.2d 1083 (6th Cir. 1987).

Government's Remedies Order are, in most if not all cases, criminal in nature. *United Mine Workers v. Bagwell*, 512 U.S. 821, 837 (1994); s*ee also id.* at 844-45 (Rehnquist, C.J. concurring); *Cobell I*, 334 F.3d at 1145. That being so, the IHO's imposition of these sanctions would impermissibly deny Defendants "the protections that the Constitution requires of such criminal proceedings." *Id.* at 826.[127]

For a "serious" criminal contempt sanction, moreover, such as the $52 million in fines in *Bagwell*, the accused is "entitled to a criminal jury trial." *Bagwell*, 512 U.S. at 838; *accord NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1184 (D.C. Cir. 1981); *Cobell I*, 334 F.3d at 1147 (citing *Bagwell*, 512 U.S. at 826-27); *F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1139 (9th Cir. 2001); *Muniz v. Hoffman*, 422 U.S. 454, 475-76 (1975). Here, there is no question that the penalties authorized by the Government's Remedies Order are "serious." Section IV.B.4.b (p. 8) authorizes the IO and IHO to extend Defendants' obligation to fund the National Smoking Cessation Quitline Network for periods of five years. A five-year extension penalty will cost $27 billion.[128] Penalties to be levied if youth smoking rates do not decline as

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[127] By contrast, "civil contempt sanctions . . . may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required." *Id*. Thus, even civil contempt sanctions may not be imposed without basic procedural safeguards.

The so-called "purgation order" is often the hallmark of a civil contempt order. This is significant, because the Government's Remedies Order specifically provides (Remedies Order, § VI.C.1.m. (p. 42)) that "[s]anctions may include fines, which may but need not be imposed as a daily fine for each day until the Defendant, Covered Person or Entity comes into full compliance with the IO's Final Order described above." Thus, the Order specifically contemplates that fines will be punitive, and thus criminal, in nature. *See, e.g., In re Bradley*, 318 U.S. 50 (1943) (guarantee against double jeopardy); *Cooke v. United States*, 267 U.S. 517, 537 (1925) (rights to notice of charges, assistance of counsel, summary process, and to present a defense); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911) (privilege against self-incrimination, right to proof beyond a reasonable doubt).

[128] It is true that, for this particular sanction, the Remedies Order stipulates that the IO's "finding" that the triggering violation has occurred must be "approved by the District Court." § IV.B.4. a-b (p. 8). But any comfort this language might provide is largely illusory. Section

[Footnote continued on next page]

rapidly as the Government hopes (under § IV.D.2-7 (pp. 12-16)) could also add up to billions of dollars. These penalties make the "serious" fines in *Bagwell* seem miniscule. Nor is there any doubt that the Government contemplates other contempt sanctions that would qualify as "serious." Section VI.C.1.m (p. 42) specifically states that "*[t]here will be no limit to a fine*, so long as it is not grossly disproportionate to the violations addressed" (emphasis added). Yet even here, the Government proposes to have these decisions made by the IHO, not a jury.[129]

Second, the IHO procedures proposed by the Government would also deprive the Defendants of their constitutional right to confront witnesses under the Sixth Amendment. Section VI.E.4.f (p. 48) provides that:

[Footnote continued from previous page]
VI.C.1.b (p. 39) empowers the IO to press charges against Defendants, before the IHO, "for *any* violation of the IO's Final Orders or *any* violation of the Final Judgment and Order . . ." (emphasis added). Thus a violation triggering the $10 billion sanction, like all other sanctions, will be determined by the IHO, and (under § VI.F (p. 50)) this court only will be empowered to modify IHO determinations that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Brooklyn Union Gas Co. v. Federal Energy Regulatory Comm'n*, 409 F.3d 404, 406 (D.C. Cir. 2005) (quoting 5 U.S.C. § 706(2)(A)). Thus the required district court "approval" will in fact be limited to the severely constrained review permitted under the APA.

[129] The IHO is also authorized to impose sanctions against individual, as opposed to corporate, Defendants, that are "serious" criminal contempts as a matter of law. Section VI.C.1.b (p. 39) authorizes the IO to "bring charges and seek remedies and sanctions against any Defendant, Covered Person or Entity," and Section III (p. 5) provides that "Covered Persons or Entities" include "any person" acting in concert with Defendants. Furthermore, Section VI.C.1.h (p. 41) authorizes the IO, after a hearing before the IHO (§VI.D.1 (p. 43)), to order the "removal of any officer, employee or other member of senior management of any Defendant" found to have participated in a RICO violation or violated this Court's Final Judgment. The courts have held that any criminal contempt fine against a natural person over $500 is *per se* a "serious" criminal contempt that implicates full procedural guarantees, including trial by jury. *United States v. Troxler Hosiery Co., Inc*. 681 F.2d 934, 936 (2d Cir. 1982) (citing *United States v. Hamdan*, 552 F.2d 276, 280 (9th Cir. 1977)); *Douglass v. First Nat'l Rlty. Corp*., 543 F.2d 894 (D.C. Cir. 1976). The Government's Remedies Order certainly contemplates fines in excess of $500, and it is equally plain that, for both the individual involved and for his or her employer, a $500 fine would be trivial compared with an order requiring a senior officer's dismissal from employment.

> The IHO may receive and consider, attaching such weight as he or she deems appropriate, the sworn testimony of any law enforcement officer regarding information given to a law enforcement agency by a reliable confidential source of information. In no instance shall such officer be required to reveal the identity of the confidential source of information.

Thus Defendants will have no right to confront their accusers, provided only that: (a) the accuser is deemed a "reliable source" by "any law enforcement officer;" or (b) that the IHO regards the declarant's out-of-court statements as "reliable." Thus, for example, any disaffected employee of any Defendant can subject Defendants to billions in additional liabilities if only he or she can find a credulous law enforcement officer (including, perhaps, any one of the Government's lawyers in this case). The same result is possible whenever the IHO determines that a declarant's statements are "reliable," a determination over which this Court will have extremely narrow scope of review. This is a blatant violation of the Sixth Amendment, which requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. Const. amend. VI. *See Lilly v. Virginia*, 527 U.S. 116, 123-24 (1999); *United States v. Evans*, 216 F.3d 80, 89 (D.C. Cir. 2000).[130]

Third, the IHO procedures would violate the constitutional presumption of innocence. Section VI.E.4.g. (p. 49) provides that "[t]he IO bears the burden of proving by a *preponderance* of the evidence any alleged violation of the Final Judgment and Order, entitlement to a Final

[130] The Government's proposal would also violate the requirements of Rule 1011 of the Federal Rules of Evidence. Here, the Government proposes that, in hearings before the IHO, "the rules of evidence [will] not apply, and reliable hearsay, depositions and affidavits [will be] admissible." § VI.E.4.d. (p. 47). But Rule 1011 of the Federal Rules of Evidence specifically provides that "[t]hese rules apply generally to . . . contempt proceedings except those in which the court may act summarily . . ." FRE 1011(b). Hearings before the IHO will not involve summary contempt, which is limited to direct contempts (those entered against "a person who commits criminal contempt in [the court's] presence if the judge saw or heard the contemptuous conduct and so certifies . . . ." Fed. R. Crim. P. 42 (b)). Ordinary rules of evidence therefore apply to criminal contempt proceedings. *See In re Floersheim*, 316 F.2d 423, 428 (9th Cir. 1963). The Government's Proposed Remedies Order, by authorizing the IHO to ignore the rules of evidence, is for that reason as well unlawful.

Order, or failure to implement a recommendation." This provision plainly violates the law whether the sanction sought is a civil or criminal contempt. In a criminal contempt proceeding the movant must prove, beyond a reasonable doubt, a "knowing, willful and intentional violation." *Blevins Popcorn*, 659 F.2d at 1183 n.61 (quoting *In re Winn-Dixie Stores, Inc*., 386 F.2d 309, 313 (5th Cir. 1967)). Even in civil contempt cases, the reasonable doubt standard does not apply, and *scienter* is not required, but it is still the movant's burden to prove a violation of the court's order or injunction by clear and convincing evidence. *Food Lion, Inc. v. United Food & Com. Workers Intern. Union*, 103 F.3d 1007, 1016 (D.C. Cir. 1997); *Washington-Baltimore Newspaper Guild v. Washington Post*, 626 F.2d 1029, 1031 (D.C. Cir. 1980); *Microsoft*, 147 F.3d at 940; *accord*, *United States v. Philip Morris USA Inc*., 287 F. Supp. 2d 5, 11 (D.D.C. 2003) ("The moving party has the burden of proving by clear and convincing evidence that the court's order has been violated.") (citing *Blevins Popcorn*, 659 F.2d at 183); *Evans v. Williams*, 35 F. Supp. 2d 88, 93 (D.D.C. 1999).

Fourth, Section VI.E.4.d (p. 48), which provides that "Nothing herein shall prohibit the IHO from deciding contested matters by summary disposition on written or oral argument from the parties," plainly violates due process. Even in the case of civil contempt, "[t]he requirement of due process prohibits summary adjudication of indirect contempts . . . Instead, the party charged with indirect civil contempt must receive notice and an opportunity to be heard prior to the imposition of sanctions for such conduct." *Evans*, 35 F. Supp. 2d at 93 (citing *Bagwell*, 512 U.S. at 827-28, 833, and *Newton v. A.C. & S., Inc*., 918 F.2d 1121, 1127 & n.5 (3d Cir. 1990)); *Sanders v. Monsanto Co*., 574 F.2d 198, 199-200 (5th Cir. 1978); *United States v. Meyer*, 462 F.2d 827, 842 (D.C. Cir. 1972). Rule 42(a) in this respect merely incorporates a requirement of due process. *Cooke v. United States*, 267 U.S. 517 (1925).

Allowing summary disposition of charges brought by the IO that call for *criminal* contempt sanctions is even more remarkable. Federal Criminal Rule 42 states that summary contempt determinations are only available against "a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies. . . . ." Fed. R. Crim. P. 42 (b). Summary contempt citations are only permitted for direct contempts, that is, those committed in court. This power has no place in hearings before the proposed IHO who will exclusively adjudicate charges of indirect contempts.[131]

Fifth, the Government's proposals for the IHO also violate the Eighth Amendment's prohibition against the imposition of "excessive fines." Section IV.B.4 (p. 8) authorizes the IO and IHO to extend Defendants' obligation to fund the National Smoking Cessation Quitline Network for periods of five years, whenever:

> . . . the IO finds [after a hearing before the IHO], with such finding approved by the District Court, that any Defendant has continued to engage in conduct prohibited by the provisions contained in Section V with the intent to prevent smokers who want to quit from doing so or with the intent to fraudulently induce new smokers to begin daily smoking after one year from the date of this Final Judgment and Order.

Remedies Order, § IV.B.4 (p. 8). The Government's Remedies Order elsewhere provides that other fines and sanctions cannot be "grossly disproportionate" to the offense. But here there is no such limitation. Thus, for example, any conduct, by any Defendant, however trivial, that the

[131] Equally egregious is § VI.E.4.i (p. 49), which provides that "[i]n his or her written decision, the IHO may impose an additional fine as a sanction above and beyond any sought or imposed by the IO pursuant to Section VI.C.1.m or VI.E.1.a." As the Supreme Court noted in *Bagwell*, "[d]ue process traditionally requires that criminal laws provide prior notice both of the conduct to be prohibited and of the sanction to be imposed." 512 U.S. at 836. Under the Government's proposed scheme, the IO can propose a modest fine, but the IHO can, with no warning, impose an enormous fine. And Defendants will be able to obtain no relief from this Court unless it can persuade the Court that the IHO acted in an arbitrary and capricious manner in concluding that the fine was not "grossly disproportionate" to the alleged offence.

IHO concludes was intended to discourage a smoker from quitting, will subject the responsible Defendant to the five-year extension. The cost of this five-year extension will, moreover, be astronomical, roughly estimated as follows:

Section IV.B.4.b, moreover, provides that in the event of a qualifying Section V violation the responsible party can be penalized for the full cost of the five-year extension of the smoking cessation program, regardless of its market share, and regardless of the seriousness of the violation. Remedies Order, § IV.B.4.b. This is a flat violation of the Excessive Fines Clause, as recently interpreted by the Supreme Court. *United States v. Bajakajian* 524 U.S. 321, 334 (1998) ("[A]" punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense) (citations omitted)). There can be no doubt that a $27 billion fine for a trivial violation, as required by § IV.B.4 (p. 8), would be grossly disproportionate and therefore unconstitutional.

Also, the penalties prescribed in the event that youth smoking rates do not fall as quickly as the Government wishes, which will be imposed regardless of Defendants' being in any way at fault, are clearly unconstitutional. For other fines, the Government has tried to push the constitutional envelope by proposing that all fines that are not "grossly disproportionate" to the offense are valid. Remedies Order, §§ VI.C.1.m (p. 42), VI.E.1.c. (p. 44-45), VI.E.4.i. (p. 49). This apparent invocation of the standard set in *Bajakajian* is wholly inappropriate in this context. The Supreme Court adopted the "grossly disproportionate" standard in large part because of the Court's long-standing doctrine that legislative determinations of appropriate penalties must be given great deference. *Bajakajian*, 524 U.S. at 336 (citing *Solem v. Helm*, 463 U.S. 277, 290 (1983), and *Gore v. United States*, 357 U.S. 386, 393 (1958)). Proving yet again that the purpose and effect of the Government's Remedies Order is to arrogate executive and legislative powers,

the Government asks this Court to ordain that penalties requested by the IO and assessed by the IHO be given the same deference that the federal courts give to Congress. In all events, it is clearly intolerable for this Court expressly to authorize the imposition of disproportionate fines, as the Government requests.

CONCLUSION

For the reasons expressed herein, Defendants request the Court to enter judgment on their behalf.

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Respectfully submitted,

/s/ Matthew A. Campbell *for* _____
Timothy M. Broas (D.C. Bar No. 391145)
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, D.C. 20006-3817
Telephone: (202) 282-5000
Fax: (202) 282-5100

Dan K. Webb
Thomas J. Frederick
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, Illinois 60601-9703
Telephone: (312) 558-5600
Fax: (312) 558-5700

Theodore V. Wells, Jr. (D.C. Bar No. 468934)
James L. Brochin (D.C. Bar No. 455456)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019-6064
Telephone: (212) 373-3000
Fax: (212) 757-3990

Attorneys for Defendants
Altria Group Inc. and Philip Morris USA Inc.

/s/ Matthew A. Campbell *for* _____
Robert F. McDermott (D.C. Bar No. 261164)
Peter J. Biersteker (D.C. Bar No. 358108)
Jonathan M. Redgrave (D.C. Bar No. 474288)
JONES DAY
51 Louisiana Avenue, N. W.
Washington, D.C. 20001-2113
Telephone: (202) 879-3939
Fax: (202) 626-1700

Robert C. Weber
Paul G. Crist
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Telephone: (216) 586-3939
Fax: (216) 579-0212

Attorneys for Defendant
R. J. Reynolds Tobacco Company

/s/ Matthew A. Campbell *for* _____
David E. Mendelson (D.C. Bar No. 471863)
KlRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Fax: (202) 879-5200

David M. Bernick
Stephen R. Patton
Renee D. Honigberg
KIRKLAND & ELLIS LLP
200 East Randolph Drive, Suite 5900
Chicago, Illinois 60601
Telephone: (312) 861-2000
Fax: (312) 861-2200

Attorneys for Defendant
Brown & Williamson Tobacco Holdings, Inc.

/s/ Matthew A. Campbell *for* _____
Edward C. Schmidt (D.C. Bar No. 199315)
Matthew D. Schwartz (D.C. Bar No. 436619)
THOMPSON COBURN LLP
1909 K Street, N.W.
Suite 600
Washington, D.C. 20006
Telephone: (202) 585-6900
Fax: (314) 552-7597

J. William Newbold
Michael B. Minton
Richard P. Cassetta (D.C. Bar No. 457781)
THOMPSON COBURN LLP
One US Bank Plaza, Suite 3500
St. Louis, Missouri 63101-1693
Telephone: (314) 552-6000
Fax: (314) 552-7597

Gene E. Voigts
Richard L. Gray
SHOOK, HARDY & BACON LLP
2555 Grand Blvd.
Kansas City, Missouri 64108-2613
Telephone: (816) 474-6550
Fax: (816) 421-2708

Attorneys for Defendant
Lorillard Tobacco Company

/s/ Matthew A. Campbell *for* _____
Bruce G. Sheffler
David L. Wallace
CHADBOURNE & PARKE LLP
30 Rockefeller Plaza, 34th Floor
New York, New York 10112-0219
Telephone: (212) 408-5100

Attorneys for Defendant
British American Tobacco (Investments)
Limited (f/k/a British-American Tobacco
Company Limited)

/s/ Matthew A. Campbell *for* _____
Steven Klugman
Steven S. Michaels
DEBEVOISE & PLIMPTON LLP
9 1 9 Third Avenue
New York, New York 10022
Telephone: (212) 909-6000

J. William Newbold
Michael B. Minton
Richard P. Cassetta (D.C. Bar No. 457781)
Jason A. Wheeler
THOMPSON COBURN
One US Bank Plaza, Suite 3500
St. Louis, Missouri 63101-1693
Telephone: (314) 552-6000

Attorneys for Defendant
The Council for Tobacco Research-U.S.A., Inc.

/s/ Matthew A. Campbell *for* _____
James A. Goold
COVINGTON & BURLING
120 1 Pennsylvania Avenue, N. W.
Washington, D.C. 20004-2401
Telephone: (202) 662-6000

Attorneys for Defendant The Tobacco Institute, Inc.